COVID-19 and international sale contracts: unprecedented grounds for exemption or business as usual?

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Abstract

The year 2020 has witnessed a health crisis of unparalleled dimensions that has triggered ongoing complications on a global scale. Through restrictions on economic activities and disruptions in supply chains, COVID-19 has severely impeded global trade. Among the ensuing problems, the question of excusing a party's failure to perform its contractual obligations is of key interest. This contribution analyses the conditions for exemption from liability with view to contracts for the international sale of goods subject to the 1980 UN Convention on Contracts for the International Sale of Goods. It revisits the statutory requirements and illustrates COVID-19 scenarios that might satisfy the relevant thresholds. This article further examines the particular legal consequences following from an exemption from liability, including the controversial discussion as to the adequate remedies in cases of economic hardship. Finally, this contribution addresses the newly revised International Chamber of Commerce's clauses on *force majeure* and hardship.

I. Introduction

> *From that point on, it could be said that the plague became the affair of us all. Up to then, despite the surprise and anxiety that these unusual events had brought us, everyone had gone on with his business, as well as he could, in the usual place. And that no doubt would continue. But, once the gates were closed, they all noticed that they were in the same boat, including the narrator himself, and that they had to adjust to the fact.*
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> — *Albert Camus*, The Plague, *1947*

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With curfews imposed by governments around the world and a myriad of aircrafts grounded, the COVID-19 pandemic has—to borrow from Albert Camus—closed the proverbial gates on international trade. Whilst the pandemic is far from over, its severe repercussions on society are all too evident and have evolved into an affair for all of humanity. Among other things, business is not going on: the World Trade Organization expects the volume of world merchandise trade to fall by 9.2 per cent in 2020.[1] A crisis of this kind raises many questions, not only concerning the response required by the international community but also with regard to the implications for contractual relations in global trade. The significance of these questions is exemplified by the fact that States such as China are issuing *force majeure* certificates in an effort to protect (domestic) companies from ensuing contractual claims.[2] The unresolved issues troubling international trade are easily discerned. In cross-border contracts for the sale of goods, questions arise as to whether the seller can be held to comply unconditionally, even in these times of crisis; which legal grounds could serve as basis for an exemption from liability; and which conditions could satisfy such an exemption, to name but a few.

For international contracts concerning the sale of goods, the answer to these questions can frequently be found within the framework of the United Nations Convention on Contracts for the International Sale of Goods (CISG), which presently accommodates 94 contracting States, including almost all major industrialized countries.[3] In a first step, this contribution will therefore explore the general concepts of party liability as provided by the CISG (Part II). These general observations will be followed by a closer examination of the central exemption provision in Article 79 of the CISG, focusing on its applicability under the COVID-19 pandemic, aided by practice-oriented scenarios (Part III). These observations then necessitate a critical analysis of the legal consequences that ensue from an exemption from liability under the CISG (Part IV). Finally, this contribution will briefly address the possibility of individual contractual stipulations on the basis of two ICC model clauses (Part V), followed by a short outlook (Part VI).

[1] World Trade Organization, 'Trade shows signs of rebound from COVID-19, recovery still uncertain' (6 October 2020) <https://wto.org/english/news_e/pres20_e/pr862_e.htm> accessed 18 December 2020.

[2] See, eg, Reuters, 'China force majeure certificate issuance pass 5,600 amid virus outbreak' (11 March 2020) <https://reut.rs/2TIfLP2> accessed 18 December 2020.

[3] United Nations Convention on Contracts for the International Sale of Goods, 1980, 1489 UNTS 3 (CISG). For the full list of Contracting States, see, eg, UNCITRAL, 'Status: United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (CISG)' <https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg/status> accessed 18 December 2020.

II. The system of liability under the CISG: strict liability and avenues of exemption

Liability for breach of contract under the CISG is assumed without the requirement of fault ('strict liability'). In order to prevent excessive liability, such a broad approach necessarily requires corrective limitations.[4] The central provision in this regard is Article 79 of the CISG, the first paragraph of which is the starting point for any exemption from liability in the international sale of goods.[5] Accordingly, a party is not held liable for a failure to perform if he can show that this failure was due to an impediment beyond his control and that the party itself could not reasonably be expected to have taken the impediment into account or to have avoided or overcome it or its consequences. Moreover, Article 79(2) of the CISG contains a provision for cases involving third parties. Article 79(3) of the CISG limits the duration of the exemption to the duration of the impediment's existence. If the exemption from liability applies, Article 79(4) of the CISG obliges the debtor to issue an informal notice of the impediment and its effect on its ability to perform to the other party within a reasonable period of time.[6] Finally, the wording of Article 79(5) of the CISG points to the exemption from claims for damages as the sole legal consequence under the provision.

Up until now, the practical significance of Article 79 of the CISG has been rather limited, given that the provision sets high standards for exemption from liability.[7] Accordingly, case law has relied on Article 79 of the CISG only in a few

[4] Yeşim M Atamer, 'Article 79 CISG', in Stefan Kröll, Loukas Mistelis and Pilar Perales Viscasillas (eds), *UN Convention on Contracts for the International Sale of Goods (CISG) – A Commentary* (2nd edn, CH Beck/Hart/Nomos, Munich/Oxford/Baden Baden 2018) para 2; Peter Huber, 'Artikel 79 CISG', in Franz Jürgen Säcker et al (eds), *Münchener Kommentar zum Bürgerlichen Gesetzbuch* (8th edn, CH Beck, Munich 2019) para 1; Ulrich Magnus, 'Artikel 79 CISG', in Ulrich Magnus and Michael Martinek (eds), *J von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz – Wiener UN-Kaufrecht* (revised edn, Sellier de Gruyter, Berlin 2018) para 1; Ingeborg Schwenzer, 'Article 79 CISG', in Peter Schlechtriem and Ingeborg Schwenzer (eds), *Commentary on the UN Convention on the International Sale of Goods (CISG)* (4th edn, OUP, Oxford 2016) para 1.

[5] Article 79 CISG reads: '(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. (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.'

[6] Schwenzer, 'Article 79 CISG' (n 4) para 46.

[7] Schwenzer, 'Article 79 CISG' (n 4) para 1 ('exemption should only be considered under very narrow conditions'); cf Clayton P Gilette and Steven D Walt, *The UN Convention on Contracts for the International Sale of Goods: Theory and Practice* (2nd edn, CUP, Cambridge 2016) 295; Huber (n 4) para 1.

exceptional cases.[8] However, the particularities of the COVID-19 pandemic as discussed in this contribution give reason to believe that more courts and arbitral tribunals will seek refuge in this provision in the near future.

III. Article 79(1) of the CISG in light of the COVID-19 pandemic

In order for an exemption from liability to be considered, the impediment in question must be qualified as uncontrollable, unforeseeable, and, in a broader sense, unavoidable within the meaning of Article 79(1) of the CISG. These three conditions need to be satisfied cumulatively.[9] Finally, this impediment has to be the sole cause for the debtor's non-performance.[10]

1. The requirements as per Article 79(1) of the CISG

A. Impediment beyond control

As a first condition, Article 79(1) of the CISG requires the failure to perform to be based on an objective impediment beyond the debtor's control. By doing so, the provision distinguishes the parties' areas of responsibility and spheres of risk. Within these spheres, the seller generally bears the full procurement risk in the case of market-related purchase of generic goods.[11] Exemption from liability may be granted only in the exceptional case that an impediment exceeds the general risk inherent in the obligation of performance.[12]

Pandemics, and especially COVID-19, are classic examples of such impediments beyond the parties' control.[13] Naturally, the debtor cannot exert

[8] See, eg. Amtsgericht Charlottenburg (Lower Court), CISG-Online No 386; Handelsgericht Zurich (Commercial Court), CISG-Online No 488 = CLOUT Case No 331; ICC, arbitral award in Case No 8790/2000, CISG-Online No 1172 = CLOUT Case No 1085; Amtsgericht Willisau (Lower Court), CISG-Online No 961 = CLOUT Case No 893; U.S. District Court, Northern District of Illinois, Eastern Division, *Raw Materials Inc v Manfred Forberich, GmbH & Co KG*, CISG-Online No 925 = CLOUT Case No 696; Cour de cassation (Belgian Court of Cassation), *Scafom Intl v Lorraine Tubes SAS*, CISG-Online No 1963; cf also Magnus (n 4) para 4, who emphasizes that as a rule, the reference to Article 79 CISG has been unsuccessful.

[9] Atamer (n 4) para 43; Gilette and Walt (n 7) 294; Schwenzer (n 4) para 11; Ingeborg Schwenzer and Edgardo Muñoz, 'Duty to renegotiate and contract adaption in case of hardship' (2019) 24 *Uniform Law Review* 149, 154.

[10] Atamer (n 4) para 58; Dionysios P Flambouras, 'The Doctrines of Impossibility of Performance and *Clausula Rebus Sic Stantibus* in the 1980 Convention on Contracts for the International Sale of Goods and the Principles of European Contract Law – A Comparative Analysis' (2001) 13 *Pace International Law Review* 261, 273.

[11] See Burghard Piltz, 'Covid-19 bedingte Lieferstörungen' (2020) 20 *Internationales Handelsrecht* 133, 136; Schwenzer, 'Article 79 CISG' (n 4) para 27.

[12] Oberlandesgericht Munich (Higher Regional Court), *Stolen car case*, CLOUT Case No 1233, English translation available at <http://cisgw3.law.pace.edu/cases/080305g1.html> accessed 18 December 2020; Gilette and Walt (n 7) 300f; cf Schwenzer, 'Article 79 CISG' (n 4) para 12.

[13] Atamer (n 4) para 46; CISG-AC Opinion No. 20, 'Hardship under the CISG' (Rapporteur: Edgardo Muñoz, opinion adopted by the CISG-AC following its 27th meeting in Puerto Vallarta, Mexico on 2-5 February 2020) para 4.3; Huber (n 4) para 10; Magnus (n 4) para 27; Schwenzer, 'Article 79 CISG' (n 4) para 17; in the particular context of the COVID-19 pandemic see also Eric Wagner, Rudolph Anthony Holtz, Tina Dötsch, 'Auswirkungen von COVID-19 auf Lieferverträge' (2020) 75 *Betriebs-Berater* 845, 848.

influence on such events. Cases in which the debtor's ability to perform is restricted as a direct result of the pandemic itself—for example, due to widespread cases of illness within his workforce—thus constitute impediments beyond his control. But even if the pandemic has a merely indirect restrictive effect on the debtor's ability to perform, Article 79(1) of the CISG may still be of use. Such indirect limitations can include State measures such as restrictions on the import and export of goods and other official prohibitions.[14] During the COVID-19 pandemic, there have been direct State interferences in business proceedings, notably through export restrictions[15] and business closures.[16] Such measures are regularly accompanied by further State interventions that only incidentally effect the economy but are just as far-reaching. This applies, for example, to quarantine restrictions imposed on container vessels, which have led to some significant disruptions in freight traffic.[17] These examples constitute further impediments originating in the COVID-19 pandemic that generally appear to be beyond the parties' control.

B. Unforeseeability

As a second prerequisite, the COVID-19 pandemic has to pass the test of foreseeability. This assessment is based on the objective standard of a reasonable person in the position of the debtor, taking into account the specific circumstances of the case at hand.[18] According to Article 79(1) of the CISG, the time of the conclusion of the contract is the relevant point of reference for this test.[19] There have been suggestions in the pertinent literature that a terminological distinction could be made between ordinary and extraordinary events with respect

[14] CISG-AC Opinion No. 20 (n 13) para 4.3; Larry A DiMatteo, 'Excuse: Impossibility and Hardship', in Larry A DiMatteo, André Janssen, Ulrich Magnus and Reiner Schulze, *International Sales Law – Contracts, Principles & Practice* (CH Beck/Hart/Nomos, Munich/Oxford/Baden Baden 2016) para 104; Flambouras (n 10) 267; Gilette and Walt (n 7) 296; Huber (n 4) para 11. However, see also Schwenzer, 'Article 79 CISG' (n 4) para 18 who notes that particularly Chinese and Russian tribunals tend to maintain a strict stance on this issue, having repeatedly 'den[ied] exemption in cases of denial of export or import licences or issuing of export or import bans'.

