EXEMPTIONS FOR THE NON-PERFORMANCE OF CONTRACTUAL OBLIGATIONS IN CISG ARTICLE 79
EXEMPTIONS FOR THE NON-PERFORMANCE OF CONTRACTUAL OBLIGATIONS IN CISG ARTICLE 79

The Quest for Uniformity in International Sales Law

Peter J. MAZZACANO

intersentia

Cambridge – Antwerp – Portland
Exemptions for the Non-Performance of Contractual Obligations in CISG

Article 79: The Quest for Uniformity in International Sales Law

Peter J. Mazzacano

© 2014 Intersentia
Cambridge – Antwerp – Portland
www.intersentia.com | www.intersentia.co.uk


ISBN 978-1-78068-220-4
D/2014/7849/81
NUR 828


No part of this book may be reproduced in any form, by print, photoprint, microfilm or any other means, without written permission from the publisher.
To Stephanie
Preface

The scope of this book is narrow and deep. Its purpose is to analyse the case law and jurisprudence surrounding Article 79 of the UN Convention on Contracts for the International Sale of Goods (“CISG” or “Convention”), which concerns exemptions or an excuse for contractual non-performance due to an “impediment” beyond a party’s control. The premise of this study is that Article 79 should be interpreted autonomously, that is, as an international norm, without reference to domestic legal concepts and principles. To this end, this book considers the application of Article 79 by courts and arbitral tribunals across a number of signatory states. By studying the treatment of Article 79 by the courts and arbitral tribunals of various states, differences in doctrine and case law have been discerned. The extent of conceptual differences towards the doctrine of excuses for non-performance also helps to determine whether the CISG’s goal of uniformity is achievable. This research concludes that there has been a convergence in the treatment of Article 79, and this supports the premise that a legal doctrine – in this case, the excuse for non-performance – germinating in various legal systems, ultimately evolved into an autonomous principle, towards a conceptual goal of uniformity in a body of international commercial law, regardless of its unique development in separate and distinct legal jurisdictions.

Chapter 1 provides an introduction to the problem of the quest for uniformity in international sales law, and considers the role of Article 79 within this broader framework. It also situates this book within the scholarly debates regarding uniform sales law efforts generally.

Uniformity in international sales law facilitates global trade by reducing legal barriers and, hence, making the trading process more efficient for market participants. This point is highlighted in the chapter. In the sections that follow, it is shown how the CISG came to be the most ambitious legal convention to date that has attempted to create an international legal environment for commercial sales that is relatively uniform in character. The focus is on the CISG as a whole. Next, the role of Article 79 as a specific example of the quest for relative uniformity in international sales law is examined in more detail. As an exception to the principle of *pacta sunt servanda*, Article 79 is of considerable importance. It is also a provision within the CISG that bears *prima facie* semblance to similar domestic legal concepts. This makes it uniquely suitable for a scholarly examination to consider the extent to which it diverges or converges with similar domestic conceptions in the quest for uniformity in international sales law.

Intersentia
That uniformity in international sales law is even possible has been the subject of much scholarly debate. This discussion, which has been passionate at times, is reviewed in some detail.

Chapter 2 provides a background to the CISG, and it includes a discussion of the ancient and modern lex mercatoria. The chapter concludes with a section on the history of the CISG, demonstrating the effort of the drafters to create a transnational sales law with neutral legal terminology, hence, the development of an autonomous provision in Article 79.

Chapter 3 details the development of force majeure-type legal principles from their ancient origins to the rise of pacta sunt servanda and its counterpart rebus sic stantibus. It also surveys the development of frustration and impossibility in the common law, and force majeure in civil law jurisdictions. It concludes by demonstrating how Article 79 developed as an autonomous legal principle as it bridged the gap between these common law and civil law conceptions of excuse for non-performance.

Chapter 4 analyses a large body of Article 79 case law. These court and arbitral decisions, while not always perfect, have made a significant contribution to a growing convergence on Article 79. The conclusion is that these decisions have been rendered, for the most part, without reference to domestic legal concepts. In other words, they are relatively uniform, autonomous interpretations of Article 79. By contrast, Chapter 5 considers a much smaller body of Article 79 case law that has been influenced by the homeward trend. These decisions have led to divergent interpretations of that provision. In spite of a number of disappointing decisions, this book concludes by noting that courts are becoming more serious in applying the CISG’s interpretive methodology. Such a development will only lead to more relatively uniform decisions on Article 79 in the future.

