Frustration and Remedies Under the CISG, UNIDROIT Principles and English Law: A Comparative Review

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Summary

The doctrine of frustration is one of the most efficient risk sharing mechanisms in a commercial contract under the Contracts for the International Sale of Goods (CISG), Institute for the Unification of Private Law (UNIDROIT) Principles of International Commercial Contract and the English law. This article investigates and comparatively discusses the various remedies that can apply under a frustrated contract.

1 Introduction

The doctrine of exemption (frustration, *force majeure*) under the United Nations Convention on Contracts for the International Sale of Goods (CISG) is not exclusive of other known rights and remedies that can accrue to a disgruntled party in a contract.[1] This seems to be paradoxical. The uniqueness of the doctrine of exemption lies in the non-liability of a party in damages when there is a failure due to a non-fault, unforeseen impediment. Article 79 of the CISG provides that:

(1) 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.

(2) If the party's failure is due to the failure by a third person whom he has engaged to perform the whole or a part of the contract, that party is exempt from liability only if:

(a) he is exempt under the preceding paragraph; and

(b) the person whom he has so engaged would be so exempt if the provisions of that paragraph were applied to him.

(3) The exemption provided by this article has effect for the period during which the impediment exists.

(4) The party who fails to perform must give notice to the other party of the impediment and its effect on his ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, he is liable for damages resulting from such non-receipt.

(5) Nothing in this article prevents either party from exercising any right other than to claim damages under this Convention.

However, the gateway remedies provision of Article 79(5) of the CISG has hugely reduced the important doctrine of exemption of contract law into a farce. Article 79(5) provides that nothing in this article prevents either party from exercising any right other than to claim damages under this Convention. The implications of this concluding part of Article 79 is that all remedies like avoidance, specific performance, sellers'/buyers' rights to substitute performance, reduction of price and other incidental remedies are still applicable under an exempted contract of sale of goods in the 1980 Convention. The only specifically mentioned exception to this *carte blanche* application of remedies is that no party can claim damages.

The UNIDROIT Principles of international commercial contracts (UNIDROIT Principles 2016) are by far more articulate in dealing with the fallout of remedies in a frustrated contract situation. Article 7.1.7(3) (4)[2] of the UNIDROIT Principles is apt in defining the applications of remedies under the doctrine of frustration in the UNIDROIT Principles. Article 7.1.7 (3) details the remedies available against a party who fails to give notice of an impediment within a reasonable time and subsection (4) provides for the right to terminate the contract or to withhold performance or request interest on money due. The legal effect of subsections (3) and (4) is to remove the rigidity that is associated with the doctrine of *force majeure*. The aftermath is no longer absolute discharge. It follows that parties can have recourse to remedy that will cushion off their losses and the application of restitution will bring about interest on money due. For example, in the case of *Governments and International Organizations with Claims Arising out of Iraqi Invasion of Kuwait*,[3] it was held following Article 7.1.7(4) that termination of a

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[1] To qualify for Art. 79 exemption, the non-performing party must also notify the other party of 'the impediment and its effect on his ability to perform' within a reasonable time. If excused, the non-performing party is not liable for damages; however, the other party retains the right to 'avoid' the contract upon a 'fundamental breach' pursuant to other provisions in the CISG. *See* Jennifer M. Bund, *Force Majeure Clauses: Drafting Advice for the CISG Practitioner*, 17 J. L. & Com. 381–413 (1998).

[2] This is a multilateral Model Law. The latest edition is the UNIDROIT Principles of International Commercial Contracts, 2016. Art. 7.1.7 provides that:

(1) Non-performance by a party is excused if that party proves that the non-performance was due to an impediment beyond its control and that it 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.

(2) When the impediment is only temporary, the excuse shall have effect for such period as is reasonable having regard to the effect of the impediment on the performance of the contract.

(3) The party who fails to perform must give notice to the other party of the impediment and its effect on its ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, it is liable for damages resulting from such non-receipt.

(4) Nothing in this article prevents a party from exercising a right to terminate the contract or to withhold performance or request interest on money due.

[3] Panel of the Commissioners, Panel F1 (1997) http://www.unilex.info/case.cfm?id=639 (accessed 19 June 2018).

contract for *force majeure* does not release the aggrieved party from its obligation to return the monetary deposit made by the other party. The above case arose following the creation of the United Nations Compensation Commission (the 'Commission') by the United Nations Security Council to deal with claims arising out of Iraq's invasion of Kuwait. Thus, the commission made a finding that monetary deposits should be returnable to the aggrieved parties who made them despite the event of frustration/*force majeure*. This established the fact that there can be remedies even in the face of a frustrated contract under the UNIDROIT Principles.

Under English common law, the legal consequences of frustration are not a function of what the parties think or make out of their situation. The common law has maintained the approach of either denying the possibility of relief or to restrict the ambit of relief as far as possible.[4] It is now accepted under common law not to accede that a contract has been frustrated lightly.[5] In the case of *Jan Gryf-Lowczowski v. Hinchinbrook Healthcare NHS Trust*,[6] it was held that the Trust was disentitled from relying on the doctrine of frustration of contract of employment with the claimant when the frustrating event was as a result of their fault. It has been held that though frustration cannot be implied lightly, however it can have an end point which will make the opinion of the parties neither totally determinative nor irrelevant.[7]

This article will incisively employ doctrinal methodology in the investigation of the points of divergences and convergences of remedies for a frustrated contract as provided under the CISG, UNIDROIT Principles and English law.

2 Remedies under the CISG exemption

2.1 Remedy of Avoidance

One of the most important remedies under the CISG is termed 'avoidance' of the contract. Ulrich Magnus writes that under the CISG, avoidance is the one-sided right of a party to terminate the contract by its mere declaration. Such termination of a contract is the hardest sword that a party to a sales contract can draw if the other party has breached the contract.[8] The fundamental aim of the remedy of avoidance is to relieve a party from further obligations when there is a fundamental breach of contract by failure of a party to perform any of his obligations – in the contract or in case of non-delivery/payment of price/accepting delivery if under the *Nachfrist*rule (additional time to perform) performance of any outstanding obligation has not been complied with.

