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The CISG and Unforeseeable Events

Abstract

This paper pursues the question how under the CISG, the world-wide sales law, unforeseen events relieve parties from their contractual obligations in practice. The practical examples are COVID 19, Brexit and the Russo-Ukrainian war. Finally, it will be seen whether, and if so, which general conclusions can be drawn from these examples for the application of the CISG's exclusion clause.

Keywords: Contracts, CISG, excuse, unforeseeable events, COVID 19, Brexit, Russian war against Ukraine

I Dedication

The following lines are dedicated with great appreciation and personal affection to Lajos Vékás on the occasion of his 85th birthday. Whenever Hungary and her civil law are mentioned in a European context, Lajos' name is mentioned first, or even alone. He is the father of the new Hungarian Civil Code. Not only is he a brilliant scholar, but what is more, he is a very charming person with a good sense of humor, a true friend and a wonderful colleague. It must have been in the early 1970s – now half a century ago – when we first met at Hamburg's Max-Planck-Institute, and since then, our connection has stayed strong.

I hope that my subject, 'The CISG and unforeseeable events,' is of interest to Lajos. I will not add to the many articles that have treated this topic mainly from a theoretical perspective. I will discuss whether recent events, namely the COVID-19 pandemic, Brexit and the Russo-Ukrainian war, affect international sales transactions in practice, and if so, how.

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II Introduction

This conference in Lajos' honor very aptly focuses on the subject of codification and the different understandings of this term, particularly in countries with Common Law and Civil Law. The CISG or UN Sales Convention of 1980[1] is a codification of sales law on the global level, for it is an instrument that tries to systematically regulate all, and not only all practically relevant, questions of sales law,[2] although it is almost exclusively designed for international commercial sales.[3] Its general system of contractual liability and many policy decisions follow, to a large extent, Common Law. On the other hand, the Convention also contains strong elements of French and German law and even of Roman law. This mixture was the fruit of a long and intense comparison of law.[4] However, the CISG's legislative style is that of a comprehensive and systematic continental codification, not that of the famous English Sale of Goods Act[5] that codified, or better, compiled, merely a number of essential sales rules.

Today, the CISG has become a true world sales law adopted by 97 states,[6] applicable to most international sales of movable goods and is often applied in practice. The leading database has collected more than 7,000 judgments and arbitration awards concerning the CISG.[7] Nonetheless, it is an astonishing phenomenon that parties often exclude the Convention, mainly because they fear they are not fully familiar with its content and are accustomed to contracting on their own terms, including their own laws. It is evident that this course of action does not succeed if both parties insist on their own law, as often, if not regularly occurs. The result in this situation is the application of the – then ineffectively excluded – CISG.

In essence, the Convention is a good example of a successful international codification. How this codification functions, and that it functions, I will show with respect to a central legal question, namely, when a party is relieved from its duty to perform if an unforeseeable circumstance distorts the original contractual balance. As a fundamental principle, also under the CISG, a party is obliged to perform or to pay damages for non-performance.

1 United Nations Convention on Contracts for the International Sale of Goods of 11 April 1980. Its most familiar abbreviation is CISG.

2 There are only a few exceptions; the CISG does, for instance, not regulate most matters concerning the material validity of – sales – contracts. This field, which touches too much on general contract law, is left to the applicable national law [Art. 4 (a) CISG].

3 Consumer sales fall within the ambit of the CISG only if the – professional – seller did not, and could not, know that the buyer bought for private purposes and was therefore a consumer [Art. 2 (a) CISG]. But astonishingly enough, fundamental elements of the CISG have also been found to apply to consumer sales; see, eg, the EU Directive on Consumer Sales of 1999 (Directive 1999/44/EC) and its successor, the Digital Sales Directive of 2019 (Directive EU/2019/771).

4 The creation of a uniform sales law based on comparison of laws started as early as with Ernst Rabel in 1928; see v. Staudinger, Magnus Einl zum CISG note 19 et seq.

5 First, the Sale of Goods Act 1893 was replaced by the Sale of Goods Act 1979; the latter was modified by the Supply of Goods and Services Act 1982 and the Consumer Rights Act 2015.

6 See the Status Report by UNCITRAL (www.uncitral.org).

7 See the collection of cases at CISG-online.org.

This is the starting point in all legal systems, expressed in the Roman Law rule: *pacta sunt servanda*.[8] However, all modern laws[9] provide for – generally rare – exceptions from this maxim, namely, where, in the circumstances, it would be unfair and unjust to hold a party to its promise. Where does the CISG draw the line between the strict duty to perform and the relief from this duty? Which are the conditions for such relief?

III The CISG's regulation for unforeseeable events

The CISG regulates the problem in its Art. 79. As far as it is of interest here, the Article runs as follows:

> (1) A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to any 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) …
> (3) The exemption provided by this article has effect for the period during which the impediment exists.
> (4) …
> (5) Nothing in this article prevents either party from exercising any right other than to claim damages under this Convention.

Thus, the article provides in para 1 that a party is not liable for any non-performance if an 'impediment beyond his control' hinders the performance. This impediment must have been such that it could not be reasonably expected that the party had taken it into account when it concluded the contract, nor could it have avoided or overcome it. It must be mentioned that the new Hungarian Civil Code contains a rather similar (and by the way, CISG-inspired) provision in its Section 6:142, second sentence.[10]

8 Dig. 2, 14, 7 § 7 (Ulpian). The CISG does not express this principle as such but indirectly insofar as any termination of the contract or other remedy that allows a deviation from the agreed contract requires a breach of the contract; see Art. 45 and 61 CISG.