[15] For instance for medical equipment, cf European Commission, 'Implementing Regulation (EU) 2020/402 of 14 March 2020 making the exportation of certain products subject to the production of an export authorization' (2020) OJ L 77 I/1. For detailed remarks on this European response to COVID-19, see Ignacio Carreño, Tobias Dolle, Lourdes Medina and Moritz Brandenburger, 'The Implications of the COVID-19 Pandemic on Trade' (2020) 11 *European Journal of Risk Regulation* 402, 403ff.

[16] For Europe, see, eg, Adam Nossiter, Raphael Minder and Elian Peltier, 'Shutdowns Spread Across Europe as Spain and France Order Broad Restrictions' (New York Times, 14 March 2020) <https://nyti.ms/2YAZUob> accessed 18 December 2020.

[17] See, eg, Robert Wright, 'Pandemic strains shipping, air and rail freight operators' (Financial Times, 22 May 2020) <https://ft.com/content/8403ddbc-9363-11ea-899a-f62a20d54625> accessed 18 December 2020.

[18] Schwenzer, 'Article 79 CISG' (n 4) para 14; cf Flambouras (n 10) 271.

[19] Atamer (n 4) para 50; Flambouras (n 10) 270; Huber (n 4) para 8; Schwenzer, 'Article 79 CISG' (n 4) para 14.

to natural phenomena.[20] A similar approach has been advocated by proposing that the test of foreseeability should relate both to the exceptional nature of the event and to its exceptional scale.[21] These distinctions reflect the fact that the occurrence of countless impediments in the past renders their possible recurrence foreseeable under regular circumstances.[22]

(i) The criterion of foreseeability in the general context of epidemics

These considerations generally also hold true for epidemics. Indeed, the occurrence of these events cannot be predicted in each individual case. However, epidemics are recurring events, as shown by the plague or the Spanish flu. Epidemics have also been documented in more recent times: with the first appearances of the SARS-associated coronavirus in 2002 and 2003 and the spread of MERS-CoV since 2012, it is apparent that the coronavirus has already led to a significant number of infections on two different occasions since the turn of the millennium.[23] According to medical publications, it was considered a statistical certainty even prior to the COVID-19 pandemic that further local or global epidemics would occur in the future.[24] All of this points to the fact that—to preserve the terminology—an 'ordinary' epidemic is a foreseeable event.[25]

(ii) Foreseeability of the scale and aftermath of the COVID-19 pandemic

That being said, the current COVID-19 pandemic is indeed exceptional in many ways compared to other outbreaks of disease.[26] This applies in part to the pandemic's severity and distribution. By way of illustration, in 2002 and 2003, a total of 8,098 human infections were registered in 29 countries for the SARS-

[20] For this approach, see Ivo Bach, 'Artikel 79 CISG' in Wolfgang Ball (ed), *Beck Online Großkommentar* (1 June 2020, CH Beck, Munich) para 8; for a comparable approach in the context of unavoidability, see further Flambouras (n 10) 272.

[21] DiMatteo, 'Impossibility and Hardship' (n 14) para 41.

[22] Cf Martin Davies 'Excuse of Impediment and Its Usefulness', in Larry A DiMatteo (ed), *International Sales Law – A Global Challenge* (CUP, Cambridge 2014) 296f. Note that Davies also advocates another innovative, more literal approach to this requirement, considering that '[a]lthough consideration of changed circumstances often uses the language of foreseeability, the ultimate question under Article 79 should not be whether the impediment was foreseeable, but whether it was one that a reasonable person would have taken into account when making the contract' (at 302). If one were to follow the latter approach, this would presumably result in an even higher threshold for Article 79 CISG given that, according to Davies (n 22) 302, '[o]ne can reasonably expect any foreseeable *force majeure* event to be taken into account when the contract is made, simply by including a *force majeure* clause'.

[23] Emmie de Wit, Neeltje van Doremalen, Darryl Falzarano and Vincent J Munster, 'SARS and MERS: recent insights into emerging coronaviruses' (2016) 14 *Nature Reviews Microbiology* 523.

[24] See, eg, Leslie A Reperant and Albert DME Osterhaus, 'AIDS, Avian flu, SARS, MERS, Ebola, Zika . . . what next?' (2017) 35 *Vaccine* 4470, 4474 who observe 'an ever-increasing threat'.

[25] Cf Niklas Lindström, 'Changed Circumstances and Hardship in the International Sale of Goods' (2006) 3 *Nordic Journal of Commercial Law* 1, 8 who suggests that '[r]eoccuring events such as flu epidemics [. . .] are foreseeable'; see further Christian Twigg-Flesner, 'A comparative Perspective on Commercial Contracts and the impact of COVID-19 – Change of Circumstances, *Force Majeure*, or what?' in Katharina Pistor (ed), *Law in the Time of COVID-19* (Columbia Law School, New York 2020) 162f.

[26] Cf Twigg-Flesner (n 25) 162f.

CoV outbreak, resulting in 774 deaths.[27] Even fewer people were infected with MERS-CoV.[28] The COVID-19 pandemic dwarfs these figures in comparison: by December 2020, according to the World Health Organization, more than 73 million people had been diagnosed with the disease, and the death toll already exceeded 1,650,000.[29]

Keeping in mind statistical uncertainties, it is also instructive to take a look beyond the mere numbers. Reactions by State authorities prove to be particularly revealing. The governmental measures taken to combat the COVID-19 pandemic were simply extraordinary—indeed, quite unprecedented. In April 2020, more than 2 billion people worldwide were subject to lockdown restrictions.[30] Moreover, numerous States limited international passenger traffic. For example, the entire non-essential travel from third countries to the European Union (EU) was temporarily restricted.[31]

The individual market participant could not have reasonably foreseen such unprecedented measures.[32] In view of all this, the COVID-19 pandemic appears so exceptional in its extent and consequences that, in principle, it should be classified as an unforeseeable event.[33] This conclusion appears to be in line with previous case law on the requirement under the CISG. For example, in *Raw Materials v Manfred Forberich*, the US District Court, Northern District of Illinois, Eastern Division suggested that, even where the freezing of ports is a usual occurrence, a frozen port might nonetheless be considered an unforeseeable event if it is caused by a sudden onset of winter that is unparalleled in its severity in over 60 years.[34] The ruling of a Dutch court points in the same direction, albeit by implication. The Dutch court rejected an exemption from

[27] For the numbers, see Ziad A Memish, Stanley Perlman, Maria D Van Kerkhove and Alimuddin Zumla, 'Middle East respiratory syndrom' (2020) 395 *The Lancet* 1063.

[28] Memish, Perlman, Van Kerkhove and Zumla (n 27) 1063.

[29] According to the World Health Organization, as of 18 December 2020.

[30] Katharina Buchholz, 'What Share of the World Population Is Already on COVID-19 Lockdown?' (Statista, 23 April 2020) <https://statista.com/chart/21240/enforced-covid-19-lockdowns-by-people-affected-per-country/> accessed 18 December 2020.

[31] Cf European Commission, 'Coronavirus: Commission invites Member States to extend restriction on non-essential travel to the EU until 15 June' (Press release, 8 May 2020) <https://ec.europa.eu/commission/presscorner/detail/en/ip_20_823> accessed 18 December 2020.

[32] This view is shared by Bodhisattwa Majumder and Devashish Giri, 'Coronavirus & Force Majeure: A Critical Study' (2020) 51 *Journal of Maritime Law & Commerce* 51, 58f.

[33] Also leaning towards this result Klaus Peter Berger and Daniel Behn, 'Force Majeure and Hardship in the Age of Corona: A Historical and Comparative Study' (2020) 6 *McGill Journal of Dispute Resolution* 79, 110f; Majumder and Giri (n 32) 59; UNIDROIT Secretariat, 'Note on the UNIDROIT Principles of International Commercial Contracts and the COVID-19 Health Crisis' para 10 <https://unidroit.org/english/news/2020/200721-principles-covid19-note/note-e.pdf> accessed 18 December 2020; Twigg-Flesner (n 25) 163; Wagner, Holtz and Dötsch (n 13) 846.

[34] For this observation, see U.S. District Court, Northern District of Illinois, Eastern Division, *Raw Materials Inc v Manfred Forberich, GmbH & Co. KG*, CISG-Online No 925 = CLOUT Case No 696 (at paragraph C). Notably, whilst generally endorsing the result, scholars have distinctly criticised the court's reasoning for following an interpretative 'homeward trend' by seeking guidance with *domestic* case law, which contradicts the command of Article 7(1) CISG. On this, see Joseph Lookofsky and Harry Flechtner, 'Nominating *Manfred Forberich*: The Worst CISG Decision in 25 Years?' (2005) 9 *Vindobona Journal of International Commercial Law & Arbitration* 199.

liability under Article 79(1) of the CISG, holding that the seller could be expected to prepare for the kind of storms that occur on an ordinary basis.[35]

(iii) Significance of the spatio-temporal dimension for the case-by-case assessment

Still, in view of the rapid dynamics of the COVID-19 pandemic, it seems necessary to classify the requirement of foreseeability from a spatio-temporal perspective. The *L-Lysine* case, a China International Economic and Trade Arbitration Commission arbitral award from 2005, illustrates the importance of this dimension in the context of an epidemic. In its award, the arbitral tribunal expressly rejected an exemption from liability under Article 79 of the CISG because 'SARS happened two months before [the] parties sign[ed] the contract'.[36] The analysis of the spatio-temporal dimension is facilitated by some brief examples based on current events. If one of the parties to an international contract for the sale of goods entered, for example, into contractual relations with the particularly affected Chinese province of Hubei or neighbouring provinces, the impediment to performance is likely to have been foreseeable for contracts concluded after 23 January 2020 at the latest since, as of this day, drastic initial restrictions were imposed, accompanied by broad media coverage.[37] Although indications of an impending epidemic had appeared earlier, there were no obvious signs that such unprecedented sovereign measures would be introduced. For contracts concluded with Italian parties, on the other hand, the foreseeability of ensuing obstacles to performance could have probably been assumed as of 23 February 2020, the date on which the comprehensive restrictions in Northern Italy came into force.[38] It is thus vital to determine the foreseeability of any impediment in terms of its temporal and spatial dimension.[39] Generic approaches are not suited to addressing the uncertainties of temporal and local particularities in any individual case.

Finally, the importance of this spatio-temporal dimension is also illustrated by the reactions of national legislators. For example, the moratorium provided for in the German contract law regulations on the occasion of the COVID-19 pandemic identifies 8 March 2020 as the date before which a widespread pandemic was not yet foreseeable to the general public.[40] Although, admittedly,

[35] Cf Rechtbank Maastricht (District Court), *Agristo NV v Macces Agri BV*, CISG-Online No 1748, making a conceptual distinction in Dutch between '*normale omstandigheden*' (para 3.10) and '*extreme weer*' (para 3.11).

[36] China International Economic and Trade Arbitration Commission (CIETAC), arbitral award in *L-Lysine case*, English translation available at <http://cisgw3.law.pace.edu/cases/050305c1.html> accessed 18 December 2020.

[37] See, eg, Michael Levenson, 'Scale of China's Wuhan Shutdown Is Believed to Be Without Precedent' (New York Times, 22 January 2020) <https://nyti.ms/36pDxCU> accessed 18 December 2020.

[38] Jason Horowitz and Elisabetta Povoledo, 'Europe Confronts Coronavirus as Italy Battles an Eruption of Cases' (New York Times, 23 February 2020) <https://nyti.ms/2SPybgt> accessed 18 December 2020.

