EXEMPTIONS FOR THE NON-PERFORMANCE OF CONTRACTUAL OBLIGATIONS IN CISG ARTICLE 79
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The Quest for Uniformity in International Sales Law

Peter J. MAZZACANO
Exemptions for the Non-Performance of Contractual Obligations in CISG

Article 79: The Quest for Uniformity in International Sales Law

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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.
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.
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