





CISG Article 79





Overview



Contractual excuses or exemptions

CISG Art. 79

A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.

Various concepts: *force majeure*, act of god provision, hardship or impracticability provision

CISG Art. 79

Similar to domestic concepts, but still an independent provision

Should be interpreted in an international and autonomous manner

Brief legal history

Pacta sunt servanda = agreements must be honored



Rebus sic stantibus = assuming things remain the same

Exception to pacta sunt servanda

Today = changed circumstances

How can a strict promise to perform a contractual obligation be reconciled with a fundamental change in circumstances?

Divergent approaches

Civil law approach

vs.

Common law approach



Party cannot contract for impossible

Concerned with performance not damages

Impossible obligation cannot be enforced



Impossible obligation may still be compensated
in monetary damages

It is never impossible to pay up



Modern concepts



General comments

Frustration



Common law concept

Party may be excused of its performance if its ability to perform has been compromised

Not applicable if performance is extremely onerous

In the U.S. - strict approach in applying the principle

Force majeure



In civil law: No person can be obliged to do impossible

In common law: Impossibility to perform does not necessarily result in a void contract

In common law: *force majeure* is a purely contractual right

Frustration vs. *force majeure*

Similarity: Both concepts deal with the same unforeseen supervening events beyond the control of the parties to agreement

Differences:

Frustration:

- requires that the underlying rationale of the contract is destroyed
- relieves the parties of their contractual obligation to perform and pay
- courts cannot revise the contract to make a more fair and equitable remedy

Force majeure:

- broader scope of unforeseen events
- subject matter of the contract need not be destroyed
- courts can revise the contractual terms to account for the unforeseen events
- may also be temporary

Article 79
Force majeure
Contract frustrated
Contract frustrated
Contract frustrated
Contract frustrated



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Aspiration to bridge the difference between civilian and common law principles

Compromise between the common law and civil law concepts

A self contained independent concept that must be read without reference to domestic legal principles

Use of neutral language in describing specific circumstances and elaborating the rule without reference to national domestic concepts

Example of the new *law mercatoria*



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