[39] Cf UNIDROIT Secretariat (n 33) paras 11, 20ff; see further Twigg-Flesner (n 25) 161 who notes that regarding 'contracts concluded from mid-to-late February onwards, it may be difficult to argue that the event/impediment only occurred after such contracts were concluded'.

[40] Cf Article 240 s 1(1) of the German Introductory Act to the Civil Code.

there is no binding legal effect on questions of the autonomous CISG, such national provisions may at least have a certain indicative effect in terms of providing evidence.

C. *Unavoidability*

In order to give rise to an exemption from liability, the COVID-19 pandemic will not only have to constitute an uncontrollable and unforeseeable event. In addition, the resulting impediment will have to pass the test of unavoidability. The debtor is required to have been unable to avoid or overcome the impediment and its consequences. This requirement is subject to a strict standard.[41] The practical relevance of this criterion has nonetheless been limited thus far. In case law, it is a 'highly exceptional' event for an exemption from liability to pass the preceding requirements only then to be refused on the basis of unavoidability.[42] The key element within the context of this prerequisite is reasonableness: the debtor is held to undertake all reasonable efforts to safeguard his ability to perform to the greatest extent possible, despite the imminent impediment.[43] These efforts may lead to (considerable) additional costs.[44] These costs may even exceed the calculated profit; if necessary, the debtor will have to incur severe financial losses in order to protect performance.[45] At the very latest, however, the threshold of reasonableness is exceeded if the additional efforts endanger the commercial existence of the debtor's entire business.[46]

2. *Burden of proof*

Before examining in detail the limits of reasonableness as described above, a word on the distribution of the burden of proof. According to the unambiguous wording of Article 79(1) of the CISG, the party claiming exemption from liability bears the burden of proof with a view to the satisfaction of its requirements.[47] The requirement of unforeseeability, in particular, is generally considered difficult to establish.[48]

41 Schwenzer, 'Article 79 CISG' (n 4) para 15 ('the requirements applied in international trade must be very strict').

42 Magnus (n 4) para 34.

43 Atamer (n 4) para 56; Huber (n 4) para 9; cf Flambouras (n 10) 272; Schwenzer, 'Article 79 CISG' (n 4) para 15.

44 Atamer (n 4) para 56; CISG-AC Opinion No. 20 (n 13) para 4.8; Huber (n 4) para 9; Schwenzer, 'Article 79 CISG' (n 4) para 15.

45 Magnus (n 4) para 34.

46 Magnus (n 4) para 34; see also Schwenzer, 'Article 79 CISG' (n 4) para 15 ('an exemption may only be considered where the ultimate "limit of sacrifice" has been exceeded').

47 Handelsgericht Aargau (Commercial Court), CISG-online No 2176 para 7.2.4; CIETAC, arbitral award in *L-Lysine case*, English translation available at <http://cisgw3.law.pace.edu/cases/050305c1.html> accessed 18 December 2020; see further Atamer (n 4) para 99; Gilette and Walt (n 7) 294f; Schwenzer, 'Article 79 CISG' (n 4) para 60.

48 DiMatteo, 'Impossibility and Hardship' (n 14) para 41; Joseph Lookofsky 'The 1980 United Nations Convention on Contracts for the International Sale of Goods', in Jacques H Herbots (ed), *International Encyclopaedia of Laws: Contracts* (29. Suppl., Kluwer Law International, The Hague 2000) para 302; cf Davies (n 22) 305.

In this regard, it seems likely that parties will rely on governmental *force majeure* certificates to substantiate their claims. In some cases, the parties even expressly stipulate the necessity to present such a certificate as a precondition for exemption from liability.[49] As mentioned above, China's Council for the Promotion of International Trade, a quasi-governmental organization, is said to have issued nearly 5,700 such certificates in response to the COVID-19 pandemic for contracts with a total volume of approximately US $73 billion.[50] The Italian Chambers of Commerce have also been authorized by the Italian Ministry of Economic Development to issue *force majeure* certificates.[51] Upon application by an individual company, an Italian Chamber of Commerce may confirm having 'received. . .a declaration that the applicant was not able to perform the contract due to the contingent measures and the current state of emergency'—that is, for reasons beyond the applicant's control.[52] As explicitly emphasized by the Italian Union of Chambers of Commerce, Industry, Crafts and Agriculture (Unioncamere), the authority issuing the certificate is not required to verify the truthfulness of the statement submitted by the applicant. In light of this, authors have doubted that the Italian domestic courts will accept these certificates as actual proof.[53] It seems equally unlikely that other domestic courts and arbitral tribunals will consider *force majeure* certificates as sufficient proof under an international convention such as the CISG, particularly if such certificates are unverified and broadly worded.[54] Even so, such certificates may at least serve as an indicator of the degree of State interference within the economy. It has been argued that some tribunals might even draw negative inferences from parties not submitting a *force majeure* certificate.[55]

3. *Relevant constellations under the COVID-19 pandemic*

Given the distinctive features of the individual cases, a universal determination of the threshold of reasonableness in a broader sense is a futile endeavour. Rather, individual constellations with the potential of proving particularly relevant in the COVID-19 pandemic can serve as a preferable basis for closer

[49] See CIETAC, arbitral award in *FeMo Alloy case*, English translation available at <http://cisgw3.law.pace.edu/cases/960502c1.html> accessed 18 December 2020; Larry A DiMatteo, 'Contractual Excuse under the CISG: Impediment, Hardship, and the Excuse Doctrine' (2015) 27 *Pace International Law Review* 258, 297.

[50] For these numbers as of 11 March 2020, see Reuters, 'Force Majeure Certificates' (n 2).

[51] Cf Italian Ministry of Economic Development, 'Circolare MISE n 008612' (25 March 2020).

[52] For further details on the application procedure, see Marta Cenini, Giulio Maroncelli and Roberta Padula, 'International supply chain: Italian Chambers of Commerce may issue the "force majeure certificates"' (IPSOA, Wolters Kluwer, 14 April 2020) <https://www.ipsoa.it/documents/impresa/contratti-dimpresa/quotidiano/2020/04/14/international-supply-chain-italian-chambers-of-commerce-may-issue-the-force-majeure-certificates> accessed 18 December 2020.

[53] Cenini, Maroncelli and Padula (n 52).

[54] Contra Majumder and Giri (n 32) 61, who assume that certificates issued by local authorities 'should have significant persuasive value over the prospective decisions to be made by the courts in future cases'.

[55] DiMatteo, 'Contractual Excuse under the CISG' (n 49) 297.

analysis. These scenarios are intended to illustrate the specific efforts that debtors will need to undertake within the boundaries of the aforementioned requirements in order to attain an exemption from liability.

A. *Loss of production on the part of the seller*

The first constellation of interest is one in which performance fails because the seller himself cannot produce the required goods as a result of the COVID-19 pandemic. There are several conceivable reasons for such a failure to perform. Sovereign measures may have forced a company to temporarily suspend production. This was the case in parts of China this year, for example, when the Chinese New Year holidays were extended.[56] At the same time, some companies made similar decisions on their own initiative.[57] The predictability of respective State measures is thus likely to prove a decisive criterion with respect to certain claims for exemption. With regard to measures initiated independently by the debtor, on the other hand, the organizational risk with regard to all internal processes generally remains with him.[58] This general rule may be subject to narrow exceptions—namely, if these measures are directly related to the COVID-19 pandemic—for instance, a massive outbreak of infections within the workforce.[59] The question of exemption will then presumably centre on the unavoidability of each individual operational measure, subject to the strict requirements discussed above.

B. *Disruptions in the supply chain*

The COVID-19 pandemic has also led to some significant disruptions in supply chains. The automotive[60] and electronics[61] industries, among others, have reported serious interruptions, which have in turn led to vast production downtimes. Could an exemption from liability for failure to perform constitute a reasonable way of resolving ensuing contractual disputes?

The shortfall of a supplier alone cannot constitute grounds for exemption.[62] In principle, the suppliers' reliability falls within the seller's area of

[56] Chris Buckley and Steven Lee Myers, 'Chinese Officials Race to Contain Anger Over Virus' (New York Times, 27 January 2020) <https://nyti.ms/2t3RE35> accessed 18 December 2020.

[57] Christoph Rauwald and Tara Patel, 'VW, Airbus Shut Plants as Pandemic Slams European Industry' (Bloomberg, 17 March 2020) <https://bloomberg.com/news/articles/2020-03-17/vw-says-virus-outbreak-poses-unknown-financial-challenges> accessed 18 December 2020.

[58] Oberlandesgericht Munich (Higher Regional Court), *Stolen car case*, CLOUT Case No 1233, English translation available at <http://cisgw3.law.pace.edu/cases/080305g1.html> accessed 18 December 2020; Atamer (n 4) para 47; Huber (n 4) para 12; Magnus (n 4) para 18; Schwenzer, 'Article 79 CISG' (n 4) para 19.

[59] Atamer (n 4) para 47 ('[o]nly if the illness is an epidemic, ... will the impediment be qualified as an extraneous one'); cf Huber (n 4) para 12; Schwenzer, 'Article 79 CISG' (n 4) para 19.

[60] See, eg, Jack Ewing and Neal E Boudette, Geneva Abdul, 'Virus Exposes Cracks in Carmakers' Chinese Supply Chains' (New York Times, 4 February 2020) <https://nyti.ms/2RZ0AjC> accessed 18 December 2020.

[61] Ana Swanson, 'Global Trade Sputters, Leaving Too Much Here, Too Little There' (New York Times, 10 April 2020) <https://nyti.ms/3c7vLR7> accessed 18 December 2020.

[62] Oberlandesgericht Hamburg (Higher Regional Court), *Iron Molybdenum case*, CISG-Online No 261 = CLOUT Case No 277, English translation available at <http://cisgw3.law.pace.edu/

responsibility.[63] For if the interpretation of the sales contract shows that it concerns a market-related purchase of generic goods, the procurement risk, as explained above, remains entirely with the seller.[64] This holds true even if the price of the pertinent goods has increased significantly on the market.[65] This responsibility for third-party suppliers and subcontractors is derived from Article 79(1) of the CISG, not from Article 79(2) of the CISG.[66] The parties, however, may settle on a modified distribution of risk within their contractual agreement. For example, parties can include a contractual restriction of the seller's obligation to the goods in stock.[67] In the absence of such provisions, the debtor trading in (generic) commodities is generally expected to purchase these goods elsewhere on the market in the event that a supplier defaults—provided, of course, that the goods are actually available on the market.[68]

C. *Illiquidity on the part of the buyer as a result of the COVID-19 pandemic*

It is to be expected that the COVID-19 pandemic will have serious economic repercussions for numerous businesses around the globe. As a result, considerable payment defaults are likely to occur in the international trade of goods. If the COVID-19 pandemic causes illiquidity on the part of the buyer, however, Article 79 of the CISG is unlikely to serve as a promising path to exemption. According to the general view under the CISG, the debtor is wholly responsible for his own financial capacity.[69] This general rule could conceivably be subject to exceptions, should the loss of financial capacity itself be caused directly and solely by an event of *force majeure*.[70] But even if such a direct link between the

cases/970228g1.html> accessed 18 December 2020; Huber (n 4) para 17; Schwenzer, 'Article 79 CISG' (n 4) para 27; cf Schwenzer and Muñoz (n 9) 155.

63 Bundesgerichtshof (German Federal Supreme Court), *Vine Wax case*, CLOUT Case No 271, English translation available at <http://cisgw3.law.pace.edu/cases/990324g1.html> accessed 18 December 2020, cf Flambouras (n 10) 268.

64 According to Schwenzer, 'Article 79 CISG' (n 4) para 27, this risk allocation is 'most commonly encountered in international trade'; see further Atamer (n 4) paras 68ff.

65 See, eg, Oberlandesgericht Hamburg (Higher Regional Court), *Iron Molybdenum case*, CISG-Online No 261 = CLOUT Case No 277, English translation available at <http://cisgw3.law.pace.edu/cases/970228g1.html> accessed 18 December 2020: 'The Seller generally bears the risk of considerable extra expenses in connection with acquiring the goods elsewhere, even the loss of transactions, as it has accepted the risk of acquiring the goods and the risk that they cannot be acquired at a certain price'. For the particular case of economic hardship caused by extreme price increases, cf below at lit. f.