9 See L. DiMatteo, 'Excuse: Force majeure and hardship' in L. DiMatteo, A. Janssen, U. Magnus, R. Schulze (eds), *International Sales Law. A Handbook* (2nd edn, Hart 2021, Oxford) 691. – Those laws which base contractual liability on the fault principle exempt the debtor all the more from liability if unforeseeable circumstances prevent correct performance because fault is then lacking in any event.

10 Section 6:142 (in its English translation): '[*Liability for damage caused by breach of contract*] A person causing damage to the other party by breaching the contract shall be required to compensate for it. He shall be exempted from liability if he proves that the breach of contract was caused by a circumstance that was outside of his control and was not foreseeable at the time of concluding the contract, and he could not be expected to have avoided that circumstance or averted the damage.'

The CISG provision requires, therefore, that three elements must be satisfied:[11] first, the mentioned impediment must be beyond the control of the debtor; traditional examples include flood, fire, earthquake, but also war, strikes,[12] that cause the party's inability to perform. The causality between the impediment and the non-performance is, to some extent, self-evident[13] Second, that the impediment could not have been taken into account; this expression is generally understood to mean that the impediment was unforeseeable[14] the decisive point of time concerning such foresight is the conclusion of the contract. Third, neither the impediment nor its effects could have been avoided or otherwise overcome. This third element comes into play if the impediment was unforeseeable. Where it was foreseeable, the defaulting party regularly remains liable. The provision assumes that this party then had an opportunity to avoid or overcome any failure to perform and should have used this opportunity. However, unavoidability and insurmountability may support the conclusion that an event was already unforeseeable.

The provision is primarily regarded as a force majeure clause, which relieves the party from performance and, in any event, from damages for non-performance due to an unforeseeable and irresistible natural or man-made event.[15] There is wide agreement in case law and legal literature that the excuse should be granted in rare cases only,[16] namely when events outside the affected party's control and sphere of risk disabled this party from performing.[17] If Art. 79 were to be too easily applied, the mentioned maxim *pacta sunt servanda*, the Convention's foundation, would be undermined. In most cases, courts have therefore declined to apply Art. 79 and relieve a party from its contractual obligations.[18] For instance, rapid price increases

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11 Others count six but mean the same elements, see, eg, Flechtner, Belgrade L. Rev. LIX (2011) No. 3 p. 84 et seq. (91).

12 See for many more examples: S. Kröll, L. Mistelis, P. Perales Viscasillas and C. Atamer (eds), *UN Convention on Contracts for the International Sale of Goods (CISG) Commentary* (C.H. Beck 2011, München) Art 79 note 46.; P. Schlechtriem, I. Schwenzer, U. G. Schroeter (eds), *Commentary on the UN Convention on the International Sale of Goods (CISG)* (7th edn, 2019) Art 79 note 16 et seq.; U. Magnus, J. von Staudinger, Der *Staudinger Kommentar zum Bürgerlichen Gesetzbuch: Wiener UN-Kaufrecht (CISG)* (Sellier, de Gruyter 2013) Art 79 note 27 et seq.

13 M. Bonell, C.M. Bianca (eds), *Commentary on the International Sales Law: The 1980 Vienna Sales Convention* (Giuffrè 1987, Milan) Art 79 note 2.6.6.; C. Brunner, B. Gottlieb (eds), *Commentary on the UN Sales Law (CISG)* (Wolters Kluwer 2019, Alphen aan den Rijn) Art. 79 note 1; Kröll, Mistelis, Perales Viscasillas, Atamer Art. 79 note 58; Schlechtriem Schwenzer, Schroeter Art. 79 note 14.

14 Kröll, Mistelis, Perales Viscasillas, Atamer 79 note 50 et seq.; v. Staudinger, Magnus Art. 79 note 32.

15 For examples, see supra at fn. 11.

16 DiMatteo, Excuse… 698 note 27; P. Mankowski (ed), *Commercial Law. Article-by-Article Commentary* (Hart, Nomos 2019, CISG 9 et seq.) Dornis Art. 79 CISG note 2 ('high threshold for exemption'); v. Staudinger, Magnus Art. 79 note 4; similarly Schlechtriem, Schwenzer, Schroeter Art. 79 note 14 ('ultimate limit of sacrifice').

17 Where a party has taken over the contractual risk, for instance of an absolutely punctual delivery irrespective of all contrary circumstances, Art. 79 does not excuse any delay even if the latter was caused by an unforeseeable impediment, for example by a strike of transport workers.

18 See only in recent years, eg, Cour d'appel de Versailles 30 May 2024, CISG-online No. 7027 para. 46 et seq.; OLG München 25 October 2023, CISG-online No. 6641 para. 90; Rechtbank Limburg 8 March 2023, CISG-online No. 6250 para. 51.

or decreases of up to 100% have generally been no excuse and have not exempted from performance.[19] In special situations, in particular, where the market price of the goods changes rapidly and is subject to speculation, even higher percentages provided no excuse.[20]

As is the case with almost all provisions of the CISG, Art. 79 comes into play only if the parties did not agree otherwise, since the Convention is governed by the principle of freedom of contract.[21] Any force majeure clause or similar clauses in the contract enjoy priority over Art. 79.

IV The example of COVID-19

In the recent past, the question was raised whether the COVID-19 pandemic relieved parties from their contractual obligations. Intuitively, one is inclined to answer this question with a clear 'yes' since nobody could foresee or avoid the pandemic. However, as will be seen, the answer must be much more differentiated.

