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# Non Performance Excuse Under the UNIDOROIT Principle, CISG, PECL and the Ethiopian Law of Sales: Comparative Analysis

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**Abstract**
Pacta sunt servanda, which recognizes the sanctity of contractual obligations, is the most sacred principle under law of contract. Nonetheless, a party may be excused from the pacta sunt servanda principle in some exceptional grounds. Among other things, term like force majeure and the doctrine of frustration are often used to designate these grounds. The contractual rules on force majeure and the doctrine of frustration are not the same under all legal instruments. In this paper, the writer undertook comparative analysis on the rules of force majeure and the doctrine of frustration as enshrined under UNIDOROIT principle of International Commercial Contracts (here in after UNIDOROIT principle), The United Nations Convention on Contracts for International Sale of Goods (here in after CISG) Principles of European Contract law (here in after PECL) and the Ethiopan Law of sales. The comparative analysis revealed that, despite terminology differences, the rule on force majeure is the same in all instruments under consideration. As regards the doctrine of frustration, the writer argue that while recent developments read the doctrine of frustration between the lines of the provisions of CISG, its crystal clear that same conclusion cannot be reached under the Ethiopian Law of Sales.
**Keywords:** Performance Excuse, Force Majeure, the Doctrine of Frustration

## Introduction

Impracticability and hardship are the two most common grounds of non performance excuse.[1] Yet, due to legal plurality, one may validly expect differences in the way the contractual rules of force majeure and the doctrine of frustration are understood in various jurisdictions or instruments. This paper is devised to compare and contrast the rules on force majeure and the doctrine of frustration as enshrined under UNIDOROIT principle, CISG and the Ethiopian Law of Sales. However, before embarking on this venture, an attempt is made explain the regime of that regulates sales in under Ethiopian law and its peculiar features. The writer also tried to provide a general over view of force majeure and the doctrine of frustration.

Accordingly, this paper is divided in to three sections. The first section is meant to explain the regime of law that regulates sales in Ethiopia. The second section is designed to shade some highlight as to the definition of terms, the historical development of non performance excuse, and rationale for performance excuse rules. The third section is devoted to compare and contrast the rules of force majeure and the doctrine of frustration as enshrined under UNIDROIT Principles, CISG, PECL and the Ethiopian Law of Sales. Finally, there is concluding remark at the end.

It is the firm belief of the writer that this manuscript will help international traders to easily identify the points of departures between the international law of sales and the Ethiopian law of sales, and, thereby, enable them to make informed decision. This manuscript may also serve as reference to law of sales students.

## 1. The Ethiopian Law of Sales in General

The Ethiopian Law of Sales is provided under Book V, Title XV, Chapter 1 of the Ethiopian Civil Code.[2] This should not take one to the wrong conclusion that it is only this chapter that regulates sales transaction in Ethiopia. Thanks to Art. 1676[3] of the code, the law on contracts in general[4] are also applicable to sales transactions so long as there is no otherwise stipulation under the law of sales.

As opposed to the classical Roman law, the Ethiopian Law of Sales doesn't make distinction between

[1] Don Mayer and *et al*, The Law, Sales, and Marketing, p. 744 http://2012books.lardbucket.org/pdfs/the-law-sales-and-marketing.pdf

[2] Ethiopian Civil Code is enacted in 1960 during the era of Emperor Haile Selassie I. Most of the provisions of the code are transplanted from Code Napoleon. Yet, there are notable differences between the Ethiopian Law of Sales and Code Napoleon. The Code is in force to date.

[3] This provisions states:"

*(1) The relevant provisions of this Title shall apply to contracts regardless of the nature there of and the parties there to*

*(2) Nothing in this Title shall affect such special provisions applicable to certain contracts as are laid down in Book V of this Code and in the Commercial Code"*

[4] The law of Contracts in General are provided under Book IV, Title XII of the Civil Code

 

sales and contracts of sale.[1] Hence, there will be sale up on the perfection of contract though the thing is not delivered to the buyer. The primary obligations of the seller are the obligation to deliver the thing and the obligation to transfer unassailable ownership right to the buyer.[2] In addition, the buyer is obliged to provide implied warranties[3] against dispossession[4], defect[5] and non- conformity[6].

