 DOI: *https://doij.org/10.10000/IJLMH.113795*

INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 5 | Issue 6

2022

Contractual Exemption Theories of Force Majeure and Hardship in International Law

SEEMA DESHWAL[1] AND DR. RITU[2]

ABSTRACT

In the global regime of commercial transactions, protecting the sanctity of contracts is of primary importance. Liability exemption for non-performance of contractual commitments has evolved from the clausula rebus sic stantibus concept, and while it is recognised under different titles in different nations, its applicability is still narrow. The international legal instruments promoting uniform guidelines to regulate international trade contracts, such as the United Nations Convention on Contracts for the International Sale of Goods (CISG), the UNIDROIT Principles for International Commercial Contracts (UPICC), and the Principles of European Contract Law (PECL), expressly refer to the concepts of hardship and force majeure to address the issue of changed circumstances negatively impacting international trade. In this paper, a comparative analysis of these international instruments has been conducted to comprehend and assess how transnational legal instruments accept force majeure and hardship, as well as how liability exemption for non-performance of contractual responsibilities may be sought under these laws. This paper also intends to analyse the force majeure provisions of these international instruments in order to identify the most inclusive provision. This paper also seeks to find out if hardship is controlled by CISG and whether elements of UPICC and PECL may be utilised to interpret Article 79 of CISG as supplemental principles.

Keywords: *Force Majeure, Hardship, Changed Circumstances, UNIDROIT Principles, CISG, & PECL.*

I. INTRODUCTION

In commercial transactions, it is assumed that the parties will fulfill their obligations in good faith. In spite of its best intentions, a party may be unable to adequately fulfill its contractual responsibilities owing to the occurrence of an unplanned event that may impede the fulfillment of obligations by the parties to a contract. The quick change in surrounding conditions might have detrimental effects on the execution of a contract, such as utter impossibility, the performance being exceedingly onerous, or the defeat of the contract's intended purpose.

[1] Author is a Research Scholar (Ph.D. in Law) at the Faculty of Law, Baba Mast Nath University, Rohtak, Haryana, India.
[2] Author is an Assistant Professor at the Faculty of Law, Baba Mast Nath University, Rohtak, Haryana, India.

 [ISSN 2581-5369]

In international commerce, especially for long-term contracts, unanticipated changes in conditions may be challenging obstacle. Globalization has raised the risk by including a large number of nations in the production and procurement processes, where political and economic shifts, as well as natural disasters, may have a significant impact on contractual negotiations.

In such scenarios of altered circumstances, the issue arises that whether parties to a contract may claim exemption from non-performance resulting from a change in surrounding conditions that were neither foreseen nor within the party's control. Despite the prevalence of various contractual exemption theories in many legal systems, such as *imprevision*, force majeure, impracticability, *wegfall der geschaftsgrundlage*, frustration, hardship, and impossibility, the relief for changed circumstances in international contractual practice primarily arises under the contractual defences of hardship and force majeure. Despite the fact that defences of hardship and force majeure are not generally utilised in many nations, they are widely acknowledged and routinely used in international commercial transactions. The wording, essential components, and legal impact of force majeure and hardship provisions are significantly different.

Contractual practice in the international arena indicates that phrases of hardship and force majeure are included in international business contracts regardless of the applicable legislation.[3] These clauses are often influenced by international regulatory instruments such as the United Nations Convention on Contracts for the International Sale of Goods (CISG), the International Institute for the Unification of Private Law's (UNIDROIT) Principles for International Commercial Contracts (UPICC), and the Principles on European Contract Law (PECL).

In this paper, the researcher has conducted a comparative analysis of various legal instruments in order to determine how to seek exemption from non-performance owing to extreme circumstances or acts of God. The hardship and force majeure clauses of various agreements are described and compared to determine which is the most inclusive. The study also attempts to determine whether there is a vacuum in the CISG when it comes to the application of hardship and if UPICC provisions may be utilised as a supplement to the CISG or as an assistance to its interpretation.