This book relies heavily on primary sources, particularly case law from numerous countries and arbitral institutions. Different languages are an impediment to the unification of international sales law. Fortunately, much of the body of law on the CISG has been translated from a wide range of languages into English. The analysis of that translated case law would not have been possible without the use of cases that have been translated by the efforts of the joint Pace Law School and Queen Mary Case Translation Programme, which has added a large body of previously unreported or inaccessible CISG cases to the Pace Law School CISG databank. Through the efforts of an international network of volunteers, most (but not all) of the foreign language cases have been translated into English. This organized effort has generated over 1,800 translations of CISG decisions and arbitral awards. These translations into English have made these important documents accessible to jurists of all nations who are interested in uniform sales law.

While the Pace Law School and Queen Mary Case Translation Programme has been a blessing to English-speaking scholars, it must be noted that translations are inherently problematic. The translator will typically have to contend with
linguistic, cultural, pragmatic, and text-specific problems. In addition, word ambiguity presents a problem, even within a single language. Many words have more than a single meaning. To add to these difficulties, critics will rightfully note that subtle meanings and nuances in the original language will be lost in the translation. The complexity of the translator’s task cannot be overstated. Yet, practically speaking, it is almost impossible for a single author to be fluent in such a variety of languages. In the case of this study, that would require a working knowledge of Bulgarian, Chinese, Dutch, Finnish, French, German, Greek, Hungarian, Italian, Russian, and Slovakian. Such linguistic expertise is beyond the scope of this author, hence the reliance on individual scholars from around the world who have provided translations into English of foreign case law (including arbitral awards) relating to the CISG. Without their assistance and scholarly contribution, this study would not have been possible.
CONTENTS

Preface .............................................................. vii

Chapter 1. The Quest for a Uniform International Sales Law ............... 1

A. The Quest for Uniformity .............................................. 1
   I. The Importance of Uniformity ................................. 3
   II. The CISG’s Quest to Promote Uniformity ................... 5
   III. Uniformity and CISG Article 79 ............................. 6
   IV. Article 79 and the Problem of Pacta Sunt Servanda .......... 7

B. Critical Scholarly Perspectives on the CISG ........................ 11
   I. The Quest for Uniformity in CISG Jurisprudence Generally .. 11
   II. Excuses for Contractual Non-Performance in Domestic and
       International Commercial Law .............................. 26
   III. Article 79 and Uniform International Sales Law ............ 30

C. Research Problem ................................................ 33

D. Methodology .................................................. 36

Chapter 2. Background to the CISG .................................. 45

A. The Ancient Lex Mercatoria as Autonomous Law ................ 45
B. The Modern Lex Mercatoria ..................................... 50
C. The History of the CISG ........................................ 51

Chapter 3. Excuses for Non-Performance: Development of an
Autonomous Concept ............................................. 59

A. The Creation of an Autonomous International Commercial Concept . 59
B. Roman Origins .................................................. 60
C. The Rise of Pacta Sunt Servanda ................................ 63
D. Legal Abstraction and the Introduction of Rebus Sic Stantibus .... 64
E. Medieval Origins of the Principle of Excuse for Non-Performance ... 65
F. Origins of the Principle of Excuse for Non-Performance
   in Common Law .................................................. 69
Exemptions for the Non-Performance of Contractual Obligations

G. Frustration ................................................................. 75
I. Impossibility ............................................................... 75
II. Frustration of Purpose .................................................. 79
III. Temporary Impossibility ............................................. 83
H. Hardship and Impracticability ........................................ 85
I. Origins of the Principle of Excuse for Non-Performance in Civil Law . 92
   I. Force Majeure ......................................................... 95
   II. Imprévision, Wegfall der Geschäftsgrundlage, Changed Circumstances and other Hardship Principles .................. 99
J. CISG Article 79 and Hardship ...................................... 103
K. CISG Article 79 as an Autonomous Legal Principle .......... 105