I will take the example of the 'Sea Bass' case (*Chilean Sea Bass Inc. v Kendell Seafood Imports, Inc.)*, which came before a US District Court and was decided in May 2024.[22] The plaintiff was a business domiciled in Chile with three ships. It caught and sold fish, almost exclusively sea bass. It did this generally in the following order: first, it sold the prospective catch to its customers; only then did its ships start to catch fish, which were afterwards delivered to the client. This happened in 2020 with the buyer, a US-based company, whose business it was to resell the fish to restaurants. In early January 2020, the parties entered a contract for an estimated 350 tons of fish – the intended total catch of the three ships – at a price of 21 US$ per kilo. This came to (finally) ca. 6 million US$. The buyer paid an advance payment of 1.3 million US$. In February, before delivery, the COVID-19 pandemic broke out in the USA, and by March 2020, the US government had ordered a nationwide closure of restaurants.

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19 See, for instance, Cour d'appel de Colmar 12 June 2001, CISG-online No. 694, confirmed by the French Cour de cassation 30 April 2004, CISG-online No. 870 (price decrease of 50% insufficient); Swiss Federal Court *(Bundesgericht)* 15 September 2000, CISG-online No. 769 (price increase of 8.5 – 9% insufficient); Tribunale Monza Giuris. It. 1994 I 145 with note Bonell (change of 30% insufficient); Rechtbank van Koophandel t'Hasselt 2 May 1995, www.unilex.info/cisg/case/263 (price decrease of 20% insufficient); but contrast with Belgian Cour de cassation 19 June 2009, CISG-online No. 1963 (price increase of 70% sufficed to adapt contract) with strong and justified critique, Flechtner, Belgrade L. Rev. LIX (2011) No. 3 p. 84 et seq. (93 et seq).; see also the survey of the caselaw by Tobias Eckardt, Ulrich Magnus, Burghard Piltz, 'Art. 79 CISG in der internationalen Rechtsprechung – eine Auswahl französischer, schweizerischer, belgischer, US-amerikanischer, niederländischer und spanischer Entscheidungen' (2020) (4) Internationales Handelsrecht 140 et seq.

20 OLG Hamburg For. Int. 1997, 168 (tripling of market price insufficient because goods and sales were subject to speculation); French Cour de cassation 17 February 2015, IHR 2017, 111 (price increase of 118% insufficient); also, but without giving precise figures on the price fluctuation, Audiencia Provincial de Valladolid 6 April 2015, CISG-online No. 2619.

21 See Art. 6 CISG.

22 *Chilean Sea Bass Inc. v Kendell Seafood Imports, Inc.*, US Dist. Ct. Dist. Rhode Island 24 May 2024, CISG-online 6990.

Was the buyer entitled to refuse the fish and any payment and to reclaim the advance payment when the seller wanted to deliver the March catch and litigated for the total price?

The answer depends on the interpretation of Art. 79 of the applicable CISG. Was the closure of restaurants through an order of the state an impediment that hindered, in an unforeseeable and unavoidable way, the buyer's performance, namely the payment of the price? The intuitive answer would probably be 'no'. True, the sudden closure was certainly not foreseeable when the contract was concluded. The merely abstract and general foresight that something unexpected can happen and influence the contract balance does not suffice to make the concrete event, such as the outbreak of a pandemic, foreseeable. However, whether the consequence of the closure was also unavoidable for the buyer appears to be doubtful, as the buyer could, for instance, have frozen and stored the fish for as long as the closure lasted. What is more important: the closure was no direct barrier that hindered the buyer from paying the Chilean seller. The fact that the buyer's customers, the restaurants, suddenly did not buy any fish made the sale uneconomical and therefore unattractive to the buyer, but payment did not become impossible. The transfer of money was in no way forbidden or restricted. The closure measure as such constituted thus no hindrance to the payment of the full contract price. As a principle, it is the buyer's contractual risk that they can use the delivered goods and have the money to pay for them.[23]

However, it is disputed whether Art. 79 CISG also covers cases such as the present one, where events outside a party's control do not directly hinder the performance of contractual duties. Instead, the event – the closure of the restaurants – distorted the agreed-upon balance between delivered goods and price only indirectly but significantly. The buyer could no longer resell the fish. The majority view encompasses these so-called hardship cases, where performance is not strictly impossible but only economically overly burdensome, as well as under Art. 79.[24] Others see a gap in the Sales Convention that the applicable national law

23 For buyer's risk related to use or resale of goods, see BGH 27 November 2007, IHR 2008, 49 (53); for buyer's risk regarding ability to pay, see, eg, ICC Arbitration Award No. 7197, JDI 1993, 1028; Schlechtriem, Schwenzer, Schroeter Art. 79 note 25, 33; v. Staudinger, Magnus Art. 79 note 18, 22.