The primary obligation of the buyer is payment of price. Apart from this obligation, the buyer is required to examine the thing, notify defects and non conformities, if any, to the seller and taking delivery.[7]

## 2. Grounds of Non- Performance Excuse: Force Majeure and the Doctrine of Frustration

Under this section, an attempt is made to explain the meanings of force majeure and the doctrine of frustration, their historical development and effects.

### 2.1. Definition

Force majeure is given a broad definition, such as in France, where case law defines it as any event that is unforeseeable, beyond the control of the parties and makes it impossible for either party to perform its obligations under the contract; and

- force majeure is defined through an itemized list of events. The typical provisions include natural as well as political events such as war, acts of terrorism, nuclear explosions, natural disasters (e.g. earthquakes, landslides, floods), strikes and protests.[8]

*Force majeure* is a civil law concept that has no real meaning under the common law. However, *force majeure* clauses are used in contracts because the only similar common law concept - the doctrine of frustration - has limited application, because for it to apply the performance of a contract must be radically different from what was intended by the parties.[9]

The doctrine had its origin in French law based on the Roman doctrine of Vis Major. The Vis major concept was referred to as acts of God and was limited to events of natural causes. The doctrine of force majeure has however, been expanded to cover events induced by men and nature. In its simplest characteristics, force majeure refers to those situations outside the control of parties and which prevent them from performing the obligations assumed under the contract. Force majeure may be said to have occurred "when the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which the performance is called for would render it impossible."[10]

### 2.2. The Historical Development of Performance Excuses

Professor David Yates opines that the real rationale behind force majeure is 'an attempt to forestall the application of what in common law systems is the somewhat imprecise doctrine of frustration'.[11] The term 'force majeure' derives from civil law and encompasses a concept now entrenched in several legal traditions, inclusive of *lex mercatoria*. Its presence in Anglo-American contract law can be directly traced to the French *Code Civil*. Force majeure is based on the concept that it is fair to allow a party to escape contractual obligations without fault when satisfaction of those obligations is made impossible. Rather than being a universally applicable concept as in French jurisprudence, however, 'force majeure' in the Anglo American tradition is purely a contractual right to the suspension or release of one's contractual obligations upon happening of certain defined events.[12] Commentators claim that there is much relation between

[1] Art. 2266 of the Civil Code defines sales as *"a contract whereby one of the parties, the seller, undertakes to deliver a thing and transfer its ownership to another party, the buyer, in consideration of a price expressed in money which the buyer undertakes to pay him"*

[2] The Civil Code of the Empire of Ethiopia of 1960, Proclamation No.165/1960, *Negarit Gazette* (extraordinary issue), 19th year No.2, 5th May 1960, Addis Ababa, Art. 2273 cum. Art.2281

[3] Implied warranties are guarantees imposed on the seller by the operation of the law. Unless excluded or restricted by the agreement of the parties, they are considered as part and parcel of the contract.

[4] Id, Art. 2288 – Art. 2286

[5] Id, Art. 2289 cum. Art. 2290 – 2300

[6] Id, Art. 2288 cum. Art. 2290 – 2300

[7] Id, Art. 2266 cum. Art. 2290 & 2293

[8] Allen&Overy, Termination and Force Majeure Provisions in Review of current European practice and guidance ,March 2013,p 55

[9] Damian McNair, *Force Majeure* Clauses**,** Asia Pacific Projects Update,2011,p 1. www.dlapiper.com

[10] Babatunde Osadare, Force Majeure and the Performance Excuse: A Review of the English Doctrine of Frustration and Article 2-615 of the Uniform Commercial code, Dunde University,p.5

[11] Damian McNair, *cited above at note 13*, p. 5

[12] Ibid

 

### 2.3. Effects of Force Majeure and the Doctrine of Frustration

Common law doctrines of frustration of contract and impracticability are analogous (but not identical) to force majeure.