Chapter 4. Getting It Right: Relative Uniformity in the Treatment of Article 79 in Domestic Courts and Arbitrations ............................................. 111

A. Article 79 Jurisprudence in Domestic Courts and Arbitrations:
   Civil Law Dominance .................................................. 111
B. Austria: The Supreme Court Gets It Right – Almost .................. 113
C. Bulgaria: Avoiding the Domestic Law Bias .......................... 118
D. China: Early Concerns of the Homeward Trend Ill-Founded...... 119
   I. Force Majeure in China ............................................. 122
   II. Article 79 Jurisprudence under CIETAC ...................... 125
   III. Article 79(1) Impediments and Non-Conforming Goods .... 127
   IV. The Impediment Requirement under Article 79(1) .......... 128
   V. Particular Impediments: Breach by Third-Party Suppliers .... 134
E. Finland: A Small Contribution Towards Relative Uniformity .... 136
F. Germany: Mastery of CISG Jurisprudence .......................... 138
   I. The Evolution of Excuses for Non-Performance: from Wegfall der Geschäftsgrundlage to an International Standard in Article 79 ............................................. 138
   II. Article 79 in Germany: General Observations ................. 140
   III. The Pre-Eminent Treatment of Article 79 in Germany ..... 142
   IV. Article 79(1) Impediments and Non-Conforming Goods .... 145
   V. Product Non-Conformity as an Impediment?:
      The Vine Wax Case ............................................. 151
   VI. Product Non-Conformity as an Impediment?:
      The Powdered Milk Case ....................................... 154
   VII. The Strict Impediment Requirement under Article 79(1) .... 156
   VIII. Miscellaneous Article 79 Issues in German Case Law:
      Additions to the Quest for Relative Uniformity ............... 159
   IX. Sophisticated Understanding of Article 79 in German Case Law . 165
G. Greece: Autonomous Interpretation as the Rule .................... 166
H. Hungary: A Small Contribution to Relative Uniformity ........... 168
I. International Chamber of Commerce: International Expertise on Article 79 ...................................................... 170
   I. Article 79 Jurisprudence in Arbitrations: Complementing Procedure and Substance ............................................. 170
   II. The ICC Cases: A Nuanced Understanding of Article 79 ........ 171
J. Italy: “Enlightened” Article 79 Case Law ........................................ 177
K. The Netherlands: A Favourable Reception of the CISG .......... 181
L. Russian Arbitrations and CISG Article 79: The Cases Promoting Uniformity ....................................................... 185
   I. Article 79(1): The High Standard for Impediments .............. 187
   II. Particular Impediments: Non-Conforming Goods ............. 189
   III. Particular Impediments: Foreign Currency Controls .......... 190
M. Slovak Republic: Right Outcome; Wrong Reference ............ 191
N. Switzerland: Paying Heed to the International Character of the CISG . 193
O. Conclusion ....................................................... 199

Chapter 5. Getting It Wrong: Divergence in Article 79 Case Law in Domestic Courts and Arbitrations .................................... 201

A. Threats to Autonomous Interpretations ............................. 201
   I. Blips on the Road to Autonomous Interpretations: Austria and CIETAC ..................................................... 202
   II. Blips on the Road to Autonomous Interpretations: ICC Case 8790 ................................................................. 203
   III. Blips on the Road to Autonomous Interpretations: Slovak Frozen Peas Case .................................................. 204

B. Belgium: Similar Issue; Mixed Results .............................. 205
   I. Circumventing Article 79: The Supreme Court Upholds the “Hardship” Principle .................................................. 207

C. France: Flawed Article 79 Jurisprudence ............................ 209

D. Russian Arbitrations and CISG Article 79: The Problematic Cases .... 212
   I. A High Standard to “Impediments” but Imperfect Decisions .... 215

E. United States of America: The Homeward Trend Revisited ........ 217

F. Conclusion ....................................................... 222

Chapter 6. Conclusion .................................................. 225

A. Article 79: Heeding the Interpretive Provision of Article 7 ............ 225
B. Article 79: The Appropriate Standard in International Commerce .... 227

Appendix A: CISG Article 79 ............................................. 229
Table of Authorities ..................................................... 231
Index ................................................................. 253

Interseinta xiii