24 See CISG-AC Opinion 7 note 26 et seq. and Opinion 20; Brunner, Gottlieb, *Commentary on the UN Sales Law* Art. 79 note 26; J. Honnold, H. M. Flechtner, *Uniform Law for International Sales under the 1980 United Nations Convention* (4th edn, Kluwer Law International 2009) not 432.2; Kröll, Mistelis, Perales Viscasillas, Atamer Art. 79 note 81 (by analogy); *Münchener Kommentar zum Bürgerlichen Gesetzbuch, CISG* (9th edn, 2024), P. Huber Art. 79 CISG note 21; *Münchener Kommentar zum Handelsgesetzbuch* (5th edn, 2021) Mankowski Art. 79 CISG note 38; Schlechtriem, Schwenzer, Schroeter Art. 79 note 25, 33; v. Staudinger, Magnus Art. 79 note 18, 22; Flechtner, Belgrade L. Rev. LIX (2011) No. 3 p. 84 et seq. (91); in the same sense, eg, Arbitration Award 19 February 2023 of the Cairo Regional Center for International Commercial Arbitration (CRCICA) CISG-online No. 6272 para. 251. At least for 'a more flexible standard than that of traditional *force majeure*' already Bianca, Bonell, Tallon Art. 79 note 3.1 (p. 592).

should fill.[25] Indeed, many national laws provide for a separate rule concerning the adaptation of the contractual balance to drastically changed circumstances.[26]

I prefer the majority view that Art. 79 also fits hardship cases because they are of close similarity to the performance impediments primarily envisaged by Art. 79, although it must be admitted that the legislative history of the Article is in favor of an exclusion from, rather than inclusion of hardship into the provision.[27] As the Sea Bass case shows, the distinction between total impossibility because of force majeure and almost total impossibility because of hardship can be rather fine. If Art. 79 covers both, a strict delimitation between them becomes unnecessary. This is in the interest of a practical application of the Convention. Moreover, the CISG contains no other provision on which a solution for these cases could be based. But like the force majeure cases, hardship cases also belong at the center of sales law, which a comprehensive sales codification should cover. Furthermore, Art. 79 (1) mentions at its end 'the impediment … or its consequences'. Indirect effects of impediments ('consequences') shall evidently be taken into account. Indirect effects will often not fully exclude the ability to perform, but make performance only more onerous. This is characteristic of hardship cases. The anyway rather neutral wording of Art. 79 (1) therefore cautiously supports the inclusion of these cases rather than their exclusion. However, two questions remain: when should the contractual balance be readjusted; when is the hardship hard enough? And second, what is the remedy if Art. 79 covers hardship?

In the Sea Bass case, different options were on the table: first, the termination of the contract, freeing the buyer from any payment duty due to the (temporary) closure of its customers. Second, the full performance duty of both parties. Third, a split of the burden that the closure caused by reducing the contract price and/or the duty to accept the goods. It is widely accepted that an exemption from the performance duty or an adaptation of the contractual balance can only be granted if the unforeseeable and unavoidable event has dramatically changed this balance.[28] On several occasions, courts have refused any exemption or adaptation where the price (or value of the goods) had changed by 100% or

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[25] See, eg, BeckOGK/Bach Art. 79 note 36; DiMatteo, Excuse… 701 note 38 et seq.; Lookofsky JL&Comm 29 (2011) 141 et seq. (168). The Belgian Cour de cassation 19 June 2009, CISG-online No. 1963 (price increase of 70% sufficed to adapt contract) with strong and justified critique by Flechtner, Belgrade L. Rev. LIX (2011) No. 3 p. 84 et seq. (93 et seq) held that Art. 79 covered hardship but left an internal gap in the Convention concerning the consequential remedy. The Court filled this gap with the hardship rule of the UNIDROIT Principles for International Commercial Contracts (PICC).

[26] See, eg, Section 6:192 new Hungarian Civil Code; § 313 German BGB.

[27] An early proposal to adopt the formulation 'Performance of that obligation has become impossible or has so radically changed as to amount to performance of an obligation quite different from that contemplated by the contract' was not successful; as to the legislative history, see DiMatteo, Excuse… 701 note 38 et seq.

[28] See also Schlechtriem, Schwenzer, Schroeter Art. 79 note 30: if the 'ultimate limit of sacrifice' *('äußerste Opfergrenze')* is exceeded. The same borderline is mentioned in CISG-Advisory Council Opinion 7 Comment 38.

less.[29] In other words, the threshold for any exemption or adaptation must be high in order not to undermine the principle that contracts must be observed.

In our Sea Bass case, it shall be assumed that the goods, if fully delivered, were literally useless to the buyer who could neither store nor resell them, and that their full payment was of such magnitude that it could easily ruin the buyer's business. In such a situation, the risk the sale entailed should not be borne by one party alone. Neither should the seller completely lose the sale and the respective profit (if the seller could have sold the fish to customers in other countries, he could have terminated the contract because of the buyer's unwillingness to pay),[30] nor should the buyer bear the burden of having to fully pay for useless goods. This is a commandment of solidarity in catastrophic situations for which no one can be blamed. A reduction in the price appears as the only alternative. This solution can be based on the good faith maxim of the Convention in its more specific form of the duty of cooperation.[31] In situations of unforeseeable urgent need, which neither party is responsible for, justice and the contract as a relationship of cooperation require the division of risk rather than burdening one party alone. If the parties cannot agree on the reduction and the seller insists on delivery, the price should be reduced to half against delivery of the totality of the agreed-upon goods unless the circumstances of the case recommend another division rate.[32]

In the concrete Sea Bass case, the parties indeed agreed during the COVID-19 pandemic on a price reduction from 21 to 15 US$ per kilo. The court confirmed this agreement, in my view, correctly. The seller was obliged to deliver the full agreed quantity and could claim only the reduced price. If parties modify or readjust their contract to changed circumstances, there is generally no reason for the court to interfere. An exception would only apply if one party reached the agreement by fraud, threat, or other illegal means. In respect of the validity of such an agreement, Art. 4 CISG refers to the applicable national law.