66 CISG-AC Opinion No. 7, 'Exemption of Liability for Damages under Article 79 of the CISG' (Rapporteur: Alejandro M Garro, opinion adopted by the CISG-AC following its 11th meeting in Wuhan, China on 12 October 2007) para 18; Flambouras (n 10) 274.

67 Huber (n 4) para 18; Schwenzer, 'Article 79 CISG' (n 4) paras 27f.

68 Huber (n 4) para 17; cf Schwenzer, 'Article 79 CISG' (n 4) para 27.

69 Oberlandesgericht Munich (Higher Regional Court), *Stolen car case*, CLOUT Case No 1233, English translation available at <http://cisgw3.law.pace.edu/cases/080305g1.html> accessed 18 December 2020; Atamer (n 4) para 47; CISG-AC Opinion No. 20 (n 13) para 4.4; Flambouras (n 10) 267; Gilette and Walt (n 7) 300; Piltz (n 11) 136; Schwenzer, 'Article 79 CISG' (n 4) para 26.

70 Cf Huber (n 4) para 16.

COVID-19 pandemic and the debtor's inability to pay could be shown, the debtor would still have to succeed in providing the extremely difficult proof of causality. It is highly unlikely that the debtor's illiquidity will be traced back solely to an impediment beyond his control.[71]

D. *Effects on freight traffic*

The effects of the COVID-19 pandemic have also had a noticeable impact on the freight business. The aviation industry, for example, reported significant cutbacks: airfreight capacity between Europe and China has fallen by 60 per cent and even by as much as 80 per cent between the USA and China, and transport costs have risen by a factor of two to three compared to the previous year.[72] If freight-related shortfalls occur, the debtor responsible for transportation is required to explore alternative means of delivery.[73] Even the collapse of central freight routes does not in itself result in exemption from liability. This holds true even if significantly more protracted routes emerge as the only available alternative.[74] And, again, the effort required of a party in finding alternative transport routes includes the obligation to bear all additional costs incurred.[75]

E. *State-imposed export restrictions*

In response to the COVID-19 pandemic, some States have also intervened directly, sometimes severely, in the international trade in goods. For example, the export of medical protective equipment was made subject to approval under an EU regulation.[76] According to a study conducted in March 2020, 54 countries were, at that time, found to have imposed export restrictions of various kinds connected to the pandemic.[77] The Eurasian Economic Union, for example, reported that exports of agricultural commodities (including rice, soybeans, and

[71] Cf Atamer (n 4) para 47 (in the context of insolvency).

[72] Wade Shepard, 'China-Europe Rail Is Set To Boom As COVID-19 Chokes Air, Sea and Road Transport' (Forbes, 31 March 2020) <https://forbes.com/sites/wadeshepard/2020/03/31/china-europe-rail-is-set-to-boom-as-covid-19-chokes-air-sea-and-road-transport/> accessed 18 December 2020.

[73] Schwenzer, 'Article 79 CISG' (n 4) para 15; cf Atamer (n 4) para 55; CISG-AC Opinion No. 20 (n 13) para 4.8; Schwenzer and Muñoz (n 9) 155.

[74] See, with reference to the blockade of the Suez Canal (1956 and 1967), Atamer (n 4) para 56; Lindström (n 25) 9f.

[75] Schwenzer, 'Article 79 CISG' (n 4) para 15.

[76] Cf European Commission, 'Implementing Regulation (EU) 2020/402 of 14 March 2020 making the exportation of certain products subject to the production of an export authorization' (2020) OJ L 77 I/1.

[77] For the number, see Simon J Evenett, 'Tackling COVID-19 Together – The Trade Policy Perspective' (Global Trade Alert, 23 March 2020) <https://globaltradealert.org/reports/51> accessed 18 December 2020. For a detailed list of trade restrictions enacted in El Salvador, Honduras, India, Indonesia, Kazakhstan, Kyrgyzstan, Romania, Serbia and Vietnam, see further Carreño, Dolle, Medina and Brandenburger (n 15) 405f.

rye) would be restricted due to the COVID-19 pandemic.[78] These export restrictions, resulting from State interventions, can constitute an impediment for the seller within the meaning of Article 79(1) of the CISG.[79] In advance, however, the seller is always required to make serious efforts to obtain possible authorizations or waivers.[80] On the other hand, a buyer importing goods cannot claim exemption from liability if the export restrictions render an intended resale impossible, thus merely impairing the intended purpose of the purchase.[81]

F. Economic hardship

Finally, in times of COVID-19, the question as to whether the CISG covers cases of economic hardship deserves particular consideration. In cases of economic hardship (hereinafter termed 'hardship'), the contractual equilibrium is disturbed by a severe change of economic circumstances, under which performance remains physically possible but has become excessively more onerous for one of the parties.[82] In scholarly literature, there are two recurring examples of hardship:[83] first, an extreme increase in the costs of procurement or production of goods that renders performance evidently unreasonable in relation to the contractual price; second, an extreme devaluation of the currency governing the purchase price is equally promoted as a situation constituting hardship. No provision of the CISG, however, explicitly addresses the concept of hardship.[84] This has resulted in a lively debate as to whether hardship falls within the scope of application of the CISG.[85]

(i) A debate spanning many years: does the CISG cover hardship?

At first, it is worth noting that hardship is not *a priori* excluded from the CISG's scope of application by virtue of Article 4(a) of the CISG. Primarily, the question of renegotiating, adapting, or even terminating sales contracts in cases of

[78] Reuters, 'Trade Restrictions on Food Exports Due to the Coronavirus Pandemic' (3 April 2020) <https://reut.rs/2UYNMek> accessed 18 December 2020.

[79] Atamer (n 4) para 73; Huber (n 4) para 11; Flambouras (n 10) 267; Magnus (n 4) para 28; for a more cautious assessment see Schwenzer, 'Article 79 CISG' (n 4) para 18.

[80] Cf Gilette and Walt (n 7) 299; Magnus (n 4) para 28.

[81] Atamer (n 4) para 72; cf Magnus (n 4) para 28.

[82] CISG-AC Opinion No. 20 (n 13) para 4.2; Joseph Lookofsky, 'Not Running Wild with the CISG' (2011) 29 *Journal of Law and Commerce* 141, 156f; Schwenzer, 'Article 79 CISG' (n 4) para 31; cf Gilette and Walt (n 7) 302. However, see also Yasutoshi Ishida, 'CISG Article 79: Exemption of Performance, and Adaptation of Contract Through Interpretation of Reasonableness – Full of Sound and Fury, but Signifying Something' (2018) 30 *Pace International Law Review* 331, 364 who suggests that it 'it would be better not to introduce another criterion apart from the letters of Article 79' and thus refrains from defining hardship, proposing instead a 'reasonable expectation test'.

[83] For the following examples, see Atamer (n 4) para 78; Schwenzer, 'Article 79 CISG' (n 4) para 31.

[84] For this observation, see, eg, CISG-AC Opinion No. 20 (n 13) para 0.5; Ishida (n 82) 361; Lindström (n 25) 3; cf Flambouras (n 10) 279.

[85] Cf Harry M Flechtner, 'The Exemption Provisions of the Sales Convention, Including Comments on 'Hardship' Doctrine and the 19 June 2009 Decision of the Belgian Cassation Court' (2011) 59 *Belgrade Law Review* 84, 87.

hardship does not pertain to their validity.[86] Rather, hardship is a matter closely related to the general concept of impossibility of performance. This naturally begs the question as to whether Article 79 of the CISG might allow for the inclusion of this concept. Both the provision's wording and drafting history have been found to provide anything between enlightening leads and interpretive dead ends in this regard. As a starting point, the letter of Article 79(1) of the CISG does not advocate the exclusion of hardship from the Convention's scope. Indeed, the provision makes no express mention of this constellation at all. The term 'impediment' in itself, however, remains open to interpretation. In the literal sense, it may well be understood to extend to economic aspects.[87] In the end, the term simply does not allow for compelling conclusions in either direction.[88]

The CISG's drafting history is equally ambiguous. In 1980, the drafting committee addressed a proposal to include a provision that addressed issues of hardship explicitly. Admittedly, this specific proposal was rejected.[89] Pointing to this rejection, one could conclude that the CISG in fact made a deliberate choice not to govern cases of hardship.[90] Yet, again, there are no compelling reasons for this conclusion.[91] As the CISG Advisory Council has convincingly noted, the rejection of this specific proposal is not tantamount to excluding hardship from the Convention *per se*.[92] After all, the decisive factor favouring the inclusion of hardship in the Convention's scope of application is its inherent objective to foster uniformity in the international sale of goods.[93] To accomplish this objective, the CISG strives to govern all constellations in which external circumstances

86 Cf CISG-AC Opinion No. 7 (n 66) para 36.

87 See, eg, Davies (n 22) 298, who extensively analyses the provision's wording, observing that '[p]urely as a matter of language, although the word "impediment" can be used to mean something that actually prevents or prohibits progress, it is more commonly used to mean something that merely impedes progress or makes it more difficult. The Latin word *impedimenta* referred to the baggage of an army, something that slowed but did not prevent its progress. Hardship is a matter of difficulty in performing, not actual prevention of performance. There seems to be good reason to accept that hardship can be an "impediment" for purposes of Article 79'. However, note that *Honnold* has a point when he observes that the term 'circumstances', which had been used in the exemption provision of the 1964 *Convention relating to a Uniform Law on the International Sale of Goods (ULIS)*, was replaced by the term 'impediment' in Article 79(1) CISG. He suggests that 'this change [had] responded to concerns that the reference to "circumstances" could be a basis for excuse merely because performance became more difficult or unprofitable'. On this, see John O Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention* (3rd edn, Kluwer Law International, The Hague 1999) para 432.2.

88 Atamer (n 4) para 80.

89 Cf Ishida (n 82) 362f.

90 Cf CISG-AC Opinion No. 7 (n 66) para 29.

91 See also Gilette and Walt (n 7) 304, who find that '[l]ittle can be authoritatively discerned from the drafting history'.

92 CISG-AC Opinion No. 7 (n 66) paras 29f; see further Ishida (n 82) 363; cf Lindström (n 25) 17 ('the meaning ... simply cannot be established with the help of the travaux préparatoires and legal literature').

93 Schwenzer and Muñoz (n 9) 153; cf Flambouras (n 10) 280.

adversely affect contractual performance, even if performance remains physically possible and has (only) become excessively more onerous for one of the parties.[94] Referring parties to domestic law for some impediments to performance (those of an economic nature) is at odds with the Convention's objective.[95] Consequently, hardship should be considered to be a matter governed by the Convention in the meaning of Article 7(2) of the CISG.[96] Today, the majority of scholars shares this view.[97]

(ii) *In concreto*, can the COVID-19 pandemic constitute hardship?

Having established that the CISG governs hardship in principle, our interest now turns to the following question: does the COVID-19 pandemic give leeway to pleading hardship? Indeed, cases of hardship may not be its most apparent consequence. As complex as the pandemic's impact on international trade is, it seems doubtful that the costs for the procurement of goods have risen to the point of excessive encumberment across the board. At first glance, if anything, the expected shock in demand rather hints at a decrease in procurement prices for goods.

However, on closer examination, this first glance at global trade proves deceptive at least for some categories of goods, which were subject to an extreme increase in price. This may be illustrated by turning to one of the most notorious goods in times of a pandemic: respiratory masks. Reportedly, at one point, prices for respiratory masks had risen by up to 3,000 per cent.[98] This serves as an

[94] CISG-AC Opinion No. 7 (n 66) paras 34f; cf CISG-AC Opinion No. 20 (n 13) para 6.4; Cour de cassation (Belgian Court of Cassation), *Scafom Intl v Lorraine Tubes SAS*, CISG-Online No 1963; Atamer (n 4) paras 79ff; Flechtner (n 85) 92.