The principle of force majeure is included in the UNIDROIT Principles of International Commercial Contracts, Article 7.1.7(1) of which provides: Nonperformance by a party is excused if that party proves that the nonperformance was due to an impediment beyond its control and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.[1]

The 'fine distinctions' between Force Majeure and the doctrine of frustration is no place more poignant when one looks at the effects and impacts of the doctrines. Traditionally, it has been thought that the force majeure clause only related to 'unanticipated events' and 'impossibility'. However, many legal commentators have moved away from this view, suggesting that force majeure provisions are a broader risk allocation tool... they allocate 'the risk of misprediction'.

When contrasted with the common law doctrine of frustration, it is here where the practical functionality and utility of the Force majeure clause is visible. Their similarities lie in the fact that they both deal with occurrences and events beyond the control of contracting parties. Force Majeure clauses it is argued permit a greater degree of flexibility in that those events which give rise to the relief sought can be defined and identified with much more certainty. The beauty of force majeure is that it most times is a term negotiated between the parties and for this reason it has the penchant for responding to the unpredictable while still maintaining relations and consequent contractual obligations, inclusive of payments, with a temporary cessation of other areas. [2] They should stipulate the actions to be taken in the event of force majeure (such as giving notice and mitigating the effects of force majeure); and they should address the consequences of force majeure, including possible extension of time for performance, recovery of certain costs, and the eventual termination of the contract.[3]

There is no question as to the fact that frustration terminates the contract automatically as soon as the frustrating event occurred and it is the court that may hold the contract frustrated even though the parties for some time conducted themselves as if the contract still existed.

## 3. Non Performance Excuse under UNIDROIT Principles, CISG, PECL and the Ethiopian Law of Sales: A Comparative Perspective

So far, it is pointed out that force majeure and the doctrine of frustration are exceptions to the rule *pacta sunt servanda*. It is further stated that while the former is developed in the Roman law tradition, the later is a common law concept. Nonetheless, as a result of the contemporary legal convergence and unification, it is not uncommon to find both concepts in a certain legal system. This is not, however, to suggest that the rules that govern these concepts are identical all over the world. This section is meant to analyze the similarities and differences between rules of force majeure and doctrine of frustration, if any, that enshrined under UNIDROIT Principles, CISG, PECL and the Civil Code.

Accordingly, the present section is divided in to two sub sections. The first sub section address the issue how force majeure is treated under UNIDROIT Principles, CISG, PECL and the Civil Code. The second sub section enquires whether the doctrine of frustration of contract is dealt similarly under all of the above mentioned legal documents.

### 3.1. Force Majeure

A first glass looks at to Art. 7.1.7 of the UNIDROIT Principles, Art. 79 of CISG, Art. 8:108 of PECL and Art. 1792 of the Civil Code reveals that different legal documents may use various terminologies to describe situations of force majeure. While the UNIDROIT Principles and the Civil Code uses simply the term force majeure to deal with situations that give rise to impossibility of performance, the CISG employed the term "Exemptions". PECL in its part set forth the term "Excuse Due to an Impediment" to describe situations of force majeure. Here in under, an attempt is made to compare the prerequisites and effects of force majeure as stipulated under the above mentioned legal documents.

#### 3.1.1. Prerequisites

A close scrutiny of the provisions of Art. 7.1.7 of the UNIDROIT Principles, Art. 79 of CISG, Art. 8:108 of PECL and Art. 1792 of the Civil Code disclose the fact that the aforementioned legal documents stipulate similar, if not identical, preconditions in order to excuse a party from performance based on force majeure. These preconditions are explained below in a comparative manner.

[1] Jones Day, Force Majeure in troubled times: the example of Libiya, p-1. www.jonesday.com
[2] Damian McNair, cited above at note 24 ,pp 10-11
[3] Jones Day, cited above at note 28, p.7

 

**A. There Must be an Impediment to Performance**

All the legal documents under consideration, with the exception of the Civil Code, employed the word "impediment" to stipulate situations of force majeure. The code used the word "prevents", which can be taken as a synonymous to the word "impediment." The problem is that the word "impediment" is not defined in any of the documents under consideration. As the commentators of all of the documents generally asserted that, though in different words, force majeure is rigid. Impediments refer to situations the occurrence of which will bring about total impossibility to perform contractual terms. However, as it will be discussed in the subsequent sub section, recent developments indicate that this assertion may not hold water for the purpose of CISG.