The essence of the Sea Bass case is therefore that contracts concluded before the outbreak of a pandemic or a similar unforeseen but lasting event can also be indirectly affected by that event. If no opportunity exists to avoid or overcome the indirect consequences of the event and where contract performance would most likely ruin one party, then the parties should themselves adapt their contract to the new situation. If they fail to reach an agreement,

[29] See the references in fn. 19. That courts in the great majority have refused to accept price changes as an excuse under Art. 79 must not be misunderstood to mean that they held hardship cases as not covered by the provision. The contrary is correct; the courts accepted hardship as an excuse, but only if a high threshold was exceeded; see the cases in fn. 19 et seq.

[30] Final non-payment amounts to a fundamental breach that allows the termination of the contract; see Art. 64 (1) (a) CISG.

[31] In the same sense, eg, *Münchener Kommentar zum Bürgerlichen Gesetzbuch,* CISG, Huber Art. 79 CISG note 21; v. Staudinger, Magnus Art. 79 note 24b; to the same result Kröll, Mistelis, Perales Viscasillas, Atamer Art. 79 note 80 (by including a tacit reference to Art. 6.2.3 (4) PICC into the contract and the application of Art. 79 CISG); similarly Schlechtriem, Schwenzer, Schroeter Art. 79 note 54 (other party is obliged to accept reasonable modified offer of the party aggrieved by the unforeseeable event).

[32] If the seller kept the goods, he should be entitled to half of his profit from the sale.

the court has to step in. It is clear that the party claiming adaptation must prove that full performance would ruin it.

The Sea Bass case concerned the situation that the parties concluded their contract shortly before the outbreak of the pandemic (it can be assumed that there was no prior outbreak of the pandemic in other countries that could have warned US citizens; by the beginning of January 2020, the situation in China, where the pandemic started was too unclear). However, the solution to this situation should also, and all the more, apply to cases of long-term contracts that were concluded long before the entry of the unforeseeable event.

But what about the situation if the parties in our case had entered into their contract shortly after the outbreak and after it became apparent that COVID-19 was an extremely dangerous pandemic? That happened in the USA around mid-February 2020. Unless the personnel of the Chilean seller had been infected and became ill due to COVID-19, the outbreak as such was again no direct hindrance to the performance of the contract and, in particular, no hindrance to paying the contract price. Art. 79 CISG would not exempt the parties from their duties. Would the situation change with the further progress of the pandemic? The next event relevant to the parties was the closure of restaurants. If the contract had been concluded after the outbreak but before such closure was announced or unexpectedly executed, the situation is the same as if the contract had been concluded before the outbreak, as discussed above. The closure ordered by the state was not foreseeable to the buyer and dramatically altered the contractual balance, as the fish, presumably, became useless to the buyer. The solution should be a division of the contractual risk between the parties.

If the parties concluded the contract after the announcement or entry into force of the closure, the shutdown was no longer unforeseeable for the buyer. The latter knew or could have known this fact and nevertheless concluded the sales contract. Therefore, the buyer bought at their own risk that the fish could still be resold or otherwise used. Even if no resales were possible, Art. 79 CISG does not relieve them of the duty to pay.

In sum, the COVID-19 outbreak as such did not exempt parties from the performance of their contractual obligations. Only if there was a direct effect of the pandemic on the contract parties (illness of their personnel and no substitutes available) did Art. 79 relieve them from their duties as long as the illness lasted or if the whole business broke down.[33] The state-ordered consequences of the pandemic, such as shutdowns, also led to an excuse for non-performance of already concluded contracts if they made fulfillment impossible, illegal, or ruinous for one party. In that latter case of economic hardship, however, a high threshold is required to overcome the actually binding character of a contract. If the threshold is exceeded, in hardship cases, a division of the contractual risk, either agreed

33 Even the first commentary on the CISG made it clear that under Art. 79 'a war or a strike does not, in itself, exonerate the defaulting party from his obligation' but only if the event is an actual and concrete hindrance to performance and meets the further requirements of the provision; see Bianca, Bonell, Tallon Art 79 note 2.6.7, 584.

between the parties or set by the court, appears preferable over a solution that burdens one party with the entire contractual risk.

Essential for any excuse or right to readjust the contract is the time at which the contract was concluded. If the conclusion occurs before the concrete entry of the unexpected event that hinders performance, the concerned party will regularly be exempted from the performance of its duties unless there is a reasonable opportunity to overcome the consequences of the event. In hardship cases, either an agreement of the parties or, where they cannot reach one, a court decision is necessary.

However, if there were already serious signs of the entry of the event – for instance, the outbreak of the pandemic in neighboring countries (an outbreak reported, eg, in Austria at an international tourist hotspot close to the German border = foreseeable in Germany) – parties should be expected to adapt their contracts to the threatening situation, for example by force majeure/hardship clauses, price adjustments or the like, even by an abstention from the conclusion of the contract. The general CISG standard requires the conduct of 'a reasonable person of the same kind as' the addressee of the conduct.[34] A reasonable merchant would take preventive measures as soon as there were sufficient and reliable signs of a coming catastrophe. Yet, the parties need not expect all and every possible consequence of the threatening event. With respect to the COVID-19 pandemic, parties having heard of the dangerous outbreak and rapid development in close countries and still concluding contracts should have considered the possibility that their business would have to be partly or totally closed because of the illness of their personnel. This would have been the natural and foreseeable consequence of the pandemic. In my view, at this time of the developing pandemic, parties were, however, not obliged to foresee the official shutdown of almost all public activities, in particular of restaurants. To this latter state intervention, they could only adapt their contracts after the intervention was announced or – without prior announcement – directly executed.