[95] CISG-AC Opinion No. 7 (n 66) paras 34f; Flambouras (n 10) 280. Cf Gilette and Walt (n 7) 297, who observe that 'the definition of the requirement ["impediement" is] in any given case highly susceptible to the possibility of a "homeward trend"'.

[96] For the contrary view, see, eg, the extensive reasoning by Gilette and Walt (n 7) 313: 'The lack of uniformity across jurisdictions about the legal principles that govern hardship also indicates a diversity of opinion too great to conclude that the drafters of the CISG intended to resolve the issue without addressing it explicitly. For the same reason, we doubt that one can resolve the issue under Article 7(2) by reference to "the general principles" on which the CISG is based, because those principles, at least with respect to the issue of hardship, are too varied to provide a clear answer to the question . . . Thus, we would resolve the hardship issue under the last clause of Article 7(2). That is, we conclude that the issue of hardship in any individual case should be resolved in conformity with the law applicable to the contract by virtue of the rules of private international law. The legal rule concerning hardship, if any, would be dictated by the governing law that applied to the contract under rules of private international law'. For others against the inclusion of hardship, see, eg, CIETAC, arbitral award in *L-Lysine case*, English translation available at <http://cisgw3.law.pace.edu/cases/050305c1.html> accessed 18 December 2020; DiMatteo, 'Impossibility and Hardship' (n 14) para 32 ('hardship relief is not allowed under the CISG'); Sarah Howard Jenkins, 'Exemption for Nonperformance: UCC, CISG, UNIDROIT Principles – A Comparative Assessment' (1998) 72 *Tulane Law Review* 2015, 2024.

[97] See, eg, CISG-AC Opinion No. 20 (n 13) para 2.2; Lookofsky, 'Not Running Wild with the CISG' (n 82) 157 who emphasizes that 'nearly all CISG scholars agree that the Article 79 exemption standard is not literal impossibility, but rather extreme difficulty of performance, thus opening up the possibility of a liability exemption for an impediment based on "hardship"'; see also Schwenzer, 'Article 79 CISG' (n 4) para 31 with further references; Schwenzer and Muñoz (n 9) 152f.

[98] Cf Jack Nicas, 'It's Bedlam in the Mask Market, as Profiteers Out-Hustle Good Samaritans' (New York Times, 3 April 2020) <https://nyti.ms/2Nz6DIK> accessed 18 December 2020.

indication that, in specific scenarios affected severely by the crisis, parties will indeed be inclined to plead hardship in the wake of the COVID-19 pandemic.

For these specific cases, it seems instructive to draw upon case law to assess the threshold for hardship under the CISG. In *Scafom International v Lorraine Tubes*, the Belgian Cour de cassation considered a price increase of 70 per cent sufficient to allow for exemption from liability under the concept of hardship.[99] The goods under scrutiny in this case were steel tubes. In contrast, in a recent French decision from 2015, *D2I v Gabo*, the French Cour de cassation considered that a price increase of more than 115 per cent fell short of the threshold for hardship.[100] The contract in this second case was concluded for the sale of heating units. What is remarkable with respect to both court decisions is that, *prima facie*, the market for steel tubes—that is, industrial goods—would seem more prone to price fluctuations than the market for heating units.[101] Ultimately, it seems reasonable to assume that the threshold for hardship would be assumed at a significantly higher level if the goods involved are subject to price speculations. Indeed, this is what was suggested by the Hamburg Higher Regional Court in the *Iron Molybdenum case*.[102] The parties to this dispute had concluded a contract for Chinese iron-molybdenum, which is a metal alloy. In its reasoning, the court expressly emphasized that 'for parties doing business in a sector that has a very speculative aspect the limits of reasonability are very high'.[103] Consequently, the court rejected the notion of hardship '[d]espite of the triplication of market price'.[104] This brief survey of case law hints at several factors that the party invoking hardship must bear in mind. Both the goods involved and their pertinent market are relevant for determining the threshold for hardship. However, it is no secret that much will depend on the individual court or tribunal's understanding of the concept of hardship. So far, the case law has not followed a uniform approach; it is thus only of limited guidance.[105]

[99] Cour de cassation (Belgian Court of Cassation), *Scafom Intl v Lorraine Tubes SAS*, CISG-Online No 1963. For criticism of this decision and the established threshold, see, eg, Davies (n 22) 299ff; Lookofsky, 'Not Running Wild with the CISG' (n 82) 165ff.

[100] Cour de cassation (French Court of Cassation), *D2I v Gabo*, CLOUT Case No 1501.

[101] See also Davies (n 22) 299 who notes that '[t]he price of raw materials fluctuates, sometimes widely. . . . Steel is no exception. The market price of steel is quite volatile'.

[102] Oberlandesgericht Hamburg (Higher Regional Court), *Iron Molybdenum case*, CISG-Online No 261 = CLOUT Case No 277, English translation available at <http://cisgw3.law.pace.edu/cases/970228g1.html> accessed 18 December 2020; confirmed by CISG-AC Opinion No. 20 (n 13) paras 7.7 f.

[103] Oberlandesgericht Hamburg (Higher Regional Court), *Iron Molybdenum case*, CISG-Online No 261 = CLOUT Case No 277, English translation available at <http://cisgw3.law.pace.edu/cases/970228g1.html> accessed 18 December 2020.

[104] Oberlandesgericht Hamburg (Higher Regional Court), *Iron Molybdenum case*, CISG-Online No 261 = CLOUT Case No 277, English translation available at <http://cisgw3.law.pace.edu/cases/970228g1.html> accessed 18 December 2020.

[105] Cf Ishida (n 82) 373, who emphasises that '[p]inpointing the percentage that is uniformly applicable to all sorts of transactions in a reasonable manner is impossible'; see further CISG-AC Opinion No. 20 (n 13) paras 7.1ff for an instructive list of six criteria that may serve as guidance when assessing the existence of hardship, namely the contractual risk allocation, whether the contract is of a speculative nature, whether and to what extent there have been previous

In scholarly literature, Brunner has suggested a price increase of 100 per cent as a rule of thumb, following his comparative study of domestic approaches to the question.[106] Schwenzer and Muñoz, in turn, have noted that, in international transactions at least, the threshold would regularly be expected to exceed 100 per cent.[107]

IV. Legal consequences following the exemption from liability under Article 79 of the CISG

Based on what has been established so far, the effects of the COVID-19 pandemic appear suitable for allowing for an exemption under Article 79 of the CISG in individual cases. This necessitates a closer look at the legal consequences under the scope of this provision.

1. Debtor's duty of notification under Article 79(4) of the CISG

If the exemption from liability applies, Article 79(4) of the CISG obliges the debtor to inform the other party within a reasonable period of time of the reason for the impediment as well as its consequences. The notification can be submitted informally but must be received by the other party.[108] The notification is intended to allow the other party to take appropriate measures.[109] The substantive requirements will be measured against this regulatory purpose; in particular, the nature, duration, and extent of the impediment shall be specified.[110] Insofar as the lack of proper, timely notification results in causal damage, the violation of the notification obligation gives rise to a claim for damages that is usually aimed at compensating reliance losses.[111]

It is argued that the obligation to notify may no longer be required if the obligee is already aware of the impediment's existence.[112] In light of the comprehensive, almost meticulous real-time reporting on the COVID-19 pandemic, the assumption of familiarity with the impediment may seem obvious. However, given the variety of conceivable impediments in an individual case, any such

market fluctuations, the duration of the contract, whether the seller has obtained the goods from its own supplier and, finally, whether either party has hedged against market changes.

106 Christoph J H Brunner, *Force Majeure and Hardship under General Contract Principles: Exemption for Non-performance in International Arbitration* (Kluwer Law International, Alphen aan den Rijn 2008) 331ff.

107 Schwenzer and Muñoz (n 9) 157, see further CISG-AC Opinion No. 20 (n 13) para 7.2 ('[M]ost decisions . . . concluded that even a price increase or decrease of 100% would not suffice'); Schwenzer, 'Article 79 CISG' (n 4) para 31 ('[A]s a rule, price fluctuations amounting to over 100 per cent do not yet constitute a ground for exemption').

108 Atamer (n 4) para 96; Huber (n 4) para 31; cf Schwenzer, 'Article 79 CISG' (n 4) para 46.

109 Atamer (n 4) para 95; Schwenzer, 'Article 79 CISG' (n 4) para 44.

110 Atamer (n 4) para 95; CISG-AC Opinion No. 20 (n 13) para 8.2; Huber (n 4) para 31; Schwenzer, 'Article 79 CISG' (n 4) para 45.

111 Berger and Behn (n 33) 112f; CISG-AC Opinion No. 20 (n 13) para 8.4; Flambouras (n 10) 273; Schwenzer, 'Article 79 CISG' (n 4) para 48.

112 Atamer (n 4) para 96; Schwenzer, 'Article 79 CISG' (n 4) para 47; cf UNIDROIT Secretariat (n 33) para 25.

general assumption cannot be supported. Besides, in light of the purpose of the provision, the level of information obtained through media coverage should not generally be considered equivalent to knowledge within the meaning of Article 79(4) of the CISG.

2. *Exemption from claims for damages*

It follows from the interplay of Articles 79(1) and 79(5) of the CISG that the debtor is exempt from claims for damages for non-performance if all requirements are met. Understandably, the exemption from liability only extends as far as the impediment actually hinders contractual performance.[113] With respect to the temporal dimension, Article 79(3) of the CISG expressly stipulates that the exemption has effect only for the period during which the impediment exists. The COVID-19 pandemic and its documented consequences are likely to constitute temporary, and not permanent, impediments to performance.

Further adding to these general observations, it seems debatable whether the exemption also applies to individual clauses for penalties or liquidated damages. Certainly, as follows from Article 4(a) of the CISG, it is the applicable domestic law that governs the validity of such clauses.[114] At least for clauses providing individual prerequisites for penalty damages, a direct application of Article 79(5) of the CISG seems far-fetched, considering that the provision's wording pertains to 'damages under this Convention' only.[115] At the same time, a liquidated damages clause that—this being its sole legal effect—fixes the quantum, whilst still resorting to the prerequisites for damages under the CISG, appears to face less of an obstacle to its applicability within the wording of Article 79(5) of the CISG.[116] Even so, it remains vital to bear in mind that in 1980 the drafting committee explicitly 'wished to reject' the proposal to extend the statutory exemption to penalties and liquidated damages.[117]

The majority opinion within the pertinent literature deems the interpretation of individual agreements to constitute the decisive factor in allowing courts to

[113] Huber (n 4) para 27; Schwenzer, 'Article 79 CISG' (n 4) para 50.

[114] Klaus P Berger, 'Vertragsstrafen und Schadenspauschalierungen im Internationalen Wirtschaftsvertragsrecht' (1999) 46 *Recht der Internationalen Wirtschaft* 401, 402; CISG-AC Opinion No. 10, 'Agreed Sums Payable upon Breach of an Obligation in CISG Contracts' (Rapporteur: Pascal Hachem, opinion adopted by the CISG-AC following its 16th meeting in Wellington, New Zealand on 3 August 2012) para 8.1.2; Schwenzer, 'Article 79 CISG' (n 4) para 52.

[115] Huber (n 4) para 28; seemingly taking a different view Wilhelm-Albrecht Achilles, *UN-Kaufrechtsübereinkommen (CISG)* (2nd edn, Wolters Kluwer Germany, Cologne 2019) 323f.

[116] Contra Berger (n 114) 402f.