It has been held that the CISG is based on the principle that avoidance is generally only possible if the breach of contract is so fundamental that the at fault party at least ought to have known that the other party would not have further interest in being bound by the contract.[9] This can be contrasted with the doctrine of 'exemption' which is based on the principle that the debtor or a party is not liable in damages for a breach of an obligation if the reason for the breach was neither controllable nor foreseeable.[10]

Non-performance under Article 79 can be regarded as a breach whenever it can be established and thus the remedy of avoidance could apply.[11] Under Articles 49 and 64 of the CISG, the convention gives both the buyer and the seller respectively the right to avoid a contract of sale of goods; but it is not every breach of contract or every fault of a party which affects performance of the contract that attracts the remedy of avoidance. The hallmark of the international sale is to reserve this important but often abused remedy to a situation of serious fundamental breach which has the capability of denying the innocent party his honest expectations from the contract.

2.2 Specific Performance and Exemption Under the CISG

The remedy of specific performance seems antithetical with the very foundation, meaning and applications of the doctrine of exemption, though it seems this remedy is permitted under Article 79(5) CISG.[12] It is a trite Latin maxim that *lex nil frustra facit* (the law does nothing in vain).[13] This fundamental maxim underlies the reluctance of the court or any legal instrument to provide a remedy that will be unattainable in law or equity. The CISG therefore will need an amendment to reflect inapplicability of the remedy of specific performance just like Article 8:101(2) of the Principles of European Contract Law (PECL).[14]

Articles 46(1)[15] and 62[16] of the CISG provide for the remedy of specific performance for both the buyer and the seller respectively. It follows therefore that this remedy can be applicable under Article 79(5) of the CISG since it is ostensibly not

[4] Audrey Diamond, in *Force Majeure & Frustration* 262 (Ewan MCkendrick ed., Lloyd's of London Press Ltd 1991).

[5] *DVB Bank SE v. Shere Shipping Company Limited and others* [2013] EWHC 2321;

Also in *Melli Bank plc v. Holbud Limited* [2013] EWHC 1506 .In this case, the court rejected an argument that a contract was frustrated because its performance had become illegal. The reason was that the defendant's failure to use the contract was not related to the imposition of sanctions.

[6] [2005] EWHC 2407.

[7] The Wenjiang (No.2) [1983] 1 Lloyd's Rep.

[8] Ulrich Magnus, *The Remedy of Avoidance of Contract Under CISG General Remarks and Special Cases*, 25 J. L. & Com. 423–36 (2005).

[9] Peter Schlechtriem & Petra Bulter, UN Law on International Sales 143 (Springer 2009).

[10] *Ibid*., at 9.

[11] *UN Convention on Contracts for the International Sale of Goods* 1056 (Stefan Kroll et al. eds, Hart Publishing 2011), para. 2.

[12] JussiKoskinen, *CISG, Specific Performance and Finnish Law* (1999) Faculty of Law of the University of Turku, Private law publication series B, 47. The author writes that 'Art. 79 does not seem to be ambiguous as it expressly provides that an aggrieved party can always claim for performance even in case of impossibility'.

[13] Reinhard Zimmermann, *Remedies for Non-Performance: The Revised German Law of Obligations, Viewed Against the Background of the Principles of European Contract Law*, 6(3) Edin. L.R 271–314 (2002).

[14] Art. 8:101(2) provides thus:

(2) Where a party's non-performance is excused under Art. 8:108, the aggrieved party 416 may resort to any of the remedies set out in Ch. 9 except claiming performance and damages.

[15] Art. 46 provides thus:

(1) The buyer may require performance by the seller of his obligations unless the buyer has resorted to a remedy which is inconsistent with this requirement.

(2) If the goods do not conform to the contract, the buyer may require delivery of substitute goods only if the lack of conformity constitutes a fundamental breach of contract and a request for substitute goods is made either in conjunction with notice given under Art. 39 or within a reasonable time thereafter.

(3) If the goods do not conform to the contract, the buyer may require the seller to remedy the lack of conformity by repair, unless this is unreasonable having regard to all the circumstances. A request for repair must be made either in conjunction with notice given under Art. 39 or within a reasonable time thereafter.

[16] Art. 62 provides that:

excluded. However what remains to be seen is how far this remedy (specific performance) can go in being legally potent in the face of the nature of the doctrine of exemption, which thrives on the notion of impossibility of performance.[17] Atamer argues that whenever there is a disproportion between the changed costs of performance and the interest of the buyer in receiving performance in kind, the seller ought to have the right to refuse a performance claim. The law should not encourage economically irrational behaviour.[18]

Analysing these provisions, it will be important to start with the fact that Articles 46 and 62 are not absolute under the CISG and have been qualified by Article 28 of the CISG which provides that:

> If in accordance with the provisions of this Convention, one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgment for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention.

It follows that whenever the remedy of specific performance is against the provisions of a national law whose court is adjudicating a CISG related matter, then the court is not bound to defer to the remedy of specific performance as provided under Articles 46(1) and 62 of the CISG unless the court can do so under its own internal jurisdiction in respect of contract of sale governed by its national law.[19] The reason behind the soft-landing approach adopted under Article 28 of the CISG in respect of the remedy of specific performance has been offered by Honnold when he writes:

> [T]his concession to the procedures of the forum was granted by ULIS (1964) in response to the objection that common-law systems compelled ('specific') performance only when alternative remedies e.g. (damages) were not adequate. Comparative research also revealed that some civil law systems would not always compel performance by the coercive measures, such as imprisonment for contempt, which may be available in 'common law' systems; as a consequence flexibility based on Article 28 is not confined to common law jurisdictions.[20]

It is also essential to add that the remedy of specific performance is not available to a party who has resorted to a remedy which is inconsistent with specific performance. For example, a party who has exercised his right to avoid the contract, or sought damages (though not applicable under Article 79) will not be heard to seek the remedy of specific performance. Also when a party in accordance with Article 80 of the CISG caused the first party's act or omission that resulted in the failure of obligation in the contract, then that party too will not bring a claim under Articles 46(1) or 62 of the CISG.[21]

There can be a situation envisaged under Article 79(3) of the CISG where the impediment that causes the frustration is temporary, and then it seems right and proper for a party, who is owed an obligation in the contract, to demand specifically from the other party to perform his obligation when it is due and not impossible to perform. There can be confusion on when and the most appropriate time to demand specific performance in such a scenario, again, if the parties are aware that though the impediment renders immediate performance impossible, but is such that will abate within a certain or reasonable period of time, then the victim party's right to specific performance will not accrue until the abatement of the supervening impediment and when it is clear that the performance of the contract is no longer impossible.