Accordingly, at least for the purpose of UNIDROIT Principles, PECL and the Civil Code, impediment covers only "true cases of impossibility". These imply that the first requirement excludes circumstances which give rise to extraordinary onerous performance from the ambit of force majeure.[1] Hence, in order to excuse a party from sticking to the doctrine of pacta sunt servanda based on force majeure under the UNIDROIT Principles, PECL and the Civil Code, performance should be absolutely impossible.

**B. The Impediment Must have been Beyond the Control of the Non Performing Party**

The requirement that the impendent must be beyond the control of the defaulting party is explicitly provided in UNIDROIT Principles, CISG and PECL.[2] Yet, this is not to suggest that this requirement is disregarded under the Civil Code. Art 1793 of the Civil Code illustrates some occurrences which may constitute force majeure. A close scrutiny of these illustrations reveal that the lists can hardly be under the control of a contracting party. They can be generally described as acts of God. Accordingly, it is possible to conclude that the requirement that the impediment must be beyond the control of the defaulting party is impliedly stipulated under the Civil Code. This implies that the latter differ only in approach from the formers in stipulating the requirement.

Hence, in all of the legal documents under consideration, in order to excuse a party from performance based on force majeure, the occurrence, which prevented the party from caring out his/her obligation, should be something outside the control of the non- performing party. To put in slightly different words, "force majeure must have come about through no fault of the debtor".[3]

**C. The Impediment Must be Unforeseeable**

UNIDROIT Principles, CISG, PECL and the Civil Code state that, though in different words, in order to excuse a party from performance, he/she could not reasonably be expected to have taken the impediments in to consideration at the time of the conclusion of the contract. It is difficult to elaborate this stipulation.

At any rate, it can be said that there is unforseebability whenever an event so unlikely to occur that reasonable parties see no need explicitly to allocate the risk of its occurrence, although the impact it might have would be of such magnitude that the parties would have negotiated over it, had the event been more likely.[4] Accordingly, the party should not be too anxious, but if an obstacle is reasonably foreseeable and the debtor nevertheless contracts unconditionally, he has taken the risk that the impediment evolves.[5]

At this juncture, it is worth mentioning that the fulfillment of that the unforcenability requirement is determined based on objective standard under all of the legal documents under consideration. That is, the standard is one of reasonable foreseenability judged from the perspective of a reasonable person placed in the same situation. The fact that the particular debtor had not actually foreseen the occurrence of an event is not relevant.

**D. The Impediment and its Consequences Must be Unavoidable**

The requirement that the defaulting party must not be in a position to avoid or overcome the occurrence which prevented him/her from performing the contract is clearly stated under Art UNIDROIT Principles, CISG and PECL. As far as the civil code is concerned, though there is no explicit stipulation, the same can be inferred from the illustrations of Art. 1793. A contracting party cannot avoid or overcome the occurrences listed under this provision in the normal course of things.

2.1.2. Effects of Force Majeure

As per Art. 1791 of the Civil Code, force majeure relive the defeating party from the liability to play damage for his/her failure to perform the contract. Same effect can be easily inferred from the provisions of Art 7.1.7 of the UNIDROIT Principles, Art. 79 of CISG and Art. 8:101 (2) of the PECL. Accordingly, it is possible to conclude that the effects of force majeure is the same under all the legal documents under consideration; that is, reliving a non- performing party from the liability to pay damage.

At this juncture, it is worth mentioning that UNIDROIT Principles, CISG, PECL and the Civil Code alike impose a duty on the defaulting party to inform the other party of the impediment and its effect on his/her

[1] See Richard Backhaus, The Limits Of The Duty To Perform In The Principles Of European Contract Law, Electronic Journal of Comparative Law, vol. 8. No. 1 P. 9

[2] These provision employed the phrase "… beyond its control…" to stipulate for this requirement

[3] Richard Backhaus, cited above at note 20, p. 4

[4] *Joseph M. Perillo* , Force Majeure and Hardship under the UNIDROIT Principles of International Commercial Contracts, P. 7.

[5] Richard Backhaus, cited above at note 20, p. 5

 

inability to perform. If he she fails to do so, he she will be liable to make good any damage which may result from none receipt of the notice.[1]
To wrap up this section, UNIDROIT Principles, CISG, PECL and the Civil Code stipulates almost the same prerequisites and effects of force majeure.