V The example of Brexit

My next example is Brexit. Did the exit of Great Britain from the EU provide an excuse for the non-performance of contracts under Art. 79 CISG? The question may astonish you because the CISG is not in force in the UK. Nonetheless, is the CISG often applicable to transactions between EU and UK businesses, namely, if private international law leads to

[34] Art. 8 (2) CISG.

the application of the CISG.[35] In the EU, this is the case if the seller is seated in an EU-CISG State[36] and if the parties did not exclude the CISG.[37]

To come back to the initial question, whether Brexit provides an excuse under Art. 79 CISG, giving a clear yes or no is impossible. Brexit was a long and complicated process. Can we identify unforeseeable and unavoidable steps in that process that hindered parties from fulfilling their contractual duties? The first step was the June 2016 referendum, which resulted in a small majority voting for the UK to exit the EU. The outcome of the referendum was unforeseeable. For many, the vote for leave was also unexpected. But the referendum was not binding. It had no impact on legal relationships and did not hinder contractual performance. It might have warned cautious parties to take preventive measures, but of what kind? It was still quite unclear in which way the British government would react to the exit vote and what possible consequences could follow. Therefore, the referendum provided no excuse for the non-performance of any contractual duty.

The next step came in March 2017 when the British government notified the EU of its intention to leave. Now, it was clear that Brexit would occur, but again, no direct effects or consequences for contracts were set in force. On the other hand, a very cautious merchant could already at that time have expected the following: after the implementation of Brexit, the UK would be a third state in relation to the EU; in particular, the customs situation would change. However, great uncertainties remained because only negotiations between the EU and the UK had begun, with an open outcome. For instance, it remained open whether already implemented EU law would continue to have the force of law in the UK, and, if so, to what extent and for how long. Again, neither the notification nor the negotiations as such should be regarded as an impediment in the sense of Art. 79 CISG.

As early as 2018, the UK enacted the European Union (Withdrawal) Act despite the fact that the necessary Withdrawal Agreement between the EU and the UK had not yet been finally concluded. The Act stated that EU law implemented until the future exit day should principally remain in force, but afterwards be subject to amendment and repeal. Since the Act had no immediate impact on the present law concerning contracts, it did not hinder performance in any way.

In the end, the protracted negotiations in January 2020 led to a finally accepted Withdrawal Agreement between the EU and the UK that only minimally deviated from the 2018 Agreement Draft. In the same month, the 2020 British Withdrawal Act was enacted.[38]

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[35] See Art. 1 (1) (b) CISG. Courts in Great Britain also apply the CISG if private international law leads to its application; see *Kingspan Environmental Ltd et al. v Boralis A/S et al.* 1 May 2012 [2012] EWHC 1147 (Comm.) para. 536, 617, 999.

[36] Only Ireland and Malta are non-EU-CISG States.

[37] See Art. 6 CISG. The exclusion can also follow from the choice of law of a non-CISG state; see, eg, OLG Linz, 23 January 2006, CISG-online No. 1377; Tribunale di Padova, 1 November 2005, CISG-online No. 967; OLG Düsseldorf, RIW 1993, 845.

[38] European Union (Withdrawal Agreement) Act 2020.

According to these instruments, the UK would leave the EU by the end of January 2020. However, a further transition period was agreed, which postponed the final exit until the end of 2020. Did the Withdrawal Agreement or the respective British Act directly affect international sales contracts of British businesses with businesses in EU Member States? Indeed, there were legal effects: the Agreement and the Act ordered that goods put on the market before the end of the transition period could further freely circulate in the EU and the UK;[39] also the customs[40] and tax duties[41] remained in force until that end. But after the end of the transition period, the UK as well as the EU were free to legislate as they liked.[42] An immediate consequence did not follow from the enactment of these instruments but only from the end of the transition period: then, customs tariffs and procedures changed for deliveries of goods between the EU and the UK. We all remember the long queues of trucks in British ports by that time. Was that change an unforeseeable and unavoidable event that relieved parties from both sides of the Channel from their contractual duties? The new customs duties and procedures made sales between the EU and the UK more difficult and less profitable, but generally not impossible or so expensive that their performance would regularly ruin the involved business. Furthermore, it was foreseeable that contracts concluded after the beginning of the Brexit process in 2016 and still running after the final exit might face problems of the kind that in fact happened. Whether the Brexit-related consequences were avoidable or could have been overcome may be uncertain, but these two elements no longer played a role if the impediment – here, the change in factual circumstances after the end of the transition period – was foreseeable. If foreseeable, the respective impediment should have been avoided or otherwise overcome, if necessary, by abstaining from concluding the contract. Therefore, in my opinion, neither Brexit as such nor its different stages of development nor the changed legal and factual situation beginning on January 1, 2021, were an excuse for the non-performance of contractual duties associated with contracts concluded before and continued after that date.