It is clear that under Article 46 of the CISG, paragraphs (2) and (3) are not applicable to an exempted contract, they only apply to a scenario where the 'goods do not conform to the contract' and this suggests that the contract is performable, only that the goods may not have been in compliance with the agreement in the contract. It has been argued that specific performance can apply under Article 79 of the CISG in a situation where late or defective performance constitutes the impediment that frustrated the contract.[22]

2.3 Remedy of Cure and Exemption Under the CISG

The remedy of cure is directly opposite to the doctrine of exemption.[23] There cannot be a possible cure for an exempted contract. Article 48[24] of the CISG provides for the cure of any obligations owed to a buyer by a seller in the contract of sale. Jacob Ziegel has noticed that 'Article 48 reaches the same results as the common law where the breach

The seller may require the buyer to pay the price, take delivery or perform his other obligations, unless the seller has resorted to a remedy which is inconsistent with this requirement.

[17] Richard Backhaus, *The Limits of the Duty to Perform in the Principles of European Contract Law*, 8.1 Electronic J. Comp. L. (2004), http://www.ejcl.org/ (accessed 17 Sept. 2018).

[18] Yesim M Atamer, 'Art 79', in *UN Convention on Contracts for the International Sale of Goods (CISG)* 1068 (Stefan Kröll et al. eds, Hart Publishing 2011), para. 41.

[19] Shael Herman, *Specific Performance: A Comparative Analysis: Part 1*, 7(1) Edin. L.R 5–26 (2003), writes that

> 'If the phrasing of art 28 is taken literally, then the CISG's approach to specific performance should.'

[20] John O. Honnold, *Uniform Law for International Sales Under the 1980 United Nations Convention* 304–12 (Kluwer Law International, 3rd edn 1999).

[21] Steven Walt, *For Specific Performance Under the United Nations Sales Convention*, 26 Tex. Int'l L. J. 211–51 (1991).

[22] Kroll et al. (n. 18) para. 16, 1061.

[23] The provision for cure under Art. 37 CISG is not applicable since it entails the seller has delivered the goods before the date set for delivery and seller has delivered goods before the date for delivery, he may, up to that date, deliver any missing part or make up any deficiency in the quantity of the goods delivered, or deliver goods in replacement of any non-conforming goods delivered or remedy any lack of conformity in the goods delivered, provided that the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense. However, the buyer retains any right to claim damages as provided for in this Convention. Thus this is contradictory to exemption since performance is still possible.

[24] Art. 48 CISG provides that:

> (1) Subject to Art. 49, the seller may, even after the date for delivery, remedy at his own expense any failure to perform his obligations, if he can do so without unreasonable delay and without causing the buyer unreasonable inconvenience or uncertainty of reimbursement by the seller of expenses advanced by the buyer. However, the buyer retains any right to claim damages as provided for in this Convention.
>
> (2) If the seller requests the buyer to make known whether he will accept performance and the buyer does not comply with the request within a reasonable time, the seller may perform within the time indicated in his request. The buyer may not, during that period of time, resort to any remedy which is inconsistent with performance by the seller.
>
> (3) A notice by the seller that he will perform within a specified period of time is assumed to include a request, under the preceding paragraph, that the buyer make known his decision.
>
> (4) A request or notice by the seller under para. (2) or (3) of this article is not effective unless received by the buyer.

is non-essential or the buyer elects not to avoid the contract.[25] The article attaches conditions to the seller's entitlement to offer cure, but this could be implied at common law.'[26] This suggests that Article 48 applies to a situation where either the breach/failure of obligations are non-fundamental or the contract is not exempted.

It will be easy to conclude that the remedy of cure is not conceivable, in the face of a exempted contract, but there can be cure in an Article 79(3) situation where the cause of the impediment that frustrated the contract is of an impermanent nature.[27] If there is no partial frustration under English law, unlike that which is obtainable under the CISG and the UNIDROIT Principles, then parties can cure whatever impediment there is and go ahead with the performance of the contract when the impediment that frustrated the contract ceases.[28]

2.4 Remedy of Reduction of Price and Exemption Under the CISG

This remedy provides for a situation where the buyer has already received delivery of non-conforming goods.[29] It is hardly a remedy that any of the parties under an exempted contract can practically have recourse to except under Article 79(3) where the impediment is not of a permanent nature. The buyer, in such instance, can make a case for reduction in price if the value he would have obtained from the contract had diminished due to the temporary impediment. Article 50 of the CISG provides for reduction of price. Article 50 and the remedy it provides for are not within the context of Article 79 of the CISG.[30] The grounds for the application of Article 79 will make it difficult for price reduction to apply. The UNCITRAL (United Nations Commission on International Trade Law), in a published comment on Article 50, articulated that:

> Article 50 applies when goods that have been delivered do not conform to the contract. Non-conformity is to be understood in the sense of Article 35, i.e. defects as to quantity, quality, description (aliud) and packaging. In addition, defects in documents relating to the goods can be treated as a case of non-conformity. The remedy of price reduction is, however, not available if the breach of contract is based upon late delivery or the violation of any obligation of the seller other than the obligation to deliver conforming goods.[31] The comment above makes a detailed analysis of the situations to which Article 50 can best be applied, and unfortunately the doctrine of exemption as envisaged under Article 79 of the CISG does not feature.[32]

2.5 Damages and Exemption Under the CISG

The CISG provides for strict liability for non-performance,[33] but Article 79(5) unequivocally removes the remedy of damages from applying under an exempted contract governed by the CISG.[34]

> Article 74 of the CISG provides for damages, it reads thus: Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract.