II. FORCE MAJEURE

The civil law concept of force majeure as a contractual exemption justification is also recognised in common law countries. It often refers to an occurrence, incident, or condition that was unforeseen, unforeseeable, unanticipated, and beyond the parties' reasonable knowledge

[3] Hubert Konarski, "*Force Majeure and Hardship Clauses in International Contractual Practice*", 2003, International Business Law Journal, p. 408.

and control, so interfering with or inhibiting execution of the contract. The principle has Roman origins and resulted from legal abstraction of two opposing legal principles popular in early Roman Empire's merchant law i.e. *Pacta Sunt Servanda* and *Clausula Rebus Sic Stantibus*.[4]

The defence of force majeure permits the parties to temporarily suspend performance of their contractual obligations and resume performance after the circumstances of the force majeure event have been resolved or passed. A force majeure occurrence may result in the suspension of contract performance, the severance of non-performed obligations, and the cancellation of contracts for time-bound agreements.

Unpredictability, externality, and irresistibility are the basic characteristics of every occurrence that qualifies as a force majeure event, and these elements must be met in order to use the defence of force majeure. In ***Devas Multimedia Private Limited v. Antrix Corporation Limited,***[5] the Arbitral Tribunal rejected the claim of the respondent Indian corporation that the event cited by the respondent was not foreseeable and could not have been anticipated at the time the contract was made and therefore cannot be considered a valid defence.

III. HARDSHIP

Hardship refers to a situation in which the conditions surrounding the performance of a contract change so drastically after the completion of the deal that it disrupts the contract's essential balance. It suggests that a party to a contract is so disadvantaged that if that party were obliged to continue performing the contract, it would be unreasonably onerous. There might be both physical and economic hardship. A basic definition of hardship is a circumstance that makes the execution of an obligation particularly burdensome and has the consequence of renegotiating a contract. The concept of hardship is expressed uniquely in the legal systems of many nations such as France,[6] Belgium,[7] Germany[8], Portugal,[9] Netherlands,[10] Greece,[11] Italy,[12] and Austria,[13] nevertheless, the common objective is to let a party in a disadvantaged position to seek good faith renegotiation in order to adjust and restore the contractual equilibrium to its original condition.

[4] Richard Hyland, "*Pacta Sunt Servanda: A Meditation*", 2001, Vanderbilt Journal of Transnational Law, 34, p. 412.
[5] ICC Case No. 18051/CYK.
[6] French Civil Code, 2016, article 1195.
[7] Belgian Civil Code, 2007, article 1147 and 1148.
[8] German Civil Code, Burgerliches Geserzbuch (BGB), 2002, article 313.
[9] Portuguese Civil Code, 1967, article 437.
[10] Dutch Civil Code (BW), 1992, article 6:258.
[11] Greek Civil Code, 1946, article 388.
[12] Civil Code of Italy (Codice Civile), 1942, article 1467-1469.
[13] Austrian Civil Code (Allgemeines Bürgerliches Gesetzbuch), 1812, article 936, 1052 and 1170.

 [ISSN 2581-5369]

In this regard, Richard Speidel has stated in his article that "*when a long-term supply contract is disputed by changed conditions, at a minimum, the advantaged party should have a legal duty to accept an equitable adjustment proposed in good faith by the disadvantaged party*".[14] The primary difference between the concepts of force majeure and hardship is that to invoke the defence of force majeure, the performance of the obligation under the contract must be temporarily capable of performance due to the occurrence of an unexpected event, and granting an extension of time to perform would save the contract. To be eligible for the hardship defence, the occurrence of the event must have disrupted the financial equilibrium to such a degree that fulfilment of contractual obligations becomes very burdensome but nevertheless achievable.

IV. INTERNATIONAL LEGAL REGIME GOVERNING ALTERED CIRCUMSTANCES

Important obligation associated with international commercial contracts is that they must optimally manage the connection between the contractual parties in order to offer remedies for violation of contract.[15] With increasing international commerce, it became apparent that appropriate legislation was required to control international trade. In an effort to develop a standard set of regulations to control international commerce, the United Nations launched the CISG in 1988. Parties to the CISG include the nations with the largest economies in the world.