Should the answer be the same or different in the case of long-term delivery contracts already concluded before the referendum of 2016 but still in force after December 31, 2020? For the performance of such contracts, a change in circumstances may provide an excuse only if performance indeed became impossible or economically unacceptable and without any alternative of avoidance, because, at the time of the conclusion of the contract, the parties could not foresee the changes. That the preconditions of impossibility or unacceptability and unavoidability are met is, however, except in rare cases, not at all likely. In my opinion, if the

39 Art. 41 Withdrawal Agreement 2020.

40 Art. 47 Withdrawal Agreement 2020.

41 Art. 51 Withdrawal Agreement 2020.

42 The UK formally abrogated hundreds of EU Regulations, Directives and Decisions which had actually remained in force in the UK even after the end of the transition period due to the Retained EU Law (Revocation and Reform) Act 2023.

conditions for an excuse were present, this is a situation that again calls for an adaptation of long-term contracts to the new situation because neither of the parties should bear the contractual risk alone.

VI The example of Russia's war against Ukraine

As already mentioned, war is generally accepted as one of the standard force majeure events, and thus, war can amount to an excuse for the non-performance of contracts. This is also true regarding Art. 79 CISG.[43] However, again, it is not war as such but only its concrete effect on a party's ability to fulfill its contractual obligations that can exempt it from liability under Art. 79 CISG. With respect to Russia's war against Ukraine,[44] numerous different situations must be distinguished.

1 Contracts concluded before the war

a) Contracts between Ukrainian parties and parties from other states (except for Russia)

The first situation is the following: The war destroyed factories or the workplaces of Ukrainian sellers, killed their workers, or led to the recruitment of their workers for the military service, so that sellers based in Ukraine can no longer deliver the promised goods that they used to produce or trade. Their exemption from their duty to perform presupposes that the relieved party, as mentioned in Art. 79 (1), 'could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract'. When concluding contracts before the war, neither the war nor the destruction of the factories nor the other consequences were foreseeable. Russia had carefully hidden its intention to attack Ukraine, at least to the general public.[45] General foresight that a war may break out and lead to the death of persons, destruction of buildings, etc., is – without serious indicia for the entry of these events – not sufficient to constitute foreseeability. In times of war, sellers can regularly also not avoid or overcome the impossibility of producing or trading the contracted goods if the impossibility results from the mentioned destruction, death, or similar events. For instance, buying substitute goods from other sources is normally unacceptable in such

43 *Hilaturas Miel SL v Republic of Iraq*, US Dist. Ct. (South. Dist. NY), 20 August 2008, F. Supp, 573 2nd 781 = IHR 2009, 206 = CISG-online No. 1777 (impossibility to deliver because of the outbreak of the war in Iraq); Schlechtriem, Schwenzer, Schroeter Art. 79 note 16; v. Staudinger, Magnus Art. 79 note 28.

44 Ukraine has been a CISG Member State since 1 February 1991.

45 Even until the day that Russian troops crossed the Ukrainian border and began the war, Russia justified the deployment of troops at the Ukrainian frontier as the mere preparation of an internal military maneuver.

circumstances. Non-delivery also does not trigger the seller's liability for damages.[46] Article 79 (1) and (5) would exempt the seller from both the duty to deliver and the duty to pay damages. The exemption will last at least as long as the war lasts;[47] however, unless the impediment can be overcome within a short time, for example, because a factory can easily be repaired and production resumed, the exemption is final.

The counterparty – under the CISG regime – may on the other hand, terminate the contract and is then itself not obligated to pay the contract price. Long-lasting or final non-delivery constitutes a fundamental breach, which allows the other party to terminate the contract.[48]

The same solution as sketched before applies if the Ukrainian State forbids any export of goods during wartime. Such a ban relieves sellers from their delivery duty and their liability for damages as long as the ban lasts.

Second situation: If a Ukrainian buyer had already received goods from a foreign seller and subsequently became unable to pay due to a loss of financial means resulting from the war, the seller's payment claim remains intact. But the Ukrainian buyer's payment default does not entitle the seller to any damages. The seller may terminate the contract because long-lasting or final non-payment also amounts to a fundamental breach of contract.[49] The seller may, in addition, reclaim the already delivered goods.[50] However, the buyer may also be unable to restitute the goods because of the war, either because war-related acts destroyed them or Ukraine disallowed their (re-)export. In both cases, Art. 79 (1) would free the buyer from restitution duty, in the first case finally, and in the second case as long as the export ban lasts.

Third situation: Let us assume the contrary situation that the seller is seated in an EU or other country and is obliged to deliver goods to a Ukrainian buyer. In this case, there generally exists no impediment to perform for the seller, and the seller is not relieved from his duty to deliver the contracted goods to the Ukrainian buyer even if the latter's factory is destroyed.[51] Only if, as Art. 71 (1) states, 'it becomes apparent that the other party will not perform a substantial part of his obligations' is the EU seller entitled to suspend its performance.

46 Art. 79 (5) CISG.

47 See Art. 79 (3) CISG.

48 See Art. 49 (1) (a) CISG.

49 See already supra fn. 26.

50 Art. 81 (2) CISG.

51 For an example of when the outbreak of the war as such led to the seller's impossibility to deliver, see *Hilaturas Miel SL v Republic of Iraq*, US Dist. Ct. (South. Dist. NY), 20 August 2008, 573 F. Supp. 2nd 781 = IHR 2009, 206 = CISG-online No. 1777. There, the seller needed certification by UN officials in Iraq for the conformity of the goods to be delivered (yarn) with the UN program 'Oil for Food'. However, due to the outbreak of the war in Iraq, these officials had left the country, and no certification was available. Since the seller had not tried other ways to get a UN delivery license nor had delivered the goods, its payment claim against Iraq failed. The court regarded Iraq as exempt from any liability.