The foundation of damages is predicated upon breach according to Article 74. A party in a contract can suffer losses by the non-performance of the other party even though there is no breach by the other party as can be seen in an exempted contract situation. It will however be worthwhile to state that the remedy of damages can still be applicable under Article 79 (4) of the CISG. This provision provides:

> The party who fails to perform must give notice to the other party of the impediment and its effect on his ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, he is liable for damages resulting from such non-receipt.

The implication of this provision is to introduce the use of damages in the compensation of a party who was not given reasonable notice of the impediment that causes failure to perform any obligations of the contract by the party who owes the obligation and fails to perform it.[35] However the parameter for measuring damages coming by way of non-receipt of notice of exemption and damages for non-performance is not provided under the convention.

3 Remedies and *force majeure* under the UNIDROIT principles

3.1 Damages and Force Majeure Under the UNIDROIT Principles

Article 7.4.1 of the UNIDROIT Principles provides to the effect that:

> Any non-performance gives the aggrieved party a right to damages either exclusively or in conjunction with any

[25] Olga Gonzalez, *Remedies Under the U.N. Convention for the International Sale of Goods* 2 Int'l Tax & Bus. L. 79 (1984). The author writes that: 'Art 37 CISG like Art 48 cannot apply when the remedy of avoidance has been exercised.'

[26] 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 6 Oct. 2018).

[27] Philip Davis & Graham Ludlam, *Wynn or Lose?*, 157 NLJ 535 (2007); the authors write that: 'Frustration is an all or nothing event; English law does not recognise the concept of partial frustration'.

[28] Peter Huber & Markus Altenkirch, *Buyer's Right to Cure*, 4(4) Eur. Rev. Cont. L., 540–45 (2008).

[29] John Honnold, *Uniform Law for International Sales Under the 1980 United Nations Convention* 444 (Wolters Kluwer 2009), para. 309.

[30] Peter A. Piliounis, *The Remedies of Specific Performance, Price Reduction and Additional Time (Nachfrist) Under the CISG: Are These Worthwhile Changes or Additions to English Sales Law*, 12 Pace Int'l L. Rev. 1–46 (2000).

[31] Digest of Art. 50 case law (2008), http://www.cisg.law.pace.edu/cisg/text/digest-art-50.html (accessed 17 June 2018).

[32] But price reduction can still apply under Art. 79 since it is not ostensibly excluded. Parties can exercise any remedy applicable within the context of the exempted contract of sale except claiming damages.

[33] Karl Riesenhuber, *Damages for Non-Performance and the Fault Principle*, 4 (2) Eur. Rev. of Cont. L., 119–53 (2008).

[34] AditiPatanjali, *A Comparative Study and Analysis of the Doctrine of Frustration Under the CISG, UNIDROIT Principles and UCC*, 23(5) I.C. C.L.R 174–87 (2012).

[35] Atamer (n. 18) para. 95, 1095; *see also* Ingeborg Schwenzer et al., *International Sales Law* 666 (Hart Publishing, 2nd edn 2012) para. 45.75.

other remedies except where the non-performance is excused under these Principles.

The general commentary on Article 7.1.7 however supported the provision of Article 7.4.1 of the UNIDROIT Principles[36] and to the effect that damages are not available against a party whose liability has been excused under any provisions of the UNIDROIT Principles.[37] The commentary reads thus:

> The Article does not restrict the rights of the party who has not received performance to terminate if the non-performance is fundamental. What it does do, where it applies, is to excuse the non-performing party from liability in damages.[38]

However, subsection 7.1.7 (3), just like Article 79(4) of the CISG, clearly approves the integration of the remedy of damages into a *force majeure* contract under the model law, especially when there is a failure to notify the victim party of the *force majeure* event.

The case of *Centro de Arbitraje de México (CAM)*[39] will be very useful in driving home the judicial interpretation of Article 7.1.7(3). In this case the defendant, a Mexican grower, and the claimant, a US distributor, entered into a one year exclusive agreement according to which the defendant undertook to produce specific quantities of squash and cucumbers and to provide them to the claimant on an exclusive basis, while the claimant had to distribute the goods on the Californian market against a commission.

The contract, which was concluded in September 2004, contained an arbitration clause in which the parties expressly referred to the UNIDROIT Principles of International Commercial Contracts as the law governing the substance of any potential disputes. The claimant brought an action before the Centro de Arbitraje de México against the defendant arguing that the defendant had breached the contract by not providing the goods referred to in the contract and by violating the exclusivity clause. The claimant asked for termination of the contract as well as damages for the harm suffered as a result of the defendant's failure to provide the goods. The claimant also asked for payment of the penalty stipulated in the contract in case of violation of the exclusivity clause.

The defendant objected that its failure to deliver the goods was due to the destruction of the crops by a series of extraordinarily heavy rainstorms and flooding caused by the meteorological phenomenon known as 'El Niño'. According to the defendant these events amounted to a case of *force majeure* and/or hardship and therefore any liability on its part was excluded. The defendant argued further that the contract entered into with the claimant was null and void since it had not been formalized or registered before the Mexican authorities.