Article 79 of the CISG acknowledges the idea of altered circumstances and states that "*a party is not liable for a failure to perform, if the failure was due to an impediment beyond its control*."[16] Similar provisions are enumerated in Article 6.2.2 and 7.1.7 of the UNIDROIT Principles for International Commercial Contracts (UPICC)[17] and Article 6.3 and Article 8.1 of the Principles on European Contract Law, 1999 (PECL).[18] During the recent Covid-19 outbreak, the International Chamber of Commerce (ICC) issued a sample clause of force majeure and hardship,[19] that parties may use as a guide for drafting their own force majeure clause and hardship clause in their individual contracts.

[14] Richard E. Speidel, "*Court-imposed price adjustments under long-term supply contracts*", 1981 Northwestern University Law Review, 76, p. 369.
[15] Dietrich Maskow, "*Hardship and Force Majeure*", 1992, The American Journal of Comp. Law, 40/3, p. 657–669.
[16] United Nations Convention on Contract for International Sale of Good, 1980 (CISG), article 79.
[17] UNIDROIT Principles for International Commercial Contracts, 1994 & 2016 (UPICC), article 7.1.7.
[18] Principles on European Contract Law, 1999 (PECL), article 6.111, article 6.3, article 8.1, article 8.2 and article 8.108.
[19] International Chamber of Commerce, "*ICC Force Majeure and Hardship Clause March 2020*", *available at:* https://iccwbo.org/content/uploads/sites/3/2020/03/icc-forcemajeure-hardship-clauses-march2020.pdf, accessed on 16th June 2022.

V. UNIDROIT PRINCIPLES FOR INTERNATIONAL COMMERCIAL CONTRACTS (UPICC)

UPICC were first released in 1994 with the intention of harmonising and regulating commercial contracts in international commerce; further versions were released in 2004, 2010, and 2016. UPICC specifies clearly force majeure and hardship, as well as their legal implications in international business transactions. The official commentaries on Article 7 of UPICC explain that the term "*force majeure*" was chosen because it is well-known in the international business community and covers the same grounds as doctrine of frustration and doctrine of force majeure, however, identical domestic references to these doctrines must be avoided. The preamble to UPICC makes it very apparent that these rules are not legally obligatory, but parties may choose to use them as the governing law for their contracts, and they may serve as a model for national and international lawmakers."[20]

A. Force Majeure

Article 7.1.7(1) of the most recent version of the UPICC, released in 2016, has a provision for force majeure that exempts the non-performing party from liability for damages if the non-performance of contract was neither within the non-performing party's control nor could have been reasonably anticipated at the time the contract was made and which could not have been avoided by the contracting parties.[21] Article 7.1.7(2) has the effect of suspending the execution of a contract due to temporary difficulties.[22] Article 7.1.7(3) relates to the non-performing party's responsibility for damages if it fails to immediately inform the counterparty of the obstacle in issue and the effect of the obstacle on its ability to execute its obligations under the contract.[23]

To qualify under the requirements of this article, it is necessary to prove beyond a reasonable doubt the causal relationship between the hindrance and the failure to execute. Article 10.8.1.1 stipulates that the general limitation period of suspension is extended by one year after the relevant barrier has been removed.[24] The Iran US claims tribunal, in ***Anaconda-Iran Incorporation v. The Government of the Islamic Republic of Iran and the National Iranian Copper Industries Company,***[25] held force majeure to be a general legal principle. The court

[20] Preamble to UPICC.
[21] UPICC, article 7.1.7(1).
[22] UPICC, article 7.1.7(2).
[23] UPICC, article 7.1.7(3).
[24] UPICC, article 10.8(1).
[25] Iran-US Claim Tribunal Case No. 169, Case No. 167 (Award No. ITL 65-167-3), 1986, *available at: https://iusct.com/cases/correction-to-award-no-65-12-january-1987/*, accessed on 15th June 2022.

also ruled that if the parties want to limit their right to raise the force majeure defence, it must be expressly stated in their contract; a general assumption to that effect does not restrict their rights.

B. Hardship

Article 6.2 of the UPICC covers hardship. In the first section, it underlines the binding nature of a contract and emphasises its rigorous execution, as outlined in Article 6.2.1, regardless of how difficult it may be for the party to carry out. Article 6.2.2 clarifies further that the general norm of stringent performance is not absolute and is open to exceptions. It is essential to recognise that a change in circumstances in and of itself does not constitute hardship; rather, the repercussions of an occurrence are the decisive variables.

