Conceptualizing the Relationship Between Doctrine of Mistake and Exemption (*Force Majeure*) Under the CISG and the UPICC

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Summary

Under the patrimonial laws, the relationship between the doctrines of mistake and exemption (force majeure) is blurred and inelegant; this is because both doctrines can apply to the same circumstances. This confusion becomes more noticeable under the United Nations Convention on the Contracts for International Sale of Goods (CISG) which excludes the doctrine of mistake from its provisions. This scenario created the attempt to interpret and apply the exemption provision of Article 79 CISG on matters bordering on mistake. However, it has been argued that the provisions on mistake under the UNIDROIT Principles of International Commercial Contracts (UPICC) will be better suited for filling the gap of the non-provision of doctrine of mistake under the CISG.

1 Introduction

Generally, the doctrine of exemption is considered different from the doctrine of mistake, but there are various links which are visibly similar when comparing the two doctrines. It has been put forward that one is excused under exemption doctrine when an event, unexpected at the time of contracting, makes one's performance impossible, and one ought not to bear the loss from the occurrence of the event. While under mistake, one is excused under this doctrine provided that at the time of entering the contract, one or both parties entered the contract under a mistaken assumption. Where the assumption is an assumption basic to the contract then one ought not to bear the loss resulting from the mistake.[1]

Facts are established that while the events of exemption come after the conclusion of the contract and will be such as to render the performance impossible, the events of a mistake will precede the conclusion of the contract and invoke the validity question of the contract.[2] It has also been argued that Article 79 of the United Nations Convention on Contracts for the International Sale of Goods (CISG) does not make any difference, as in English law, regarding the time of the occurrence of impediments that will lead to frustration of the contract. The CISG does not differentiate between initial and subsequent impediments; even if performance of the contract is already impossible when concluding the contract, hitherto it has no effect on the validity of the contract as it would have under English Law.[3] There is no definition or provision for mistake under the CISG. Article 4(a)[4] excluded issues relating to validity of the contract from the jurisdiction of the CISG, and in accordance with Article 7(2) of the CISG:

> Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

It has been canvassed by Lookofsky that since the CISG is generally not concerned with validity, most problems which fall under this heading – e.g. fraud, duress, mistake or the reasonableness of contract terms – must be resolved in accordance with domestic rules of law.[5] However, owing to Article 7(1) of the CISG, which preaches interpretation of the CISG in order to project its international character and uniformity, thus relevant provisions of UNIDROIT Principles of International Commercial Contracts (UPICC), Principles of European Contract Law (PECL), and Draft Common Frame of Reference (DCFR) can be used to fill the gap created by absence of mistake under the CISG.[6]

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[1] Richard Warner, *Impracticability Frustration Mistake* (2003), http://www.kentlaw.edu/faculty/rwarner/classes/contracts/impracticability_frustration_mis.html (accessed 21 Feb. 2018).

[2] Patrick C. Leyens, *CISG and Mistake: Uniform Law vs. Domestic Law the Interpretative Challenge of Mistake and the Validity Loophole* (2003), http://www.cisg.law.pace.edu/cisg/biblio/leyens.html (accessed 9 Jan. 2018). He writes that 'A case of mistake is one of the challenges for the interpretation of CISG Art. 4(a). Under a number of domestic laws a case of mistake raises a question of validity. Does this indicate that we should apply CISG Art. 4(a) and open the way for domestic remedies? … The CISG is silent on the question of mistake but its Art. 4(a) excludes matters of the validity of the contract from its scope. Thus the interpretative challenge is to ascertain whether a case of mistake raises a question of validity that comes under CISG Art. 4(a).'

[3] Yesim M. Atamer, *Art. 79*, in UN Convention on Contracts for the International Sale of Goods (CISG) (Stefan Kröll et al. eds, Hart Publishing, 2011) para. 48, 1073.

[4] Art. 4 of the CISG provides thus:

> This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. In particular, except as otherwise expressly provided in this Convention, it is not concerned with:
>
> (a) the validity of the contract or of any of its provisions or of any usage;
>
> (b) The effect which the contract may have on the property in the goods sold.

[5] Joseph Lookofsky, In Dubio Pro Conventione *Some Thoughts About Opt-Outs, Computer Programs and Premption Under the 1980 Vienna Sales Convention (CISG)*, 13 Duke J. Comparative & Int'l L. 263 280 (2003). Also at http://www.law.duke.edu/(accessed 9 Dec. 2017).