It was held, concerning the defendant's argument, that the rainstorms and flooding which destroyed the crops did not amount to a case of *force majeure*, that the meteorological events in question did not meet all the criteria set out in Article 7.1.7 (1) of the UNIDROIT Principles defining *force majeure*. Indeed, while the rainstorms and flooding were undoubtedly beyond the defendant's control, their occurrence could not be considered unforeseeable by the defendant, who in the course of their long-standing activity in the agricultural sector had experienced similar events on several occasions.[40]

Moreover, according to the arbitral tribunal, an additional reason for confirming the liability of the defendant for its non-performance was that the defendant failed to give notice to the claimant of the events in question and of their effect on its ability to perform as required by Article 7.1.7(3) of the UNIDROIT Principles.[41]

It follows logically that even if liability for non-performance has been excused, the non-performing party owes the legal obligation to go ahead and notify the victim party of his non-performance, the impediment and its effect on his performance.[42] Failure to do so will not affect his general contractual non-liability if other factors that ground an action for *force majeure* are present and operative. Thus, the non-performing party will be liable not for damages resulting from the impediment but for not giving notice of the impediment.[43]

3.2 Remedy of Cure and Force Majeure Under the UNIDROIT Principles

The remedy of cure is central in international commercial law, particularly in a contract of sale of goods. It has been a rewarding commercial practice for parties to do everything possible in order to preserve a commercial contract. It is not always feasible to cure in a frustrated contract situation. This is because the situation entails a total breakdown of the will and means to perform the contract due to an impediment that is beyond the control of the parties, and which the parties could not reasonably be expected to have taken into account or to have avoided or overcome at the time of the conclusion of the contract. In this traditional frustration situation, the remedy of cure would be a toothless bulldog in applying to this situation.

On the other hand, there can be a situation where the remedy of cure can apply in a *force majeure* contract. Just like under the CISG, when an impediment is only temporary (Article 7.1.7 (2)), the non-performing party can cure the

[36] Karl Riesenhuber, *Damages for Non-Performance and the Fault Principle*, 4 (2) Eur. Rev. of Cont. L., 119–53 (2008).

[37] Reinhard Zimmermann, *Remedies for Non-Performance: The Revised German Law of Obligations, Viewed Against the Background of the Principles of European Contract Law*, 6(3) Edin. L.R 271–314 (2002).

[38] http://www.unidroit.org/english/principles/contracts/principles2004/integralversionprinciples2004-e.pdf (accessed 14 June 2018).

[39] 30 Nov. 2006, http://www.unilex.info/case.cfm?id=1149 (accessed 15 June 2018).

[40] Alison Mayfield, *Force of Nature*, 161 NLJ 773 (2011).

[41] *Supra*.

[42] Marel Katsivela, *Contracts: Force Majeure Concept or Force Majeure Clauses*, 12(1) Unif. L. Rev. 101 (2007).

[43] Damages in the above scenario will normally be measured or calculated from the time and event that happen at the period the former party fails to put the victim party on notice about the impediment that caused non-performance. Art. 7.4.2 of the UNIDROIT has provided an insight to what such calculable damages could comprise of; it provides that:

> (1) The aggrieved party is entitled to full compensation for harm sustained as a result of the non-performance. Such harm includes both any loss which it suffered and any gain of which it was deprived, taking into account any gain to the aggrieved party resulting from its avoidance of cost or harm.
>
> (2) Such harm may be non-pecuniary and includes, for instance, physical suffering or emotional distress.

It therefore adds up to argue that damages in the face of frustration may normally accrue under Art. 7.4.2(2) heading, and that since force majeure involves a non-fault, beyond control and unforeseeable happening, it seems right that the appropriate damages should be for non-pecuniary losses suffered as a result of failure to put the victim party on notice about the impediment.

impediment when it is practicable to do so and go on with fulfilling the obligations he owes in the contract.[44] Article 7.1.4[45] of the UNIDROIT provides for the remedy of cure.

From the Article 7.1.4 provision, it can be espoused that whenever the remedy of cure is attainable under a *force majeure* contract, the non-performing party owes the obligation to give notice of the manner and time of the cure to the victim party. It is also reasonable to add that whenever the remedy of cure is set into motion in a *force majeure* contract situation all other remedies are put in abeyance until the time set out for the cure has elapsed.[46]

3.3 Specific Performance and Force Majeure Under the UNIDROIT Principles

Just like under the CISG, and the common law, this remedy is very difficult to attain under a *force majeure* contract. But there can be specific performance under Article 7.1.7(2) when the impediment is of a temporary nature, a victim party can seek that the non-performing party should go ahead and perform obligations owed in the contract. A party can also withhold performance or request interest on money due. The UNIDROIT Principles provide separately for specific performance of monetary obligations and specific performance of non-monetary obligations. Article 7.2.1 provides that: 'Where a party who is obliged to pay money does not do so, the other party may require payment'.

The above provision is only possible if performance is not impossible, but where the contract has been affected by *force majeure*, it will be a farce to rely on this remedy.[47]

Article 7.2.2[48] on the other hand provides for the non-monetary specific performance. The provision re-echoes the fundamental position that specific performance can only be achievable when it is not impossible in law or fact. Arguably, the doctrine of *force majeure* does not foreclose justifiable remedies from applying to mitigate the impediment caused in the circumstance.

4 Frustration and remedies under English common law and Sale of Goods Act of 1979

Frustration operates spontaneously and discharges the contract.[49] It can be invoked by either of the parties to the contract[50] and it is not based on breach or default. Under the general common law, frustration according to Treitel discharges the parties only from duties of future performance. In other words, rights that have been invested and accrued before the frustrating event will remain enforceable, but those which would have been accrued if not for the frustrating event will not become due and enforceable.[51] However, this common law rule has been ameliorated by the Frustrated Contract Act of 1943.

There are some remedies that will apply under the common law and the Sale of Goods Act of 1979. Damages are very important in the common law jurisdictions and will apply in certain cases where other remedies could not, but it could hardly apply under a frustrated contract due to the fact that the concept of damages is based on fault, whereas the doctrine of frustration is based on fortuitous non-blame worthy events happening.[52] Thus the CISG, the UNIDROIT Principles and the English law are in tandem about treating the concept of damages with suspicion when it concerns a frustrated contract.