If the prospective non-performance is concerned with war, as probably in most cases, it would again constitute a fundamental breach, and if that fact were clear,[52] the seller could also prematurely terminate the contract [Art. 72 (1) CISG]. The provision requires that this fact becomes clear 'prior to the date of performance'. If the fact of threatening non-performance was already clear prior to the conclusion of the contract, no right of premature termination is granted because the aggrieved party accepted the risk with open eyes.[53] After the performance date, termination for non-performance remains possible.

b) Contracts between EU parties and Russian parties

Are sellers and buyers who are seated in EU states affected by the war if they had concluded contracts with Russian parties before the war? Since 2014, the EU has enacted 14 sanction packages with ever stricter sanctions against Russia.[54] Now, the sanctions forbid the export of almost all kinds of goods that can be used for military purposes, in particular weapons, but also dual-use goods such as electronic devices, chemicals, cameras, etc. Likewise, the import of many Russian products is prohibited, in particular oil, coal, liquid gas, most metals, alcoholic beverages, cigarettes, etc. The sanctions have no retroactive force but must be observed from the date of their formal entry into force.[55] It is evident that the sanctions affect and exclude most, if not all, sales transactions between EU parties and Russian parties. If a concrete contract was concluded before the release of the respective sanction and should be performed thereafter, the EU ban disallows its performance. This is an impediment in the sense of Art. 79 CISG. The EU party is freed from delivery or payment duties and is not liable for damages as long as the EU sanctions are in force.

2 Contract concluded during the war

What is the fate of contracts that are concluded during wartime? Contracts between EU parties and Ukrainian parties remain fully in force and must be fulfilled as concluded unless the Ukrainian party becomes unable to perform due to the war, be it that its factory is destroyed, or state sanctions forbid the export of goods or the transfer of money. These events, if unforeseeable and unavoidable, rank as impediments under Art. 79 CISG and relieve the party from performance. Not surprisingly, parties must thoroughly evaluate the contractual risk when concluding contracts during wartime.

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52 'Clear' means a higher degree of evidence than the expression 'it becomes apparent' in Art. 71 (1) CISG.

53 See also Honsell (ed), *Kommentar zum UN-Kaufrecht* (2nd edn, Springer 2010), Brunner, Hurni Art. 72 note 6; *Münchener Kommentar zum Handelsgesetzbuch*, Mankowski Art. 72 note 6; v. Staudinger, Magnus Art. 72 note 14.

54 See Council Regulation (EU) No. 833/2014 concerning restrictive measures in view of Russia's actions destabilizing the situation in Ukraine, OJ L229 of 31 July 2014, p. 1 with amendments up to 10 September 2024.

55 Art. 14 Regulation 833/2014 (preceding fn.).

Sales contracts concluded between EU parties and Russian parties after 2014 or during the war must not contravene the prohibitions that the EU has enacted step by step since 2014. If they do, the EU party is released from the duty to perform and actually should have refrained from contracting. Any violation of a prohibition is subject to sanctions against the perpetrator and their helpers.[56]

VII Summary

1. Under Art. 79 CISG, a party is excused for non-performance of a contractual duty if an unforeseeable, unavoidable, and insurmountable event hinders performance for which neither party is responsible. The threshold for the application of the provision is high. Courts are right in granting this excuse only very rarely.

2. The event must hinder actual and concrete contract performance. The mere occurrence of long-lasting events, such as COVID-19, Brexit, and the Russian war against Ukraine, does not yet, in itself, excuse non-performance.

3. Indirect consequences of events that do not directly hinder performance can nonetheless lead to exoneration from contractual duties if unforeseeability, unavoidability, and insurmountability are determined. This is often true for hardship cases where the contractual equilibrium is highly distorted, in particular, where performance would ruin the party involved. According to the to-be-supported majority view, these cases are also covered by Art. 79 of the CISG.

4. In hardship cases, it will often appear that, in particular, with long-term contracts, exemption from performance is an inapt remedy. A readjustment of the originally agreed-upon contractual balance, initially made by the parties but in their default by the judge, is preferable to prevent an unjust division of the contract risk. The duty of cooperation and solidarity, inferred from the CISG's good faith principle, provides the basis for this solution.

5. Foreseeability of an event is given if a reasonable person in a comparable situation would have expected the event in the mainly concrete form in which it happened and would have taken preventive measures against it.

6. Unavoidability and insurmountability merely play a role if the event was unforeseeable. In such a situation, the involved party is obliged to take all reasonable and acceptable steps to avoid or mitigate the non-performance or its consequences.

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[56] According to Art. 8 Regulation 833/2014, the EU Member States are obliged to determine 'effective, proportionate and dissuasive' penalties against those who violate the prohibitions of the Regulation. It is however no violation of the sanctions if a notary public authenticates a contract for the sale and purchase of a house or a flat even if the transaction as such would fall under the sanctions mainly because the notary is generally neutral and does not act in the interest of one of the parties; his or her activity is therefore no 'legal advisory service' which Art. 5n (2) (b) of the mentioned Regulation forbids regarding Russian parties; see CJEU in Case C-109/23 *GM, ON v PR* ECLI:EU:C:2024:681, 5 September 2024.

CISG's regulation of the influence of unforeseeable events on the contract's fate appears to be a suitable and practical solution. It has been adopted by a number of countries. Among many other features, the provision of Art. 79 proves the CISG is a reasonable codification that can and does serve as a good regulation for international sales, and moreover, as a model for national legislators. The success of the CISG is mainly due to the fact that it borrowed and merged ingredients from many national laws, in particular from Common and Civil Law. This is also a model for good legislation.