[6] For instance the provision of s. 7:201 Draft Common Frame of Reference (DCFR) provides thus:

> (1) A party may avoid a contract for mistake of fact or law existing when the contract was concluded if:
>
> (a) the party, but for the mistake, would not have concluded the contract or would have done so only on fundamentally different terms and the other party knew or could reasonably be expected to have known this; and
>
> (b) the other party;
>
> (i) caused the mistake;
>
> (ii) caused the contract to be concluded in mistake by leaving the mistaken party in error, contrary to good faith and fair dealing, when the other party knew or could reasonably be expected to have known of the mistake;
>
> (iii) caused the contract to be concluded in mistake by failing to comply with a pre-contractual information duty or a duty to make available a means of correcting input errors; or
>
> (iv)Made the same mistake.
>
> (2) However a party may not avoid the contract for mistake if:
>
> (a) the mistake was inexcusable in the circumstances; or
>
> (b) the risk of the mistake was assumed, or in the circumstances should be borne, by that party.

The best definition of mistake that reflects international stance is the definition in the UNIDROIT Principles.[7] Article 3.2.1 of the UNIDROIT Principles of International Commercial Contracts (UPICC) defines mistake as '[a]n erroneous assumption relating to facts or to law existing when the contract was concluded'. The Article 3.2.1 of UNIDROIT Principles definition suggests that a mistake can be as to facts of a contract of sale of goods or as to laws that govern the contract of sale of goods. The error must not be intentional as knowledge vitiates the doctrine of mistake (except unilateral mistake). Therefore, when parties labour in mistake during the formation of a contract, the court or tribunal can apply this doctrine if there is absence of foreknowledge and bad faith. This lack of knowledge is the bridge that linked some forms of the doctrine of mistake (for instance mutual and common mistake) and the doctrine of exemption.[8]

It has also been suggested that mistake has a strong relationship with the concept of risk. A party who owns the risk of performance in a contract cannot be relieved by the rule of mistake. It has been held in the case *of Associated Japanese Bank International Ltd. v. Crédit du Nord S.A.*[9] that:

> [l]ogically, before one can turn to the rules as to mistake … one must first determine whether the contract itself provides who bears the risk of the relevant mistake. Only if the contract is silent on the point is there scope for invoking mistake.

The objective of this article is to employ doctrinal methodology in the study of the areas of divergences and convergences as regards doctrine of mistake and force majeure under the CISG and the UPICC.

2 Exclusion of mistake under the CISG

Determining what falls under the validity perimeter in an international contract of sale of goods is not an easy task; there is no consensus on the items in this set. It depends on what a particular municipal law thinks can be categorized as touching on their own validity yardsticks. Jacob Ziegel appreciated the above problem when he writes that:

> Validity is not defined in Article 4 or elsewhere in CISG. Presumably it includes any defence that may vitiate the contract under the proper law or laws of the contract because, for example, of lack of capacity, misrepresentation, duress, mistake, unconscionability, and contracts contrary to public policy.[10]

However, the above listed possible validity items are not conclusive, there are serious contentions on whether the issue of mistake should be regarded as falling under the validity items in the CISG. Many scholars are of the opinion that there is no conclusive exclusion of the doctrine of mistake under the CISG. Patrick Leyens canvassed that the issue of exclusion should be approached from the different national laws perspective. He writes thus:

> If we look exclusively to domestic law for the answer of this question we will face a problem that perhaps is best illustrated by mistake in regard to the conformity of goods. For example, Austrian law would allow avoidance of the contract if such a mistake can be proven; whilst, under German law, a damage-based remedial scheme comparable to that of the CISG is applicable. Under Austrian law, we therefore could argue that a mistake in regard to the conformity of goods is a validity issue, whilst under German law we could not. The consequence would be that a mistaken party in one country, for example in Austria, could nullify the contract whilst in another country, for example Germany, the party would be restricted to the remedies provided under the CISG. With regard to the goal of the CISG to provide a uniform remedial scheme for all Contracting States, particularly in the field of breach of warranty, this result looks strange.[11]

This analysis using Austrian and German national laws brings to the fore the contention that mistake can be a validity issue excluded under Article 4 of the CISG[12] if the legal end point of it leads to the contract being void, voidable, nullity or avoided. Whereas if CISG-like regime of remedies are the end-point; then it is an issue that can come within the purview of other articles of the CISG.

There is also a strong case that the doctrine of mistake could be interpreted or adjudicated under Article 35 of the CISG.[13] Reflecting on the above provision (Article 35 CISG), if the seller delivered goods which fell afoul of the requirement to conform to quantity, quality and description of the required contracted goods, then it does not matter if the cause of the non-conformity precedes the contract, it is a risk within the contractual domain of the seller and he must

[7] Patrick C. Leyens, *CISG and Mistake: Uniform Law vs. Domestic Law the Interpretative Challenge of Mistake and the Validity Loophole* (2003) (accessed 11 Jan. 2018). The writer argues that 'in cases in which both the CISG and the UNIDROIT Principles follow the same idea, where appropriate the UNIDROIT Principles can be referred to as an interpretative source under CISG art 7(2)'.