Money received under a frustrated contract can be specifically ordered to be paid back or any other restitution remedy can be specifically ordered by the court, but on the other hand, the performance of the contract cannot be ordered, discharge by frustration does not depend on the choice or election of the parties or court because it is automatic.[53] Then, there is the Frustrated Contract Act of 1943 which was enacted in order to streamline the reliefs available to parties in a frustrated contract when the contract has not been frustrated by perishing of the goods and when the

[44] Joseph Perillo, *Force Majeure and Hardship Under the UNIDROIT Principles of International Commercial Contract*, Universidad Panamericana (1998). He writes thus: 'Temporary impossibility gives rise to prospective inability to perform. Although the obligor may be excused by temporary impossibility, the prospective inability will normally give the promisee a power to suspend performance and demand assurance of due performance'.

[45] Art. 7.1.4 UNIDROIT Principles provides thus:

(1) The non-performing party may, at its own expense, cure any non-performance, provided that

(a) without undue delay, it gives notice indicating the proposed manner and timing of the cure;

(b) cure is appropriate in the circumstances;

(c) the aggrieved party has no legitimate interest in refusing cure; and

(d) cure is effected promptly.

(2) The right to cure is not precluded by notice of termination.

(3) Upon effective notice of cure, rights of the aggrieved party that are inconsistent with the non-performing party's performance are suspended until the time for cure has expired.

(4) The aggrieved party may withhold performance pending cure.

(5) Notwithstanding cure, the aggrieved party retains the right to claim damages for delay as well as for any harm caused or not prevented by the cure.

[46] This will be in line with the commercial policy of affecting the possible performance of the contract rather that discharge of it.

[47] UNIDROIT Principles 2016, The commentary on this Art. 7.2.1 by the UNIDROIT throws light to the application and interpretation of this art thus:

This art reflects the generally accepted principle that payment of money which is due under a contractual obligation can always be demanded and, if the demand is not met, enforced by legal action before a court. The term 'requires' is used in this art to cover both the demand addressed to the other party and the enforcement, whenever necessary, of such a demand by a court.

[48] Art. 7.2.2 provides that:

Where a party who owes an obligation other than one to pay money does not perform, the other party may require performance, unless

(a) performance is impossible in law or in fact;

(b) performance or, where relevant, enforcement is unreasonably burdensome or expensive;

(c) the party entitled to performance may reasonably obtain performance from another source;

(d) performance is of an exclusively personal character; or

(e) the party entitled to performance does not require performance within a reasonable time after it has, or ought to have, become aware of the non-performance.

[49] Stephen Hackett & Clare Arthurs, *A Frustrating Experience*, 161 NLJ 95 (2011).

[50] GuenterTrietel, *Frustration & Force majeure* (Sweet & Maxwell 2014) para. 15–005 549 'Frustration is different from recession because recession emanates on the election of the victim party.'

[51] Edwin Peel, Law of Contract 909 (Sweet & Maxwell 2007) 909.

[52] *Minnevitch v. Cafe De Paris (Londres) Ltd* [1936] 1 All ER 884.

[53] *Denny Molt& Dickson v. James B Fraser* [1944] A.C 265 at 274.

contract does not fall under section 7 of the Sale of Goods Act of 1979.[54]

4.1 Application of Frustrated Contract Act of 1943

The premise upon which the Frustrated Contract Act was made necessary can be traced in a cocktail of common law cases with uncomfortable outcomes. The cases of *Appleby v. Myers* and *Chandler v. Webster* applied the principle that rights accrued or which failed to accrue before the supervening impediment should either be enforceable or unenforceable as the case may be. In *Appleby v. Myers*[55] the plaintiff undertook to erect machinery upon the defendant's premises, the work to be paid for upon completion. When the work was almost completed both the premises and the machinery already erected were destroyed by fire. It was decided that the contract was frustrated; however, the plaintiff could recover nothing for the work done since the obligation to pay did not arise until completion. Also, in *Chandler v. Webster*[56] the above common law remedial rule was applied to make the hirer (Chandler) pay the remaining GBP 41 15s which had accrued and was due before the illness of the King frustrated the procession view-room contract. Chandler was also barred from retrieving his initial deposit payment of GPB 100 from Webster.

These two cases follow the guideline laid down in the principle that the loss should lie where it has fallen due. However these two cases are no longer the face of remedial application of consequences of frustration under the common law and the sale of goods. The *Fibrosa* case[57] brought a new lease of life and also its own controversy to the application of frustration remedies. In this case it was held that a Polish company could recover an advance contract payment sum of GBP 1,000 which they paid to the English company before the German occupation of Gdynia frustrated the contract. The House of Lords based their action on the total failure of consideration to further fulfil the contract which became impossible to be performed.

The fallout of the *Fibrosa* case, along with the oppressive decision in the case of *Whincup v. Hughes,*[58] was the stimulating factor that heralded the enactment of the Law Reform (Frustrated Contracts) Act 1943. Generally, the court will not apply this Act to a contract forbidden by legislation.[59] The Law Reform (Frustrated Contracts) Act 1943 is an Act of the Parliament of the United Kingdom; it applies only where the contract is governed by English law.[60] It is a remedial provision of positive law which establishes the rights and liabilities of parties involved in frustrated contracts.[61] It amended previous common law rules on the complete or partial return of prepayments, where a contract is deemed to be frustrated, as well as introducing a concept that valuable benefits may also be returned.[62]

However, it is a restricted piece of legislation[63] which falls short of covering situations where specific goods have perished. This makes the statute look non-inclusive and impotent when faced with the kind of frustration articulated under section 7 of the Sale of Goods Act 1979 and other forms of contract, like charterparty, except a time charterparty or a charterparty by way of demise or contract for the carriage of goods by sea and insurance contract. The parties to a contract can also chose to oust the jurisdiction of the Act and thus render it inapplicable.[64] While delimiting the jurisdiction of the Act,[65] section 2(5) provides for the limitation in the application of section 7 of the Sale of Goods Act. However it has been argued that it is hard to see why the sale of specific goods should be distinguished from sales of unascertained goods, or why the result should differ according to the nature of the frustrating event.[66]

Section 1 of the above Act provides for the adjustment of the rights and liabilities of the parties to a frustrated contract.[67]

[54] Under s. 7 of the Sale of Goods Act 1979, both parties are discharged from contractual obligation where the price, or part thereof, has been paid – it can be recovered on a total failure of consideration. Consequently on a total failure of consideration, the seller cannot deduct anything for expenses incurred before the frustrating event occurred. Also payments made under a contract under s. 7 cannot be recovered if there is only a partial failure of consideration. Finally, if price has not been paid but the seller has delivered some goods, he cannot sue for the price because of the common law rule of partial failure of obligation.