### 3.2. The Doctrine of Frustration

It is explained under section one, during its earlier period of its development, the doctrine of frustration used to be limited to situations where it is possible to perform the contract, but performance would be senseless. It is further noted its scope is broadened to encompass cases where a fundamentally different situations has arisen which make performance extremely onerous, which is short of total impossibility, to one of the parties or diminish the value he/she would receive as a result of performance. It is in this broaden sense that the doctrine of frustration is understood under this sub section.
Unlike the case of force majeure, the doctrine of frustration is not treated similarly under UNIDROIT Principles, CISG, PECL and the Civil Code. The CISG and the Civil Code do not explicitly and clearly provide for excuses from performance in cases where changes in circumstances bring about contractual disequilibrium. This silence may be interpreted differently.
As far as UNIDROIT Principles and PECL are concerned, while the former deals with cases of frustration under the provisions of 6. 2.1 up to Art. 6.2.3, the latter addresses the issue under Art. 6:111. Under the present sub section an attempt is made to make a comparison between these provisions. In addition, and perhaps most importantly, the effects of the silence of the CISG and the Civil Code to govern all situations of frustrations will be examined thoroughly.

#### 3.2.1. The Doctrine of Frustration under UNIDROIT Principles and PECL

The UNIDROIT Principles and PECL used different terminologies to describe situations of frustration. While the UNIDROIT Principles employed the word "hardship" to stipulate situations of frustrations, the latter used the term "Change of Circumstances". Despite this minor difference in usage of terminologies, the rules are essentially similar. Here in under, the prerequisites and effects of the doctrine of frustration as enshrined under these legal instruments is discussed in a fairly detail manner.

**I. Prerequisites**

**A. The Obligation of One of the Parties Must become Excessively Onerous**

Both under UNIDROIT Principles and PECL, a party is bound to fulfill his/her obligations even if performance has become more onerous, whether because the cost of performance has increased or because the value of the performance he/she receives has diminished.[2] If, however, in the words of UNIDROIT Principles, the occurrence of events fundamentally alters the equilibrium of the contract or , in the words of PECL, performance of the contract becomes excessively onerous because of a change of circumstances, a party may be excused from performance.

It is important to clarify whether the expressions "fundamental alterations" as used under UNIDROIT Principles and "excessively onerous performance" as used under PECL have any practical difference. Some authors suggest that the requirement of 'excessively onerous performance' well reflects the essence of the doctrine, whereas the requirement of 'fundamental alteration' as established in the UNIDROIT Principles bears the risk of being abused.[3] However, the commentators of the UNIDROIT Principles suggested that the requirement of 'excessively onerous' performance is implicitly incorporated within the requirement of 'fundamental alteration.[4] Hence, it is possible to assert that these different terminologies have no practical effect.

It must be noted that the exact determination of the required contractual equilibrium threshold (as expressed in a percentage or other numeric term) appears to be a particularly difficult endeavor. Whether an alteration is "fundamental" in a given case will of course depend upon the circumstances. However, earlier commentators of UNIDROIT Principles suggest that if the performances are capable of precise measurement in monetary terms, an alteration amounting to 50% or more of the cost or the value of the performance is likely to amount to a "fundamental" alteration. This threshold was rejected by latter commentators who, however, failed to formulate another alternative.[5]

The point here is that to excuse performance under the doctrine of frustration, performance must be excessively onerous to one of the parties. It is important to draw a distinction between excessively onerous performance and impediment. While the latter presuppose an insurmountable obstacle, the former is of degree less than impossibility and greater that more onerous performance. It is not possible to provide for

[1] See, for instance, Art 79 of the PECL
[2] See Art 7.1.7. of UNIDROIT Principles
[3] Daniel Girsberger, Fundamental Alteration Of The Contractual Equilibrium Under Hardship Exemption, p. 4
[4] Ibid
[5] Id, p. 7

 

straightforward criteria to determine whether a performance has become excessively onerous to justify excuse from performance.