Article 6.2.2 outlines the essential requirements for invoking the hardship defence: I the event must have disturbed the fundamental balance of the contract; (ii) the event must have occurred or its occurrence must have become known after the contract is made; (iii) the event must be unforeseeable; (iv) the event must be beyond the parties' control; and (v) the risk arising from the event was beyond the parties' ability to assume.[26]

Article 6.2.3 deals with the impacts of hardship, which permits a non-performing party in a disadvantaged position to urge the counterparty to renegotiate and modify the contract in light of new circumstances. Until the request for renegotiation is granted, the disadvantaged party may not delay performance, unless extraordinary circumstances necessitate it.

The Article goes on to state that if the disputing parties are unable to achieve an amicable resolution within a reasonable amount of time, they may seek judicial intervention. It is then for the court to determine whether it is a case of hardship and decide whether to *(a) terminate the contract at a date and on terms to be fixed, or (b) adapt the contract with a view to restore its equilibrium.*[27]

VI. PRINCIPLES OF EUROPEAN CONTRACT LAW (PECL)

The law experts of Europe drafted PECL as a model for commercial regulations of trade. PECL consists of the basic principles of contract law and the law of obligations as they are found in the national legal systems of several European Union countries. This document has the same provisions for non-performance, hardship, and force majeure clauses as that of UPICC.

[26] UPICC, article 6.2.2.
[27] UPICC, article 6.2.3.

 [ISSN 2581-5369]

A. Force Majeure

Article 6.3 of the PECL provides Force majeure provisions. Similar to Article 7.1.7(1) of UPICC, Article 6.3(a) of PECL excludes liability of a party for failing to perform its obligations under a contract due to an unforeseeable impediment beyond their normal sphere of control, which occurred after the contract was formed and where it was impossible for the non-performing party to avoid or overcome the impact of such impediment.[28] Article 6.3(b) defines a list of events, including war, armed conflict, blockade, natural disaster, act and orders of government pertaining to force majeure events or similar events, which can be considered force majeure events for the purposes of these principles, unless the parties have agreed to the contrary in their contract.[29]

It is important to emphasise that mere anticipation of an event cannot be considered force majeure; an actual incident must have occurred for force majeure to apply. In a leading case on the subject, titled as ***Sub-Zero Freezer Co. Inc. v. Cunard Line Limited,***[30] the contract had no force majeure clause. The facts of this case were instructive in nature and laid emphasis on that force majeure must be a genuine incident that prevents a party from completing the contract. The anticipation of a specific terrorist occurrence or threat cannot be considered a case of force majeure.

Articles 6.3(c) (suspension of performance), 6.3(d) (notice requirements), and 6.3(e) (extension of restriction period) of the PECL are equivalent to Articles 7.1.7(2), 7.1.7(3), and 10.8(1), respectively.

B. Hardship

Article 8.1 of PECL defines hardship as an event of legal, political, economic, technical, financial or similar nature that occurred or became known after the contract was concluded and whose associated risk was not anticipated by the disadvantaged party, causing a fundamental change in the basic contractual balance and making it excessively burdensome for the disadvantaged party to perform.[31] This clause resembles Article 6.2.2 of the UPICC.

Article 8.2 of PECL, similar to Article 6.2.3 of UPICC, outlines further legal repercussions of hardship; (a) renegotiations to determine alternative contractual conditions to continue the contract;[32] (b) apply to arbitral tribunal or court[33] to either (i) alter the contractual requirements

[28] PECL, article 6.3(a).
[29] PECL, article 6.3(b).
[30] 01-C-0664-C (W.D. Wis. Mar. 12, 2002).
[31] PECL, article 8.1.
[32] PECL, article 8.2(a).
[33] PECL, article 8.2(b).

in accordance with the changing circumstances in order to restore original balance and if such restoration is not practicable, the parties must equally share the losses caused by the hardship;[34] or (ii) terminate the contract if restoration of contractual equilibrium is not feasible.[35] The non-performing party is obligated to provide timely notification of the intervening event to the counterparty, and failure to do so allows the counterparty to seek damages resulting from non-receipt of the notice.[36]

VII. CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG)

United Nations Commission on International Trade Law (UNCITRAL) established CISG as a diplomatic conference on 11 April 1980 in an effort to build worldwide economic order by establishing a uniform set of rules governing the international trade of goods. In addition, it attempted to promote the growth of international commerce by taking diverse economic, social, and legal systems into consideration, and eliminating legal impediments to international trade.[37] Article 79 of Section IV of the CISG includes provisions allowing a party to seek relief from contractual obligation for losses resulting from an unforeseen hindrance.