[8] Events under the doctrine of exemption, just like mutual and common mistake under the common law, must be without the knowledge of the parties.

[9] [1988] 3 All ER 902.

[10] Jacob.S Ziegel, *Report to the Uniform Law Conference of Canada on Convention on Contracts for the International Sale of Goods* (1981), http://www.cisg.law.pace.edu/cisg/text/ziegel79.html (accessed 12 Jan. 2018).

[11] Leyens, *supra* n. 7.

[12] Ostensibly, doctrine of mistake is among items excluded under the sphere of the CISG. It is a matter that falls within the domestic laws of validity. The CISG carefully shielded its applications from being tainted with the cumbersome and highly polarized validity issues in different national law jurisdictions. The inability of the CISG to categorically provide for the doctrine of mistake has created more problems rather than solving them; this research will suggest that the lack of provisions to tackle the issues of mistake is an area which must be re-visited for possible amendment.

[13] (1) The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract.

(2) Except where the parties have agreed otherwise, the goods do not conform with the contract unless they:

(a) are fit for the purposes for which goods of the same description would ordinarily be used;

(b) are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement;

(c) possess the qualities of goods which the seller has held out to the buyer as a sample or model;

(d) are contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods.

(3) The seller is not liable under subparagraphs (a) to (d) of the preceding paragraph for any lack of conformity of the goods if at the time of the conclusion of the contract the buyer knew or could not have been unaware of such lack of conformity.

therefore be liable and thus subject to the provisions of Article 35 CISG. This by necessary implication denotes that facts which can fit under the doctrine of mistake can be remedied under Article 35 of the CISG. Article 35 though does not mention mistake but must be interpreted to accommodate situations where a seller fails to deliver goods that conform to the contract and more especially if the non-conformity existed erroneously before the conclusion of the contract.

Even though Article 35(2) (b) provides that the goods do not conform with the contract unless they 'are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract' this does not ultimately exclude non-conformities preceding the contract. The time of the existence of the non-conforming event will be immaterial if the buyer relies reasonably on the skills and judgement of the seller.

In addition, Article 79 of the CISG is very important in determining the scope of mistake. There can be instances where the parties unknowingly carry on with a contract of sale of goods when the goods have perished. This can be called common mistake in the domestic common law parlance, but there is no doubt that this type of situation will render the contract impossible of performance if it goes to the root of the contract. In the absence of any provision for mistake under the CISG, it follows that Article 79 will rise to the occasion and treat this fact as a case of exemption.[14]

3 Force majeure and mistake under the UNIDROIT principles (UPICC)

Under the UNIDROIT Principles, the relationships between the doctrine of mistake and *force majeure* are most noticeable. The first important fact is that the doctrine of mistake and the doctrine of *force majeure* are not considered to affect the 'validity' of a contract under the UNIDROIT Principles. It has been argued that Article 3.1.3 will apply 'irrespective of how the relevant domestic law classifies its rule that initial impossibility leads to invalidity'.[15]

Article 3.1.3 of the UNIDROIT Principles provides that[16]:

> (1) The mere fact that at the time of the conclusion of the contract the performance of the obligation assumed was impossible does not affect the validity of the contract.
>
> (2) The mere fact that at the time of the conclusion of the contract a party was not entitled to dispose of the assets to which the contract relates does not affect the validity of the contract.

Paragraph (1) echoes the provision of Article 7.1.7 of UNIDROIT which provides for *force majeure*. If the performance of a contract is impossible, then the contract will still be a valid contract even though a non-performable contract.[17] The doctrine of mistake talks about erroneous assumption of facts or law, it follows that if such error of judgement is such that it is beyond the control and expectation of a party, then it will be a case for either mistake or *force majeure*. The only noticeable difference is the time of the existence of the impediment or error. While a mistaken error of facts or law would have existed before the conclusion of the contract, a *force majeure* impediment would mostly excuse the obligations of the parties if it occurs after the conclusion of the contract. This is illustrated in comment (1) to the Official Commentary UNIDROIT Principles which provides:

> A contract is valid even if the assets to which it relates have already perished at the time of contracting, with the consequence that initial impossibility of performance is equated with impossibility occurring after the conclusion of the contract. The rights and duties of the parties arising from one party's (or possibly even both parties') inability to perform are to be determined according to the rules on non-performance. Under these rules appropriate weight may be attached, for example, to the fact that the obligor (or the obligee) already knew of the impossibility of performance at the time of contracting[18]

Under the common law, the above hypothetical example falls under the doctrine of mistake and it is a matter that underscores the validity of the contract. More so, under the CISG, the above scenario in the UNIDROIT commentary may be grouped under the items clearly excluded as ousting the jurisdiction of the CISG in accordance with Article 4. It is a validity issue that would be reserved for the national laws.[19] The UNIDROIT Principles, however, boldly state that such situation does not touch on validity and will be subjected to its jurisdiction.