**B. Time Requirement**

There is a slight difference between UNIDROIT Principles and PECL as to the time within which the circumstance which make the performance excessively onerous. As per Art. 6.2.2 of UNIDROIT Principles, the events must occur or become known to the disadvantaged party after the conclusion of the contract. Hence, for the purpose of UNIDROIT Principles, even if an event occurred before the conclusion of the contract, it may result in excuse from performance if the occurrence of the event comes to the disadvantaged party after the conclusion of the contract.

Coming to PECL, as opposed to the rule enshrined under UNIDROIT Principles, a party may be excused from performance if the change of circumstances occurred only after the time of conclusion of the contract.[1]

**C. The Change of Circumstances should not be Unforeseeable**

Both instruments stipulate this requirement using similar words.[2] No remedy is available if a reasonable man in the position of the burdened party could have foreseen and taken in account the change. This objective criteria are put in place to preserves the sanctity and freedom of contract: a party should be generally responsible for his sake.[3] If a party knows or should know a risk of change he is expected to take precautions. He cannot rely on relief provided by the law and the courts if he refuses to do so.

**D. The Risk of the Change in Circumstances should not be Assumed by the Party**

Art 6:111 (3) of the PECL state that the risk of the change of circumstances is not one which, according to the contract, the party affected should be required to bear. There is similar sitipulation under Art. 6.2.2 of UNIDROIT Principles.

**II. Effects**

As per Art Article 6:111, in cases where the obligation of one of the parties become excessively onerous, they are obliged to re-enter into negotiations to achieve an agreement on either an adaptation or cancellation of the contract. If the parties fail to achieve an agreement within a reasonable time, the court may take action on the basis of Article 6:111 (3): It may (a) end the contract stipulating date and terms. Alternatively, (b) it may adapt the contract. In addition, the court may award damages if one of the parties refuses to negotiate or breaks off negotiations contrary to good faith. The same effect it stipulated under Art 6.2.3 of UNIDROIT Principles.

Generally, the UNIDROIT Principles and PECL provides for similar prerequisites and effects for situations of force majeure. The only difference lies on the time at which a change in circumstance should occur. While events which has occurred before the conclusion of the contract might be considered for the purpose of UNIDROIT Principles if the parts has come to know them after the conclusion of the contract, PECL prescribe that only events which has occurred after the conclusion of the contract shall be considered.

**3.2.2. The Doctrine of Frustration under CISG and the Civil Code**

As it the case under the UNIDROIT Principles and PECL, the Civil Code explicitly provides that if change of circumstances merely renders the performance of an obligation more onerous, it will not be a ground to excuse performance. To this effect, Art. 1674 (1) states that a contract shall remain in force notwithstanding that the conditions of its performance have changed and the obligations assumed by a party have become more onerous than he foresaw. Of course, the effect of such change of circumstance may be regulated by the parties.[4] The court would not have any saying in these cases.[5] The issue here is what if change of circumstances renders the performance of an obligation excessively onerous. Unlike the UNIDROIT Principles and PECL, the Code didn't address this issue. Neither Art. 79 of the CISG provide explicit solutions for the question.

There is no consensus among commentators of CISG on the issue whether relief is available under Art.79 of the CISG if change of circumstances renders performance excessively onerous. While some consider that the wording of Article 79 is sufficiently flexible to include an extreme situation of unexpected hardship within the meaning of "impediment", others opine that there is no place in the CISG for any relief on account of economic hardship.[6] The problem is that the "legislative as well as the drafting history of Article 79 is not conclusive enough to warrant a conclusion that the hardship problem was meant to be excluded or included within its scope."[7]

So, until recently several court decisions have rejected the possibility that negative market developments constitute an impediment within Article 79(1). In fact, as of 2007, no court has exempted a party

[1] See Art 6:111 (2) (a) of PECL
[2] [2] Richard Backhaus, cited above at note 9, p. 11
[3] Id, p. 12
[4] The Civil Code, Art. 1674 (2)
[5] Ibid
[6] [6] Richard Backhaus, cited above at note 9, P.7
[7] Ibid