[55] [1867]LR 2 CP 651.

[56] [1904] 1 KB 493.

[57] [1942] 2 All ER 122.

[58] [1871] LR 6 CP 78.

[59] Nicholas J. McBride, *Restitution for Services Performed Under an Illegal Contract*, 57 The Cambridge L. J. 449–51 (1998).

[60] James Fawcett et al., *International Sale of Goods in the Conflict of Laws* 1163 (Oxford University Press 2005) para. 19.43.

[61] Goff .J held in *BP v. Hunt* [1979]1 W.L.R. 783 at 799 that the aim of the Act is to 'prevent the unjust enrichment of either party to the contract at each other's expense'.

[62] Andrew Burrows, *The Relationship Between Common Law and Statute in the Law of Obligations*, 128 L.Q.R. 232–59 (2012).

[63] Ewan McKendrick & Matthew Parker, *Drafting Force Majeure Clauses: Some Practical Considerations*, 11(4) ICCLR 132–38 (2000).

[64] Stephen Hackett & Clare Arthurs, *A Frustrating Experience*, 161 NLJ 95 (2011), the writers argue that: (the Law Reform (Frustrated Contracts) Act 1943 applies to many commercial contracts, unless it has been expressly excluded or alternative provisions have been agreed. By contracting out of the Act, a party may protect its position in respect of monies and expenses paid or due before the frustrating event occurred, as well as ruling out a claim for a 'just sum' where a valuable benefit has been conferred).

[65] S. 2(5) 1943 Act provides thus:

This Act shall not apply—

(a)to any charterparty, except a time charterparty or a charterparty by way of demise, or to any contract (other than a charterparty) for the carriage of goods by sea; or

(b) to any contract of insurance, save as is provided by Subs. (5) of the foregoing section; or

(c) to any contract to which [s. 7 of the Sale of Goods Act 1979] (which avoids contracts for the sale of specific goods which perish before the risk has passed to the buyer) applies, or to any other contract for the sale, or for the sale and delivery, of specific goods, where the contract is frustrated by reason of the fact that the goods have perished.

[66] P. S. Atiya et al., '*The Sale of Goods*' 357 (Pearson Educational Ltd, 11th edn).

[67] Section 1 of the 1943 Act provides thus:

1(1)Where a contract governed by English law has become impossible of performance or been otherwise frustrated, and the parties thereto have for that reason been discharged from the further performance of the contract, the following provisions of this section shall, subject to the provisions of section two of this Act, have effect in relation thereto.

(2)All sums paid or payable to any party in pursuance of the contract before the time when the parties were so discharged (in this Act referred to as 'the time of discharge') shall, in the case of sums so paid, be recoverable from him as money received by him for the use of the party by whom the sums were paid, and, in the case of sums so payable, cease to be so payable:

Provided that, if the party to whom the sums were so paid or payable incurred expenses before the time of discharge in, or for the purpose of, the performance of the contract, the court may, if it

The provision is very instructive in fostering the common law rule of remedy in the face of a frustrated contract. Section 1(2) has overturned the common law stance that there is no remedial recovery of payments made under a contract where the failure of consideration has been partial. Section 1 (2) is complimented by section 2(4) of the Act.[68] The implication of this section 2(4) is to sever the executed from the frustrated part of the contract, and then the partial failure of consideration in respect of the whole contract would be turned into a total failure of consideration in respect of the frustrated part of the contract. This is solely for the purposes of enabling the payer to recover his payment.[69]

It is also one of the major contributions of the Act to allow a party to whom the sums were paid or payable to keep part or the entire sum if he can show that he has incurred reasonable expenses in furtherance of the performance of the contract before the contract became frustrated. This succour was provided in the second limb of section 1(2) of the Act. But there is also a proviso that what the party will recover or retain will not be in excess of the expenses incurred. Section 1 (2) abolishes the common law rule limiting the right of recovery to cases of total failure of consideration.

The effect of section 1(2) is to rescue the payer from a possible oppressive bargain because the prepayment is recoverable irrespective of the consideration which he would have received had the contract been performed.[70] It does not apply in a case where a customer merely deposited money with a bank. It only applies to a sum paid or payable in pursuance of the contract,[71] the sum must have been paid before the time of discharge and in some cases the payee may be entitled to set off against a claim, by the payer's amount of any expenses incurred, before the time of the discharge in furtherance of performance of the contract.[72]

Section 1(3) enables a party to recover the benefit, other than payment of money, his performance of any part of the contract conferred on the other party. This section does not define 'benefit' unlike its kindred improved legislation of British Columbia District of Canada where section 5(1) defines benefit.[73] Benefit according to the case of *BP v. Hunt*[74] can either be the end-point of the services or in some cases the services themselves. Section 1(3) is chiefly concerned with non-monetary benefit. This section has been described as the restitutionary right for benefits rendered. In *BP Exploration Co (Libya) Ltd v. Hunt (No 2)*[75] the judge, while applying section 1(3) held that a just sum which will prevent the unjust enrichment of the defendant at the claimant's expense should be awarded to the claimant for the benefit of their pre-performance of the contract conferred on the defendant.

Thus, under section 1(3), a party who has failed to perform an obligation other than one to pay money can be liable for the consequences of his non-performance of that obligation and he will be unable to offset any liability in respect of the non-performance as section 1(3) only deals with benefit obtained before the time of discharge.[76]

One of the major shortcomings of section 1(3) is that the determination of 'just sum' is left entirely to the discretion of the court, and in the absence of any judicial precedent, this can be a recipe for confusion. But fortunately, in accordance with section 2(3)[77] parties can contract out of this Act or modify the provisions of this Act according to their agreed

considers it just to do so having regard to all the circumstances of the case, allow him to retain or, as the case may be, recover the whole or any part of the sums so paid or payable, not being an amount in excess of the expenses so incurred.