[117] See United Nations Conference on Contracts for the International Sale of Goods, 'Official Records: Documents of the Conference and Summary Records of the Plenary Meetings and of the Meetings of the Main Committees' (New York, 1981) 385f <https://www.uncitral.org/pdf/english/texts/sales/cisg/a-conf-97-19-ocred-e.pdf> accessed 18 December 2020; cf Schwenzer, 'Article 79 CISG' (n 4) para 52.

remain within the purview of Article 79 of the CISG.[118] It is argued that the exemption provided for by Article 79 of the CISG can be regarded as a general principle within the meaning of Article 7(2) of the CISG[119] or may be used as a rule of interpretation in cases of doubt,[120] as long as the individual agreement cannot be found to provide a separate standard for an exemption from liability.[121] Others want to allow an exemption from liability under the requirements of Article 79(1) of the CISG if the interpretation of the individual contractual damage clause shows that this clause is intended to replace, and not merely supplement, a statutory claim for damages.[122] For the sake of uniformity, both approaches seem preferable to a solution under national law, although recourse to domestic law has also been advocated as a solution for this issue.[123]

3. *The fate of the claim for performance*

Even if the debtor is considered exempt from liability for damages, the exemption does not affect the existence of the sales contract itself nor the ensuing claim for performance.[124] Notwithstanding, there is broad consensus that the claim for performance ceases to exist in the event of objective, permanent impossibility.[125] The dogmatic reasoning behind this result is less obvious.[126] Some attempt to fill the gap by applying general principles in the meaning of Article 7(2) of the CISG, [127] whereas others take a more general recourse to the provisions on the transfer of risk and Article 79 of the CISG itself.[128] Beyond these dogmatic subtleties, however, the COVID-19 pandemic should, in any event, only rarely result in a permanent, objective impossibility of performance. This is illustrated by the rapid reduction of public restrictions in the Chinese areas first affected by the COVID-19 pandemic, where companies were able to

[118] CISG-AC Opinion No. 10 (n 114) para 5.2; Huber (n 4) para 28; Magnus (n 4) para 53; Schwenzer, 'Article 79 CISG' (n 4) para 52; Schwenzer and Muñoz (n 9) 170; cf Berger (n 114) 403.

[119] Huber (n 4) para 28.

[120] Magnus (n 4) para 53; see further Schwenzer, 'Article 79 CISG' (n 4) para 52 ('In case of doubt, the exemption should accordingly also be applied').

[121] Cf CISG-AC Opinion No. 10 (n 114) para 5.2; contra Flambouras (n 10) 281.

[122] Atamer (n 4) para 15.

[123] For the latter approach see, eg, Gilette and Walt (n 7) 335, who reason: '[T]he CISG does not deem a liquidated damages clause as either damages or as a non-damages remedy. It simply does not regulate damages stipulations, thereby leaving their regulation to domestic law. Thus, because Article 79(5)'s effect is limited to exemption from damages, a liquidated damages clause continues to operate when a party is exempt under Article 79. It becomes inoperable in the circumstances only if invalid under applicable domestic law.'

[124] Atamer (n 4) para 16, Flambouras (n 10) 275; cf Schwenzer, 'Article 79 CISG' (n 4) para 53; contra Ishida (n 82) 342-355.

[125] See Magnus (n 4) para 58 with further references; Schwenzer, 'Article 79 CISG' (n 4) para 54; Schwenzer and Muñoz (n 9) 171; cf CISG-AC Opinion No. 20 (n 13) para 9.3; Flambouras (n 10) 275f.

[126] For instructive remarks on the current state of debate, see Atamer (n 4) paras 16-21, 29-34. See further Piltz (n 11) 137 who criticises that no reasoning for the exemption from the claim for performance is entirely convincing.

[127] Huber (n 4) para 30.

[128] Schwenzer, 'Article 79 CISG' (n 4) para 54.

resume production relatively quickly. In fact, 98 per cent of the listed companies in China had resumed operations by the end of March 2020.[129] If the impediment to performance is only temporary, however, the suspension of the claim to performance—regardless of the underlying dogmatic reasoning—can itself be of a temporary nature only.[130]

4. *Effects on other legal remedies*

The question remains as to what effect the exemption from liability under Article 79 of the CISG has on other legal remedies available to the contracting parties. According to Article 79(5) of the CISG, nothing in this article prevents either party from exercising any right other than the exempt claim to damages. The wording illustrates the CISG's basic understanding that, in principle, all other remedies remain available.[131] The following sections will discuss the effects on other forms of remedy in detail.

A. *Right to avoid the contract*

The most drastic legal consequence is found in the remedy of avoidance. As shown above, the claim to performance principally remains intact despite the seller's exemption from liability under Article 79 of the CISG. Nevertheless, it is easily conceivable that the buyer may seek to avoid the contract in accordance with Article 49(1)(a) of the CISG following a delay in performance due to the COVID-19 pandemic. Principally, the right to avoid the contract will remain available even if Article 79(1) of the CISG applies.[132] To this end, however, the failure to comply with the contractually agreed delivery time must constitute a fundamental breach of contract within the meaning of Article 25 of the CISG. The requirements regarding fundamentality are strict since the termination of contracts is understood to be the *ultima ratio* under the CISG.[133] Due to the temporary nature of the pandemic as an impediment to performance, the conditions for a fundamental breach of contract are likely met only in exceptional circumstances. Such an assumption is conceivable, however, if the parties have attached particular importance to the time of delivery as indicated by the contract.[134]

[129] The Economist, 'China goes back to work' (26 March 2020), <https://economist.com/china/2020/03/26/china-goes-back-to-work> accessed 18 December 2020.

[130] Peter Huber, 'Artikel 46 CISG', in Franz Jürgen Säcker et al (eds), *Münchener Kommentar zum Bürgerlichen Gesetzbuch* (8th edn, CH Beck, Munich 2019) para 19; Schwenzer, 'Article 79 CISG' (n 4) para 53.

[131] Piltz (n 11) 136; Schwenzer, 'Article 79 CISG' (n 4) para 56; Twigg-Flesner (n 25) 160.

[132] Atamer (n 4) para 40; Schwenzer, 'Article 79 CISG' (n 4) para 56; cf Schwenzer and Muñoz (n 9) 173.

[133] Bundesgerichtshof (German Federal Supreme Court), *Tools case*, CISG-Online No 2545 (at para 24); Urs Peter Gruber, 'Artikel 25 CISG', in Franz Jürgen Säcker et al (eds), *Münchener Kommentar zum Bürgerlichen Gesetzbuch* (8th edn, CH Beck, Munich 2019) para 5; Markus Müller-Chen, 'Article 49 CISG' in Peter Schlechtriem and Ingeborg Schwenzer (eds), *Commentary on the UN Convention on the International Sale of Goods (CISG)* (4th edn, OUP, Oxford 2016) para 2.

[134] Cf Bundesgerichtshof (German Federal Supreme Court), *Tools case*, CISG-Online No 2545 (at para 35); Gruber (n 133) para 21; Ulrich G Schroeter, 'Article 25 CISG' in Peter Schlechtriem

Alternatively, the buyer may declare the contract avoided in accordance with Article 49(1)(b) of the CISG if the seller, in spite of physical possibility of performance, fails to deliver within a reasonable period of grace (Article 47(1) of the CISG). If the period of grace lapses at a time when performance is not yet possible again, the buyer may not declare the contract avoided. Ensuing disputes will then most likely focus on the determination of a reasonable period of time. This assessment must be made in accordance with the circumstances of the individual case.[135] The literature suggests taking the cause of the original failure to perform into consideration: if non-performance is caused, for example, by fire or strike, the buyer can usually be expected to tolerate a prolonged delay.[136] This concept might be transferred to the assessment of an appropriate grace period under the COVID-19 pandemic.

B. *Right to reduce the purchase price*

Likewise, the right of the buyer to reduce the purchase price in accordance with Article 50 of the CISG continues to exist.[137] According to Article 50 of the CISG, the buyer may reduce the price in the same proportion that the value of the delivered goods bears to the value that conforming goods would have had at the time of delivery. The right to reduce, hence, is contingent on the delivery of non-conforming goods. This remedy is likely to remain more of a theoretical aspect under the COVID-19 pandemic. At least at a first glance, there is hardly a scenario conceivable in which goods will actually be delivered while their quality falls short of contractual standards due to the COVID-19 pandemic.

On the other hand, it does seem conceivable that the COVID-19 pandemic may result in a partial delivery due to disruptions in the supply chain. The question then arises whether Article 50 of the CISG allows for a price reduction in the case of a partial delivery. This has not been conclusively established. In principle, Article 50 of the CISG does not cover cases of non-performance. However, some authors argue in the context of partial performance that deviations in quantity lead to a lack of conformity pursuant to Article 35(1) of the CISG. From this argument, they conclude that Article 50 of the CISG is applicable to partial delivery.[138] However, this contradicts the systematic structure of Article 45 and following of the CISG since partial non-performance is specifically governed by Article 51(1) of the CISG. Thus, Article 50 of the CISG is not applicable in the case of partial delivery.[139] Instead, the failure to deliver the

and Ingeborg Schwenzer (eds), *Commentary on the UN Convention on the International Sale of Goods (CISG)* (4th edn, OUP, Oxford 2016) paras 38f.

135 Markus Müller-Chen, 'Article 47 CISG', in Peter Schlechtriem and Ingeborg Schwenzer (eds), *Commentary on the UN Convention on the International Sale of Goods (CISG)* (4th edn, OUP, Oxford 2016) para 6.

136 Müller-Chen, 'Article 47 CISG' (n 135) para 6.

137 Atamer (n 4) para 41.

138 See, eg, Peter A Piliounis, 'The Remedies of Specific Performance, Price Reduction and Additional Time (*Nachfrist*) under the CISG: Are these worthwhile changes or additions to English Sales Law?' (2000) 12 *Pace International Law Review* 1, 31.

139 Ivo Bach, 'Article 50 CISG', in Stefan Kröll, Loukas Mistelis and Pilar Perales Viscasillas (eds), *UN Convention on Contracts for the International Sale of Goods (CISG) – A Commentary* (2nd

outstanding goods simply constitutes non-delivery within the meaning of Article 49(1) of the CISG.[140] If the partial non-delivery substantially deprives the buyer of what he was entitled to expect under the contract and thus constitutes a fundamental breach of contract within the meaning of Article 25 of the CISG, the buyer may terminate the contract in respect of the non-performed part without granting a period of grace (Article 49(1)(a) of the CISG). There is, then, no need for an additional right to reduce the purchase price.

C. *Interest claims*

The claim for interest provided for in Article 78 of the CISG was conceived in particular with a view to cases in which one party defaults on payment of the purchase price. In the present context, the interest claim will be of notable relevance if the buyer is forced into illiquidity due to the COVID-19 pandemic. It has already been shown, however, that exemption from liability on the grounds of illiquidity will hardly ever be feasible. In this theoretical case, however, the interest claim would still remain unaffected despite the exemption from liability. While it is true that the claim for interest follows directly on from the claim for damages from a systematic point of view, the wording of Article 78 of the CISG ('without prejudice to any claim for damages recoverable under article 74') clarifies that claims for damages and claims for interest constitute separate rights.[141] This means that the interest claim continues to exist even in the event of exemption from liability in accordance with Article 79 of the CISG.[142]

5. *Contract renegotiation and adaptation as a legal consequence in cases of hardship*

The legal consequences resulting from hardship are among the questions in the context of Article 79 of the CISG that have not yet been conclusively clarified. As stated above, according to the wording of Article 79(5) of the CISG, no legal consequence other than the exemption from the liability for damages is explicitly provided for. In contrast to cases of objective, permanent impossibility, while some may still consider the claim for performance of the contract to be temporarily unenforceable,[143] the claim for

edn, CH Beck/Hart/Nomos, Munich/Oxford/Baden Baden 2018) para 18; Markus Müller-Chen, 'Article 50 CISG', in Peter Schlechtriem and Ingeborg Schwenzer (eds), *Commentary on the UN Convention on the International Sale of Goods (CISG)* (4th edn, OUP, Oxford 2016) para 2.

140 Cf Markus Müller-Chen, 'Article 51 CISG' in Peter Schlechtriem and Ingeborg Schwenzer (eds), *Commentary on the UN Convention on the International Sale of Goods (CISG)* (4th edn, OUP, Oxford 2016) para 5.