 

from liability on the grounds of economic hardship.[1] The CISG Advisory Council Opinion No. 7 suggested that this state of affairs is inconsistent with the admission, by a majority of legal commentators, that a fair legal system should admit some flexibility within the general principle of *pacta sunt servanda* to account for a genuine situation of hardship.[2] As to the question what type of factual scenario may be proposed for an exceptionally "hard" case of hardship that would merit relief, it advises that the scenarios envisaged under Art. 6.2.2 of the UNIDROIT Principles shall be used as gap filling provision.[3]

Accordingly, in 2009 the Belgian Supreme Court held that held that while Art 79 of CISG expressly covers *force majeure* cases as events exempting from performance, it does not implicitly exclude the relevance of less than *force majeure* situations such as hardship.[4] It further asserted that in accordance with Article 7(1), the Convention has to be interpreted having regarded to its international character and to the need to promote uniformity in its application.[5] The court used this assertion as a pretext to decline to resort to domestic laws which have a diverse rule on situations of hardship.

As to the effect of hardship, both the advisory and the Belgian Supreme Court suggest the same effect as enshrined under the UNIDROIT Principles and PECL.

Coming to the civil code, the writers of this paper couldn't find an authority on the matter. However, since Art. 1764 (1) of the code explicitly provides that the court may not vary a contract or alter its terms on the ground of equity[6], it is possible to conclude that non performance will not be excused even if change of circumstances render the obligation excessively onerous.

To wrap up the present sub section, while UNIDROIT Principles and PECL provide for rules on the doctrine of frustration, the CISG and the Civil Code are silent on the issue whether there will be any relief if change of circumstances renders the obligation excessively onerous. Recent development suggest that Art. 79 (1) of the CISG does not implicitly exclude the relevance of less than *force majeure* situations such as hardship. Same conclusion cannot be reached as far as the Civil Code is concerned.

**Concluding Remark**

While force majeure is a civil law concept, the doctrine of frustration is developed in the common law legal tradition. All the legal instruments compared i.e. UNIDROIT Principles, CISG, PECL and the Civil Code, alike deal with situations of force majeure. All of them stipulate rigid requirements to provide a relief for the defaulting party. These requests are that the existence of total impossibility to perform, unforseenability, uncontrollability and unavoidability. These make it difficult to obtain excuse from performance under Force majeure.

The four legal instruments also provide for similar effects of force majeure- the aggrieved party may not require damage for the non- performance.

Coming to the doctrine of frustration, as opposed to force majeure, it provides relief if change of circumstances makes give rise to hardships short of total impossibility. Yet, all the above mentioned documents do not provide excuse from performance for the mere fact that performance becomes more onerous. In cases where change in circumstances renders performance excessively onerous, while UNIDROIT Principles and PECL provides relief for the disadvantaged party, the CISG and the Civil Code do not deal with the matter.

Though there is no consensus among commentators CISG as to the issue whether the convention envisaged situations of hardship, recent developments vow the affirmative. It seems pretty clear that same conclusion cannot be reached under the Civil Code.

As clearly and similarly stated under UNIDROIT Principles and PECL, the effect of frustration short of impossibility is that the disadvantaged party will have the right to initiate renegotiation. In cases where the parties fail to reach an agreement, the court may adopt the contract.

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[2] Ibid

[3] Ibid

[4] Anna Veneziano, UNIDROIT Principles and CISG : Change of Circumstances and Duty to Renegotiate according to the Belgian Supreme Court, p. 4

[5] Ibid, Article 7(2) states that in matters governed by the Convention, gaps have to be filled on the basis of the general principles underlying the CISG, and only when no such principles are found should the judge have recourse to the domestic law applicable according to the relevant conflict of law rules.

[6] The court is only allowed to alter administrative contracts and contracts concluded between parties who has Special relationship. See Art 1764 and 1765 of the Civil Code

 

**I. Treaty**

⇨ The United Nations Convention on Contracts for International Sale of Goods, adopted in 1980, entered in to force in 1988.

**II. Soft Laws**

⇨ UNIDROIT Principles Of International Commercial Contracts 2010
⇨ The Principles Of European Contract Law (PECL) 2002

**III. National Law (Ethiopian)**

⇨ The Civil Code of the Empire of Ethiopia of 1960, Proclamation No.165/1960, *Negarit Gazette* (extraordinary issue), 19th year No.2, 5th May 1960, Addis Ababa

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