Article 79(1) provides "*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*."[38]

Article 79(4) reinforces the necessity of alerting the other party with a clear indication that failing to tell the counterparty of the known hindrance shall entitle the counterparty to payment of damages resulting from such failure to receive notice. However, Article 79(5) makes it clear that the applicability of Article 79 solely excludes obligation for payment of damages, and that the parties are not prohibited from exercising other rights under the convention. Article 79 is intended to shield disadvantaged parties from the dangers of uncontrolled and unavoidable events. This provision may be used if the prerequisites are met, i.e. (i) the impediment must be unavoidable; (ii) unpredictability; and (iii) inevitability.[39]

In an international dispute titled ***Macromex Srl. V. Globex International Inc.***,[40] the contract

[34] PECL, article 8.2(b)(i).
[35] PECL, article 8.2(b)(ii).
[36] PECL, article 8.2(c).
[37] Preamble to CISG.
[38] CISG, article 79(1).
[39] Ingeborg Schwenzer, "*Force Majeure and Hardship in International Sales Contracts*", 2008, Wellington Law Review of Victoria University, 39(4), p. 710.
[40] ICDR Case No. 50-181-T-00364-06, *available at: https://jusmundi.com/fr/document/decision/en-macromex-srl-v-globex-international-inc-interim-award-tuesday-7th-august-2007*, accessed on 16th June 2022.

lacked a phrase for force majeure, thus the seller relied on Article 79 of the CISG. The Arbitrator said that the seller's argument meets the requirements of Article 79(1)(2) and even 79(4), but it does not meet the requirements of Article 79(1). (3) i.e. "*the impediment could not be reasonably avoided or overcome.*" The court relied on the uniform commercial code of the United States' substituted performance in order to fill the void, since the seller did not try to deliver the consignment at a nearby port and was thus ruled accountable to pay damages. Importantly, in order to use the defence of force majeure under Article 79 of the CISG, all significant preconditions of force majeure outlined in that article must be met.

VIII. ANALYSIS

In international regimes, courts emphasise the antiquated notion of *pacta sunt servanda*, i.e., the rigorous fulfilment of contracts for business continuity. Although acknowledged, the applicability of exception doctrine *rebus sic stantibus*,[41] is still considered narrowly. The international instruments addressed here to encourage consistency in commercial contracts allude to the idea of altered circumstances, which is characterised as an "impediment" in these treaties. However, the titles of Article 7.1.7 of UPICC and Article 6.3 of PECL make unambiguous reference to "force majeure," but Article 79 of CISG mentions merely obstruction without defining the circumstances that come under its purview. The prerequisites for occurrences forming a force majeure hindrance under these principles are identical, and they all absolve parties of duty for non-performance.

It is the responsibility of the parties to establish that the circumstances of their case satisfy the key prerequisites for force majeure. In an ***ICC Case No. 9978/1999***,[42] the seller failed to deliver the products and relied on Article 79 of the CISG, claiming that its obligation for not delivering the goods is excused in accordance with Article 79 and the force majeure provision of the contract. In accordance with current German legislation, the tribunal applied CISG to the contract and determined that the supplier's delivery failure constitutes a business risk that the seller has adequately undertaken. The court emphasised that barriers related to business risks cannot be expected to be covered by Article 79 of the CISG, and the parties should maintain the contract's integrity. The panel also determined that its ruling is consistent with the practise of the majority of ICC arbitrators, who does not permit force majeure defences so often.

[41] David R. Rivkin, "*Lex Mercatoria and Force majeure*", in Emmanuel Gaillard (ed.): Transnational Rules in International Commercial Arbitration, ICC Publication No. 480/4, 1993, p. 165.
[42] ICC Court of Arbitration, Award in Case No. 9978, March 1999, published in ICC Bulletin No. 11-2 of 2000, p. 117.