4 Definition of mistake under the UNIDROIT principles

Article 3.2.1 provides for the definition of mistake under the UNIDROIT Principles, it provides that: 'Mistake is an erroneous assumption relating to facts or to law existing when the contract was concluded'. This definition is succinct in underlying the basic legal requirement for the application of the doctrine of mistake. There is an erroneous assumption when a party is in error by having a wrong or an incomplete understanding of the situation.[20] While commenting on the doctrine of mistake and its time element, the Official UNIDROIT commentary observes that:

[14] Leyens, *supra* n. 7 was of the opinion that 'According to a number of domestic laws, a case where the goods do not exist at the time of contract conclusion is classified as a validity issue. In contrast, under the CISG it is addressed as an issue of risk allocation or as an excuse for non-performance. Under CISG Art. 68, it is provided that if the goods are sold in transit the risk passes 'from the time of the conclusion of the contract' (emphasis added). Under CISG Art. 79(1), a party is excused from liability for non-performance '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 (…)'. Both rules can be interpreted as cross-references to domestic concepts that are labelled 'initial impossibility'.

[15] *Commentary on the UNIDROIT Principles of International Commercial Contracts* (PICC) (Peter Huber in Jan Kleinheisterkamp & Stefan Vogenauer eds, Oxford 2009), para. 8, 410.

[16] Art. 3.1.3 UNIDROIT Principles removes the defect of initial impossibility as an invalidating factor.

[17] Nisreen Mahasneh, *Subject matter and consideration of the contract: the approaches of the 2010 UNIDROIT PICC, the 1980 CISG, and the 1976 Civil Code of Jordan*, 19(3) Unif. L. Rev. 390 (2014).

[18] UNIDROIT Principles of International Commercial Contracts (Rome 2004), Cited as http://www.unidroit.org/english/principles/contracts/principles2004/integralversionprinciples2004e.pdf - (accessed 12 Feb. 2018).

[19] The above hypothetical case cannot apply under either the doctrine of exemption under Art. 79 CISG, frustration under the common law or *Force majeure* under the UNIDROIT Principles because one of the parties has knowledge of the impossibility of performance.

[20] Huber, *supra* n. 15, para. 3, 411.

> The purpose of fixing this time element is to distinguish cases where the rules on mistake with their particular remedies apply from those relating to non-performance. Indeed, a typical case of mistake may, depending on the point of view taken, often just as well be seen as one involving an obstacle which prevents or impedes the performance of the contract. If a party has entered into a contract under a misconception as to the factual or legal context and therefore misjudged its prospects under that contract, the rules on mistake will apply. If, on the other hand, a party has a correct understanding of the surrounding circumstances but makes an error of judgment as to its prospects under the contract, and later refuses to perform, then the case is one of non-performance rather than mistake.[21]

The UNIDROIT Principles being a gap-filling model law has aided in providing a clue in the absence of the non-provision of the doctrine of mistake and/or other lacuna under the CISG.[22] Many courts and tribunals have aptly borrowed from this law while determining whether or not the doctrine of mistake can be applicable in the issues involving parties to a contract.[23] Though Franca Ferrari thinks this move is wrong and argues that the UNIDROIT Principles cannot be used to fill in the gap under the CISG but that:

> The principles can be useful, for instance, to corroborate a solution reached through the application of the CISG's rules, as evidenced not only by several arbitral awards, but also by one state court decision; on these occasions, the UNIDROIT Principles of International Commercial Contracts were used to find corroboration of the results reached by applying the rules of the CISG.[24]

Nevertheless, it is not every act of mistake that is relevant under the contract. There must be real and significant legal implications before a contract can be affected by the mistake of the parties in the contract. There is also a 'reasonable person' test when determining the issue of whether or not there is a mistake under Article 3.2.2.[25]

The (Article 3.2.2) detailed provision relating to the application of the doctrine of mistake is very apt in distinguishing the doctrine of mistake from that of *force majeure*. Under Article 7.1.7 of the UNIDROIT Principles, there is no reasonable person's test, once the non-performance of a party can be proven to be beyond his control or expectations, and then the doctrine applies. However, under the doctrine of mistake, the question of whether or not a reasonable person would have acted differently if the true state of the mistake had been known, is material in deciphering whether the error of fact or law can be said to be a mistake or not. It has been held that:

> [T]o be relevant, a mistake must be serious. Its weight and importance are to be assessed by reference to a combined objective/subjective standard, namely what 'a reasonable person in the same situation as the party in error' would have done if it had known the true circumstances at the time of the conclusion of the contract. If it would not have contracted at all, or would have done so only on materially different terms, then, and only then, is the mistake considered to be serious [26]

There is no provision for temporary mistake under the UNIDROIT Principles just like Article 7.1.7(2) of the UNIDROIT, which provides that when the impediment is only transitory, the excuse shall have the effect for such period as is reasonable having regard to the effect of the impediment on the performance of the contract. Finally, both doctrines can result in termination and avoidance of the contract by the victim party respectively, and it is possible also that where parties have allocated risk in exercise of the principle of freedom of contract, then such risk will be assumed to have been duly covered if an error of facts or law, or an impediment beyond the control of the parties occurred. Such adversity should be borne by the party who owes the risk, though contrary view has been argued by Sylvain Bollée who writes that *force majeure* can discharge a party who owes the risk from liability.[27]

5 Conclusion

The UNIDROIT principles provided copiously for the doctrine of mistake and it is not considered a validity issue under

Also, if the parties have acted in good faith but are in error as to the real position of their contractual positions, then it comes under the definition of mistake. It will be germane to note that an error in this context is an equivalent to a fault. Then the time of the occurrence of the error as mentioned before is material in understanding the application of mistake and separating it from other non-performance doctrines like frustration, exemption and *force majeure*.

[21] *Ibid*.

[22] ICC Court of Arbitration, arbitral award No. 8128, (accessed 29 Dec. 2017).

[23] [25 Nov. 1994] [Zürich Chamber of Commerce], http://www.unilex.info/case.cfm?id=642 (accessed 14 Jan. 2018).

[24] Franco Farrari, *Gap-filling and Interpretation of the CISG: Overview of International Case Law* 2 I.B.L.J, 221–39 (2003).

[25] Art. 3.2.2 UNIDROIT Principles provide thus:

(1) A party may only avoid the contract for mistake if, when the contract was concluded, the mistake was of such importance that a reasonable person in the same situation as the party in error would only have concluded the contract on materially different terms or would not have concluded it at all if the true state of affairs had been known, and

(a) the other party made the same mistake, or caused the mistake, or knew or ought to have known of the mistake and it was contrary to reasonable commercial standards of fair dealing to leave the mistaken party in error; or

(b) The other party had not at the time of avoidance reasonably acted in reliance on the contract.

(2) However, a party may not avoid the contract if

(a) it was grossly negligent in committing the mistake; or

(b) the mistake relates to a matter in regard to which the risk of mistake was assumed or, having regard to the circumstances, should be borne by the mistaken party.

[26] UNIDROIT Principles of International Commercial Contracts, Cited as http://www.unilex.info/instrument.cfm?pid=2&do=comment&pos=51 (accessed 19 Jan. 2018).

[27] Sylvain Bollée, *The Theory of Risks in the 1980 Vienna Sale of Goods Convention*, Pace Review of the Convention on Contracts for the International Sale of Goods, Kluwer 245–90 (1999–2000), the author writes that:

'The theory of risks must be clearly distinguished from the doctrine of *force majeure*, which is not concerned with the allocation of risk. The doctrine of *force majeure*, rather, exempts a defaulting party from liability in damages where failure to perform his obligation is due to an impediment beyond his control. For instance, if the goods are at the buyer's risk and perish or deteriorate, the buyer may be liable for damages for non-acceptance if the seller has suffered any (e.g. storage charges). In some legal systems, only *force majeure* can discharge the buyer from such liability. The rules as to risk are silent on this issue'.

this model law. There is a total omission of the doctrine of mistake under the CISG, and the English law view that an antecedent event will make a contract void or voidable for mistake is absent under the CISG. It does appear therefore that any impediment beyond control of the parties which already existed at contract formation and unknown to the obligor can theoretically be good enough for exemption under Article 79 of the CISG.[28] It will be important therefore to use UNIDROIT Principles of International Commercial Contracts provisions on mistake in filling the gap created by the absence of 'mistake' provisions under the CISG. It is obvious that despite the flexibility of doctrine of exemption under the CISG, it will not be enough to interpret and adjudicate on matters relating to mistake.

[28] Atamer, *supra* n. 3 para. 48, 1074.