141 Atamer (n 4) para 42; Flambouras (n 10) 282; Schwenzer, 'Article 79 CISG' (n 4) para 57.

142 Atamer (n 4) para 42; CISG-AC Opinion No. 14, 'Interest under Article 78 CISG' (Rapporteur: Yeşim M Atamer, opinion adopted by the CISG-AC following its 18th meeting in Beijing, China on 21-22 October 2013) para 3.21; CISG-AC Opinion No. 20 (n 13) para 9.10; Flambouras (n 10) 282; Schwenzer, 'Article 79 CISG' (n 4) para 57.

143 Schwenzer, 'Article 79 CISG' (n 4) para 55; Schwenzer and Muñoz (n 9) 171f.

performance will certainly not be permanently extinguished in cases of hardship.[144]

In particular, it is highly controversial whether the CISG recognizes a claim for renegotiation or (judicial or arbitral) contract adaptation as a legal consequence. This is because in the case of hardship the exemption from claims for damages alone is rarely an adequate solution. This follows from the fact that these cases are regularly characterized by a shift in the balance of contractual obligations.[145] Therefore, the party affected by hardship will be primarily interested in renegotiating and adjusting the contract. This contribution is not intended to provide a conclusive assessment of the advantages and disadvantages of such legal consequences. However, since the desire to renegotiate and ultimately adjust the terms of the contract could prove to be of significance in the extreme cases of the COVID-19 pandemic described above, some considerations are called for.

A. *Rejection of national solutions in view of their ultima ratio nature*

Some voices reject a solution within the CISG. They advocate recourse to national law instead.[146] This approach is hardly convincing. Any (premature) recourse to national law would contradict the pursuit of legal harmonization, which is one of the central themes of the CISG.[147] The objective of legal harmonization would be especially endangered by national solutions in this particular instance, since the answers offered by national legal systems to questions of hardship are particularly diverse.[148] Where a solution within the CISG is legally feasible, it should be given preference.[149] As will be demonstrated below, an internal solution within the CISG can, in fact, readily be achieved.

B. *Approaches to justifying contract renegotiation and adaption as a legal remedy within the CISG*

The approaches advocating an internal solution are manifold. In the absence of an explicit solution within the CISG, some assume the answer in the UNIDROIT Principles of International Commercial Contracts (PICC)—namely, in Article 6.2.3 of the PICC.[150] This provision entitles the disadvantaged party to

[144] See, eg, Atamer (n 4) para 78 (at fn 201); cf Markus Müller-Chen, 'Article 46 CISG' in Peter Schlechtriem and Ingeborg Schwenzer (eds), *Commentary on the UN Convention on the International Sale of Goods (CISG)* (4th edn, OUP, Oxford 2016) paras 12f.

[145] *Supra* III(3)(f).

[146] See, eg, Bach, 'Artikel 79 CISG' (n 20) para 36.

[147] See eg, Ingeborg Schwenzer and Pascal Hachem, 'Article 7 CISG', in Peter Schlechtriem and Ingeborg Schwenzer (eds), *Commentary on the UN Convention on the International Sale of Goods (CISG)* (4th edn, OUP, Oxford 2016) para 10.

[148] For an overview of the varying domestic approaches in the U.S., China, France, Germany, Spain and the United Kingdom, see DiMatteo, 'Impossibility and Hardship' (n 14) paras 53ff. See further Gilette and Walt (n 7) 303.

[149] Schwenzer and Hachem (n 147) para 42.

[150] Cf Cour de cassation (Belgian Court of Cassation), *Scafom Intl v Lorraine Tubes SAS*, CISG-Online No 1963; Cour de cassation (French Court of Cassation), *D2I v Gabo*, CLOUT Case

renegotiation, and it also provides for the possibility of a judicial (or arbitral) adjustment of the contract.[151] In part, this provision of the PICC is regarded as an expression of a general principle (Article 7(2) of the CISG),[152] in part as reflecting an international commercial practice (Article 9(2) of the CISG).[153] Both approaches are not free of pitfalls.[154] It is worth noting that the CISG requires an autonomous interpretation pursuant to Article 7(1) of the CISG.[155] Thus, any solution requires an autonomous justification inherent in the Convention.[156] The mere fact that a soft law instrument provides for a specific solution to an issue falling under the CISG does not in itself make this approach convincing, even if the soft law originates within an authority such as UNIDROIT.[157] This is particularly true as there is no evidence of universal recognition of the PICC, especially not in the common law.[158] Likewise, Article 6.2.3 of the PICC is not merely a codification of an existing international trade practice. There is, quite simply, no uniform approach to approaching cases of hardship that transcends the boundaries of individual legal systems.[159]

No 1501; Atamer (n 4) para 86. For guidance on the process of renegotiation and adaptation under the UNIDROIT Principles in times of COVID-19, see UNIDROIT Secretariat (n 33) paras 42ff. See further Berger and Behn (n 33) 126ff and UNIDROIT Secretariat (n 33) paras 33ff for recent comments on the threshold for hardship under the PICC.

151 Article 6.2.3 PICC reads: '(1) In case of hardship the disadvantaged party is entitled to request renegotiations. The request shall be made without undue delay and shall indicate the grounds on which it is based. (2) The request for renegotiation does not in itself entitle the disadvantaged party to withhold performance. (3) Upon failure to reach agreement within a reasonable time either party may resort to the court. (4) If the court finds hardship it may, if reasonable, (a) terminate the contract at a date and on terms to be fixed, or (b) adapt the contract with a view to restoring its equilibrium'.

152 Cour de cassation (Belgian Court of Cassation), *Scafom Intl v Lorraine Tubes SAS*, CISG-Online No 1963.

153 See Atamer (n 4) para 86 (regarding Article 6.2.3(4) PICC).

154 For comprehensive criticism, see, eg, Franco Ferrari, Clayton P Gilette, Marco Torsello, Steven D Walt, 'The Inappropriate Use of the PICC to Interpret Hardship Claims under the CISG' (2017) 17 *Internationales Handelsrecht* 97–102; see further Lindström (n 25) 20 ('How international principles could fill a gap in the CISG seems to remain somewhat unclear').

155 See CISG-AC Opinion No. 20 (n 13) para 11.9; Ferrari, Gilette, Torsello and Walt (n 154) 101; cf Davies (n 22) 298; Gilette and Walt (n 7) 297.

156 Notably, the preamble to the PICC emphasises that '[t]hey [the PICC] may be used to interpret or supplement international uniform law instruments'. However, to conclude from this that a provision of the PICC does in fact supplement the CISG seems to be a circular argument. This view is shared by, eg Ferrari, Gilette, Torsello and Walt (n 154) 100; Flechtner (n 85) 95. See, however, Joachim Bonell, 'UNIDROIT Principles of International Commercial Contracts: Why? What? How?' (1995) 69 *Tulane Law Review* 1121, 1143, who emphasises that the PICC could at least 'considerably facilitate' the task of establishing the autonomous principles and criteria to interpret international conventions.

157 Ferrari, Gilette, Torsello and Walt (n 154) 101.

158 See Scott D Slater, 'Overcome by Hardship: The Inapplicability of the UNIDROIT Principles' Hardship Provisions to CISG' (1998) 12 *Florida Journal of International Law* 231, 260, who notes that '[d]espite some wishful thinking on the part of commentators in civil law nations, the UNIDROIT Principles are not general principles on which the CISG is based'.

159 See Ferrari, Gilette, Torsello and Walt (n 154) 101, who observe that 'it would be difficult to find a legal issue that had more varied responses among legal systems than the rights of the parties when circumstances change dramatically'. See further Gilette and Walt (n 7) 309, who emphasise that '[t]o elevate a "soft law" principle of renegotiation from the PICC into a default rule enforceable by courts in the name of uniformity seems to ignore both the variations in domestic law and the intentions of parties who omitted, perhaps intentionally, a renegotiation

A solution based on the principles inherent in the CISG, without explicitly resorting to the PICC, seems more appropriate.[160] The following principles of the Convention could serve as cornerstones of such a solution: the principle of maintaining good faith in international trade,[161] the general principle of co-operation,[162] the principle of preserving the contract (*favor contractus*),[163] and, finally, the principle of reasonableness.[164] Taking all these factors into account, it seems appropriate to draw the following conclusions: in the event of an extreme and simply untenable shift in the economic parameters of contractual performance, triggered by external factors and leading to a corresponding, equally extreme distortion of the contractual equilibrium, the affected party may seek to preserve the essence of the contractual equilibrium by demanding renegotiations and, ultimately, adjustment of the contract to a reasonable extent, restoring the economic feasibility of adhering to the contract. This approach corresponds with numerous comments in the literature.[165] If a breach of such an obligation to renegotiate is understood as a breach of contract, at least the outright rejection of any offer of renegotiation could in itself give rise to a claim for damages.[166] There is no doubt that the determination of the exact scope of the obligation as well as the extent of the causal damage in such a case is likely to pose some difficulties in practice.[167]

Recently, Schwenzer and Muñoz have advocated a slightly different approach. Both authors reject a duty to renegotiate by law. They consider any such statutory duty 'neither advisable nor necessary'.[168] Whilst rejecting a specific duty to

clause from their contract'. Finally, see Flechtner (n 85) 91 who notes that 'the relief available for hardship under the UNIDROIT Principles is unfamiliar—indeed, almost shocking—to one trained in U.S. law'.

160 Cf CISG-AC Opinion No. 20 (n 13) para 11.9 ('[A]ll solutions developed must be based on the Convention itself'); Flambouras (n 10) 289 who argues that the PICC exclusively apply if the parties so agree; Schwenzer, 'Article 79 CISG' (n 4) para 55.

161 On the principle of good faith as a standard of behaviour of the parties and the respective controversies, see, eg, Pilar Perales Viscasillas, 'Article 7 CISG', in Stefan Kröll, Loukas Mistelis and Pilar Perales Viscasillas (eds), *UN Convention on Contracts for the International Sale of Goods (CISG) – A Commentary* (2nd edn, CH Beck/Hart/Nomos, Munich/Oxford/Baden Baden 2018) paras 24ff.

162 See, eg, Perales Viscasillas (n 161) para 64.

163 For further remarks on the principle of preserving the contract, see Perales Viscasillas (n 161) paras 64f; Schwenzer and Hachem (n 147) para 35.

164 See, eg, Perales Viscasillas (n 161) para 64.

165 See, eg, CISG-AC Opinion No. 7 (n 66) para 40; Huber (n 4) para 21; Magnus (n 4) para 24b; cf Anna Veneziano, 'UNIDROIT Principles and CISG: Change of Circumstances and Duty to Renegotiate according to the Belgian Supreme Court' (2010) 15 *Uniform Law Review* 137, 144ff, who invokes both on the good faith principle and, supplementary, the PICC. For the opposing view, see, eg, CISG-AC Opinion No. 20 (n 13) para 11.5; Flambouras (n 10) 288; Slater (n 158) 261. Undoubtedly, some of the arguments against a duty to renegotiate do have some merit; particularly that it seems difficult to determine the duty's scope in advance, on this, see Atamer (n 4) para 84.

166 On this, see Veneziano (n 165) 147: 'Though not expressly stated, a failure to comply with the above-mentioned provisions should give rise to a right to recover damages in favour of the other party.'

167 For a critical assessment of this question, see, eg, Atamer (n 4) para 84; CISG-AC Opinion No. 20 (n 13) paras 11.6f; Schwenzer and Muñoz (n 9) 162f.