 [ISSN 2581-5369]

Article 6.3 of PECL and Article 7.1.7 of UPICC are comparable to Article 79 of CISG, however PECL and UPICC are more flexible since they need just relative impossibility and not absolute impossibility for applicability.[43] In contrast to Article 7.1.7 of UPICC and Article 6.3 of PECL, however, Article 79 of CISG provides responsibility immunity even in the event that a third party's failure to perform causes non-performance. Moreover, the impediment in the CISG and UPICC encompasses all types of events, whether natural or artificial, if they meet the criterion stated in these articles, whereas PECL's Article 6.3(b) describes force majeure events such as war, civil riot, epidemic, act of government, and blockade, among others. The exemptions granted by Article 79 CISG and Article 6.3 of PECL are limited to the term of the obstacle, but the excuse granted by Article 7.1.7 of UPICC is valid for a time that is appropriate in light of the effect of the impediment in question on the execution of the contract.[44] The most prevalent characteristic of these laws is that they impose a duty on the affected party to inform the other and provide for damages resulting from such non-receipt.[45]

Although the main objective of these instruments is to provide a party with temporary relief, they also provide exceptions to assess the claims. CISG[46] restricts the parties to claim damages and PECL[47] exempts claim for damages and performance and offers termination of contract and claim of damages if the non-performance continues for an indefinite period. UPICC, in contrast, although it may excuse a party's non-performance owing to an obstacle, does not prohibit a party from withholding performance, cancelling the contract, or recovering owed funds. Since these laws are not obligatory but rather serve as guiding principles, the parties to international contracts are free to adapt these provisions according to the needs of their contract and trade, or they may include elaborate clauses in their contracts to govern the occurrence of unforeseen events.

It is widely believed that Article 79 of the CISG solves the challenges of changing conditions in international commerce without resorting to any national regulations. The vocabulary of the text is derived from local law, with allusions to concepts such as force majeure and frustration omitted on purpose. In this context, the most commonly posed question is whether this clause governs and resolves the extreme change in circumstances (sometimes referred to as hardship) that makes execution of the contract overly difficult but not impossible. The imprecise wording

[43] Sylvette Guillemard "*A comparative study of the UNIDROIT Principles and the Principles of European Contracts and some dispositions of the CISG applicable to the formation of international contracts from the perspective of harmonisation of law*", 2001, Kluwer Law International, p 83-113.
[44] UPICC, article 7.1.7(2).
[45] UPICC, article 7.1.7(3), CISG, article 79(4) and PECL, article 6.3(d).
[46] CISG, article 79(5).
[47] PECL, article 6.3(c).

 [ISSN 2581-5369]

of Article 79 does not provide sufficient clarity to settle the question on its own. Some international arbitration rulings such as ***African Holdings Company of America v. the Democratic Republic of Congo***[48] ***and Chevron Corporation and Texaco Petroleum Corporation v. Ecuador (II),***[49] confirm that domestic law may be construed with the assistance of UPICC, however Article 79 of the CISG is seldom supplemented and interpreted using UPICC.

In a leading case titled as ***Scafom International BV v. Lorraine Tubes S.A.S,***[50] unpredictably, the price of steel rose by 70% when a Dutch buyer and a French seller signed a sales deal. The customer rejected the offer to renegotiate and demanded delivery of the products at the stipulated price. The deal was governed by the CISG. The ruling of the Tongeren Commercial Court was reversed by the Antwerpen Court of Appeal, which said that the CISG does not address economic hardship in a contract and that French law should be applied to this issue. The Supreme Court rejected this reasoning. The Belgian Court of Cassation ruled that the unforeseeable change in circumstances has unduly increased the burden of performance and relied on Article 7(2) of CISG, which states that matters governed by CISG but not expressly settled in it must be settled in accordance with the general principles on which it is based and, in the absence of such principles, in accordance with the law applicable pursuant to rules of private international law.[51] Article 6.2.3 of UPICC was utilised by the court to interpret Article 79 of the CISG and provide the seller the power to renegotiate in order to fill the void created by Article 79 of the CISG not addressing hardship.