168 Schwenzer and Muñoz (n 9) 163; see further Schwenzer, 'Article 79 CISG' (n 4) para 55.

renegotiate, they nonetheless endorse the result of the contractual terms being renegotiated in cases of hardship. In fact, Schwenzer and Muñoz still consider it probable that the benefiting contractual party will be held to accept an offer to renegotiate under the duty to mitigate losses laid down in Article 77 of the CISG.[169]

In any event, what cannot be inferred from the general principles of the CISG is the judicial (or arbitral) competence to adapt the contract.[170] No provision under the Convention assigns a comparably creative role to the court (or tribunal).[171] It is therefore not up to a court (or tribunal) to adapt or terminate the contract in these cases.[172] Besides, as Flechtner has put it, the remedy of contract adaptation by courts is 'vehemently rejected in the Common Law tradition'.[173] Consequently, recognizing such a remedy would contradict the international character of the Convention. That said, the prospect of damage claims should be sufficient to encourage the parties to refrain from rejecting renegotiation offers prematurely.

V. Individual contractual agreements: parameters and examples

One final point worth mentioning is the possibility of including individual contractual and thus tailor-made exemptions from liability in the letter of the contract. As shown above, Article 79 of the CISG provides for a specific legal approach favoured by the CISG. Nevertheless, this provision is open to party disposition in accordance with Article 6 of the CISG.[174] Generally speaking, it

[169] Schwenzer and Muñoz (n 9) 165; Ingeborg Schwenzer, 'Force Majeure and Hardship in International Sales Contracts' (2009) 39 *Victoria University of Wellington Law Review* 709, 721ff.; cf CISG-AC Opinion No. 20 (n 13) para 11.3 ('[T]here are factual incentives for the parties to renegotiate their contract').

[170] See Schwenzer and Muñoz (n 9) 167 who note that any such approach is 'hardly convincing from a dogmatic point of view'. See further Flechtner (n 85) 96f. For scholars seemingly leaning towards a court's right to adapt the contract, see, eg, CISG-AC Opinion No. 7 (n 66) para 40, stating that 'Article 79(5) may be relied upon to open up the possibility for a court or arbitral tribunal to determine what is owed to each other, thus "adapting" the terms of the contract to the changed circumstances'. However, see also CISG-AC Opinion No. 20 (n 13) para 12.6, clarifying that the 'Advisory Council's statement did not suggest that the remedy of contract adaptation was contemplated in Article 79 CISG, because allowing a court or arbitral tribunal "*to determine what is owed to each other*" does not give the adjudicator the power to adjust a term of the contract'.

[171] CISG-AC Opinion No. 20 (n 13) para 12.1. See further Flambouras (n 10) 288, who has, however, advocated this finding regarding both renegotiations and contractual adaptation by a third party. For the contrary view, see Ishida (n 82) 379, who argues: '[I]t is the very function of the CISG to interpret and supplement what parties have expressly agreed to. In this sense, a judge applying the CISG always rewrites or supplements a contract. This is all the more true of the provisions with the word "reasonable" in their texts. . . . Taking account of these extensive powers granted to judges by the CISG, it would not be a deviation from the language of the Convention for them to adapt the contract based on the "reasonable expectation test" of Article 79(1), particularly when they deal with an unexpected skyrocketing price beyond once-in-decade increase.'

[172] CISG-AC Opinion No. 20 (n 13) paras 12.1, 13, 13.3.

[173] Flechtner (n 85) 97; cf CISG-AC Opinion No. 20 (n 13) para 12.7.

[174] Lindström (n 25) 6; Magnus (n 4) para 65; Schwenzer, 'Article 79 CISG' (n 4) para 58; cf Flambouras (n 10) 283.

seems advisable to stipulate individual arrangements through *force majeure* or hardship clauses.[175] The advantages are self-evident. As has been shown, in certain constellations an exemption from liability according to Article 79 of the CISG may result in questions that have not yet been conclusively resolved from a legal point of view. An individual contractual solution enables parties to determine the desired distribution of risk with greater legal certainty—for example, with regard to the highly controversial issue of hardship. The recommendation of individual clauses is, of course, subject to one reservation: the parties will only derive a sustainable benefit from an individual contractual arrangement if the contractual clause is drafted with the necessary foresight, care, and experience. Relying on midnight or boilerplate clauses, in contrast, rather threatens to fuel legal controversies.[176] The substantive validity of the clauses is governed not by the Convention but, rather, by the applicable national law (see Article 4(a) of the CISG).

Predating the COVID-19 pandemic, well-known examples of such contractual arrangements are found in the model clauses issued by the International Chamber of Commerce (ICC)[177]—namely, the ICC's 2003 *Force Majeure* Clause[178] and the

[175] Huber (n 4) para 34; Gilette and Walt (n 7) 295; cf Atamer (n 4) para 94; Schwenzer, 'Article 79 CISG' (n 4) para 58; UNIDROIT Secretariat (n 33) paras 30, 45.

[176] Berger and Behn (n 33) 113f; DiMatteo, 'Impossibility and Hardship' (n 14) para 122.

[177] For recent remarks on the ICC Model Clauses see Twigg-Flesner (n 25) 156ff.

[178] The previous ICC Force Majeure Clause 2003 read in its relevant parts as follows (emphasis added): '(1) Unless otherwise agreed in the contract between the parties expressly or impliedly, where a party to a contract fails to perform one or more of its contractual duties, the consequences set out in paragraphs 4 to 9 of this Clause will follow if and to the extent that that party proves: (a) that its failure to perform was caused by an impediment *beyond its reasonable control*; and (b) that it could not reasonably have been expected to have taken the occurrence of the impediment into account at the time of the conclusion of the contract; and (c) that it could not reasonably have avoided or overcome the effects of the impediment. ... (3) In the absence of proof to the contrary and unless otherwise agreed in the contract between the parties expressly or impliedly, a party invoking this Clause shall be presumed to have established the conditions described in paragraph 1[a] and [b] of this Clause in case of the occurrence of one or more of the following impediments: ... (d) act of authority whether lawful or unlawful, compliance with any law or governmental order, rule, regulation or direction, *curfew restriction*, expropriation, compulsory acquisition, seizure of works, requisition, nationalisation; (e) act of God, *plague, epidemic*, ...; (f) ... prolonged break-down of transport; ... (g) general labour disturbance such as but not limited to boycott, strike and lock-out, go-slow, occupation of factories and premises. (4) A party successfully invoking this Clause is, subject to paragraph 6 below, *relieved from its duty to perform* its obligations under the contract from the time at which the impediment causes the failure to perform if notice thereof is given without delay or, if notice thereof is not given without delay, from the time at which notice thereof reaches the other party. (5) A party successfully invoking this Clause is, subject to paragraph 6 below, *relieved from any liability in damages* or any other contractual remedy for breach of contract from the time indicated in paragraph 4. (6) Where the effect of the impediment or event invoked is temporary, the consequences set out under paragraphs 4 and 5 above shall apply only insofar, to the extent that and as long as the impediment or the listed event invoked impedes performance by the party invoking this Clause of its contractual duties. ... (7) A party invoking this Clause is under an obligation to take all reasonable means to limit the effect of the impediment or event invoked upon performance of its contractual duties. (8) Where the duration of the impediment invoked under paragraph 1 of this Clause or of the listed event invoked under paragraph 3 of this Clause has the effect of substantially depriving either or both of the contracting parties of what they were reasonably entitled to expect under the contract, either party has the right to terminate the contract by notification within a reasonable period to the other party.'

ICC's 2003 Hardship Clause.[179] Several aspects deserve special attention in the context of the present pandemic. First, in contrast to Article 79(1) of the CISG, such contractual regulations often contain more detailed lists of events to be covered.[180] However, according to a recent publication of the ICC, many of the clauses establish, in essence, the same three-step test that characterizes Article 79(1) of the CISG.[181] Moreover, the ICC has revised both model clauses in the wake of the COVID-19 pandemic.[182] The ICC seems to assume that the COVID-19 pandemic would generally be covered by the ICC's new 2020 *Force Majeure* Clause. It has been suggested that the affected party would merely have to prove that it could not avoid or overcome the impediment.[183] In this context, it was explicitly pointed out that the previous ICC's 2003 *Force Majeure* Clause followed a 'similar approach'.[184]

A glance at the legal consequences provided for by the ICC's Hardship Clause is also of interest. The ICC's 2003 Hardship Clause stipulates an obligation for the contracting parties to renegotiate. Should the renegotiations fail, the clause provides for a subsidiary right to termination of the contract. An adaptation of contractual terms through a third party is alien to the model clause of 2003.[185] This has changed with the ICC's 2020 Hardship Clause. The model clause now provides for three different legal consequences in the event of failed renegotiations, any of which the parties can choose when concluding the contract: the termination of the contract by one of the parties, the termination of the contract by a judge (or arbitrator), or, finally, the adjustment or termination of the

[179] The previous ICC Hardship Clause 2003 read in its relevant parts as follows: '(1) A party to a contract is bound to perform its contractual duties even if events have rendered performance more onerous than could reasonably have been anticipated at the time of the conclusion of the contract. (2) Notwithstanding paragraph 1 of this Clause, where a party to a contract proves that: (a) the continued performance of its 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 (b) it could not reasonably have avoided or overcome the event or its consequences, the parties are bound, within a reasonable time of the invocation of this Clause, to negotiate alternative contractual terms which reasonably allow for the consequences of the event. (3) Where paragraph 2 of this Clause applies, but where alternative contractual terms which reasonably allow for the consequences of the event are not agreed by the other party to the contract as provided in that paragraph, the party invoking this Clause is entitled to termination of the contract.'

[180] Schwenzer, 'Article 79 CISG' (n 4) para 58.

[181] Cf ICC, 'Force Majeure Clauses in Commercial Contracts – General Considerations' (30 March 2020) <https://iccwbo.org/content/uploads/sites/3/2020/03/2020-forcemajeure-comm contracts.pdf> accessed 18 December 2020: '[I]mpediment is beyond the party's control; the impediment could not reasonably have been foreseen ... the effects of the impediment could not have been avoided or overcome by the party'.

[182] See ICC, 'ICC Force Majeure and Hardship Clauses' (24 March 2020), <https://iccwbo.org/publication/icc-force-majeure-and-hardship-clauses/> accessed 18 December 2020.

[183] For this assessment, see ICC, 'General Considerations' (n 181): 'The ICC Model Force Majeure Clause 2020 ... provides that plague and epidemic are examples of presumed impediments that trigger the use of the clause; regarding such a presumed impediment, the party invoking the clause need prove only that it could not have been avoided or overcome'.

[184] See, again, ICC, 'General Considerations' (n 181).

[185] On this, see the ICC Hardship Clause 2003 (n 179).

contract by a judge (or arbitrator).[186] This enables the parties to ensure sufficient legal certainty at an early stage.

VI. Outlook

It can hardly be an exaggeration to state that the COVID-19 pandemic and its economic consequences are an unprecedented event in the recent history of mankind. Not only has the virus spread around the globe at great speed and claimed a devastating number of lives, but the extent to which States have taken sovereign action to deal with the pandemic is also simply unprecedented. As effective, and thus commendable, as these measures certainly are, however, they also seriously interfere with global economic operations. The repercussions of these measures have not spared the international trade in goods, hampering the performance of international contracts in numerous ways.

Within the CISG, most of the legal answers to the resulting issues can be found in Article 79 of the CISG and its rules on the exemption from liability. Whilst the impact of this provision has been limited thus far, the exceptional nature of the COVID-19 pandemic and its consequences suggest that this may change in the near future. Ultimately, of course, much will depend on the circumstances of the individual case, leaving little room for generalized answers. However, this analysis has shown that certain reoccurring constellations are conceivable in which the exemption from liability under Article 79 of the CISG may prove a desirable and necessary remedy. In some individual cases, the COVID-19 pandemic and its impact on individual businesses may even meet the threshold of hardship. As shown, the CISG is applicable here and it grants the affected party the right to demand renegotiation of the contractual conditions. However, it has also been shown that this last scenario in particular is associated with considerable legal uncertainty. To combat uncertainties for future crises, it is therefore advisable to negotiate individual contractual clauses pertaining to *force majeure* and hardship in order to determine the desired distribution of contractual risk well in advance.

[186] See ICC, 'ICC Force Majeure and Hardship Clauses' (n 182).