Comparatively, UPICC's provisions on hardship and non-performance are more inclusive than those of CISG.[52] CISG lacks such a clause, but UPICC grants courts the authority to modify a contract in order to restore its original balance. In order to protect contractual commitments, UPICC highlights the uniqueness of the event.[53] Geographically, PECL is mainly focused on the legislation prevalent in the European Union. The terms "hardship" and "changing

[48] ICSID Case No. ARB-05-21, as cited by Jarrod Hepburn in "*The Role of the UNIDROIT Principles of International Commercial Contracts in Investment Treaty Arbitration*", 2015, Int. and Comparative Law Quarterly, 64, p. 905.
[49] Permanent Court of Arbitration, Case No. 2009-23, as cited by Jarrod Hepburn in "*The Role of the UNIDROIT Principles of International Commercial Contracts in Investment Treaty Arbitration",* 2015, Int. and Comparative Law Quarterly, 64, p. 905.
[50] Supreme Court of Belgium, Case No. C.07.0289.N, 2009 *available at*: http://cisgw3.law.pace.edu/cases/090619b1.html.
[51] CISG, Article 7(2).
[52] Johanna Hoekstra, "*Regulating International Contracts in Pandemic: Application of the Lex Mercatoria and Transnational Commercial Law*", in Carla Frestman and Andrew Fagen (eds.) "*Covid-19, Law and Human Rights: Essex Dialogues"*, 2020, University of Essex, p. 117.
[53] *Ibid*.

circumstances" are not included in the CISG, despite attempts to incorporate them.[54] During the preparation of the CISG, efforts to incorporate measures about hardship were rejected. It was evident from said refusal that the CISG did not plan to incorporate this provision. Intriguingly, the secretariat commentary on the draught counterpart of Article 79 of the CISG, which was Article 65 of the 1978 draught of the CISG, expressly prohibits the seller's release from its obligations in the event of a substantial change in circumstances where the contract is no longer as originally agreed.[55]

Although judges in international arbitration recognise the reality of hardship, there is no common consensus that Article 6.2.3 of UPICC serves as a gap filler for Article 79 of CISG, since CISG specifically prohibits judges from modifying the terms of the contract. In addition, the independent rights of the parties outlined in Article 6 of the CISG enable the parties to choose whether or not the CISG will regulate their transaction. Parties to international contracts have the option of selecting CISG, UPICC, or PECL as the applicable law. If the parties so wish, Article 6.2.3 of UPICC or Article 8.1 of PECL will be included into their contract and will augment the application of Article 79 of the CISG. In light of the ambiguities surrounding the application of Article 79 and its restrictive interpretation, it is highly advised that the parties choose and integrate their controlling law, preferably in the contract itself, to prevent problems after the contract has been executed.

IX. CONCLUSION

Both the concept of force majeure and the principle of hardship strive to mitigate the harm that may result from forced performance under altered circumstances. In order to preserve the integrity of contracts, arbitrators in international business practice disfavour the defence of hardship. Instead, the defense of force majeure is favoured since performance may be resumed after the force majeure event is ended. The international legal instruments of UPICC, PECL, and CISG are used for illustrative purposes, and parties to international commercial contracts tend to give the broadest possible interpretation of the hardship and force majeure clauses in their contracts in order to invoke said clauses and protect themselves from unpredictable circumstances leading to burdensome contracts, should the need arise.

Moreover, the force majeure and hardship provisions given in Articles 6.3 and 8.1 of PECL and Articles 7.1.7 and 6.2 of UPICC are far more elaborate than that of Article 79 of CISG; however, the CISG is more prominent being an official treaty with more than 80 signatory member states,

[54] Secretariat Commentary on Article 65 of draft of CISG, 1978, Comment No. 5, available at: http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-79.html.
[55] *Ibid*.

 [ISSN 2581-5369]

which means that the CISG takes precedence over other instruments of international legal principles unless the parties agree to contrary by express terms in their contracts or the arbitral tribunal rules otherwise. UPICC and PECL may be used to interpret Article 79 of the CISG, but not as additional provisions, since that was not the goal of the drafting committee. The parties may choose to specifically integrate UPICC and or PECL as either supplemental law to CISG or controlling law in their contract.

*****

 [ISSN 2581-5369]