(3)Where any party to the contract has, by reason of anything done by any other party thereto in, or for the purpose of, the performance of the contract, obtained a valuable benefit (other than a payment of money to which the last foregoing subsection applies) before the time of discharge, there shall be recoverable from him by the said other party such sum (if any), not exceeding the value of the said benefit to the party obtaining it, as the court considers just, having regard to all the circumstances of the case and, in particular,

(a)the amount of any expenses incurred before the time of discharge by the benefited party in, or for the purpose of, the performance of the contract, including any sums paid or payable by him to any other party in pursuance of the contract and retained or recoverable by that party under the last foregoing subsection, and

(b)The effect, in relation, to the said benefit of the circumstances giving rise to the frustration of the contract.

(4)In estimating, for the purposes of the foregoing provisions of this section, the amount of any expenses incurred by any party to the contract, the court may, without prejudice to the generality of the said provisions, include such sum as appears to be reasonable in respect of overhead expenses and in respect of any work or services performed personally by the said party.

(5)In considering whether any sum ought to be recovered or retained under the foregoing provisions of this section by any party to the contract, the court shall not take into account any sums which have, by reason of the circumstances giving rise to the frustration of the contract, become payable to that party under any contract of insurance unless there was an obligation to insure imposed by an express term of the frustrated contract or by or under any enactment.

(6)Where any person has assumed obligations under the contract in consideration of the conferring of a benefit by any other party to the contract upon any other person, whether a party to the contract or not, the court may, if in all the circumstances of the case it considers it just to do so, treat for the purposes of subsection (3) of this section any benefit so conferred as a benefit obtained by the person who has assumed the obligations as aforesaid.

[68] Section 2(4) 1943 Act provides thus:

Where it appears to the court that a part of any contract to which this Act applies can properly be severed from the remainder of the contract, being a part wholly performed before the time of discharge, or so performed except for the payment in respect of that part of the contract of sums which are or can be ascertained under the contract, the court shall treat that part of the contract as if it were a separate contract and had not been frustrated and shall treat the foregoing section of this Act as only applicable to the remainder of that contract.

[69] Atiya, *supra* n. 66, at 357.

[70] Audrey Diamond, in *Force Majeure & Frustration* 229 (Ewan MCkendrick ed., Lloyd's of London Press Ltd 1991).

[71] *Libyan Arab Foreign Bank v. Banker's Trust Co* [1989] O.B 728, 772.

[72] This principle of law is predicated upon the defence of change of position where it will be inequitable to require a person whose position has changed to make restitution in full. *See Likin Gorman v. Karonale Ltd* [1991] 2A.C 548.

Also pre contract expenditure, except those (expenditure) incurred in the reasonable believe that a contract will be concluded, according to Ewan Mckendrick is unlikely to be included as an expenses under section 1(2) because at the time of the expenditure, there was no contract for the expenses to be incurred in the performance of the contract.

[73] Frustrated Contract Act [RSBC 1996] Ch. 166:

Section 5(1) 'In this section, "benefit" means something done in the fulfilment of contractual obligations, whether or not the person for whose benefit it was done received the benefit.'

[74] [1983] 2 A.C 352.

[75] *Supra*.

[76] Ewan McKendrick (ed) Force Majeure and Frustration of Contract (n. 70) 239.

[77] S. 2(3) of the Law Reform (Frustrated Contracts) Act 1943 provides thus:

terms. In addition, there will be no restitution for services performed under an illegal contract. Also, it has been held that breaches prior to discharge remain actionable, and services performed, benefits conferred and payments made after the frustrating event are outside the scope of the Act.[78]

5 Conclusion

The discussions above captured the relevant jurisprudential differences in the application of remedies under the doctrines of exemption/frustration/*force majeure*. It has been argued that some remedies, such as price reduction which can apply under the CISG and the UNIDROIT Principles, cannot apply under the English law doctrine of frustration because of the automatic discharge posture of the latter. Under the CISG, the buyer can ask for a price reduction although the delivery of defective goods was not attributable to the seller under Article 79.[79] More so, the remedy of cure has no place under the English common law doctrine of frustration, but under the CISG (Article 79(3)) and UNIDROIT Principles (Article 7.1.7(2)) there are provisions for the remedy of partial exemption or partial *force majeure*.

In addition, common law due to its strict rules produced a litany of irreconcilable principles via some celebrated cases. Nevertheless, these failed to help in bringing real justice to bear on what remedies are suitable after frustration occurred. Even the arrival of the Frustrated Contract Act of 1943 has not solved the problems of finding a balance between risk, frustration and justice under a frustrated contract. It has been canvassed that the main purpose of the 1943 Act is to provide flexible machinery for the adjustment of loss.[80] Still, the restrictive sphere of the applications of the Act and the needless isolation brought by the distinctions between specific goods/unascertained goods *vis-à-vis* frustration by perishing of goods/other kinds of frustration depict a pursuit of rhetoric and academics other than justice and fair play. More so, section 1(2) can be abused in certain situations involving mere bad bargaining. It is not palatable that a payer can be granted a shield under section 1(2) of the 1943 Act in order to escape the consequences of a bad bargain. This, without doubt, runs against the traditional common law principles that there is hardly any succour for a bad bargain made by a party to a contract. This is always the case if it is an onerous circumstance that discharged the contract.

Arguably, there should be a more inclusive and simple regime of remedies, where all modes of frustration should be brought together without the need for technical distinctions which are holding sway currently. It will be germane to note that section 2(5)(c) of the 1943 Act has been criticized. Goff and Jones[81] are of the opinion that the aforementioned provision should be repealed. In fact, the South Australia Frustrated Contract Act of 1988, which is a better and revamped version of the 1943 Act, applies to contracts which normally would not apply under the 1943 Act. In the final analysis, the English law (common law, 1979 Act, and 1943 Act) should be upgraded in order to key into the uniform remedial provisions of the CISG and UNIDROIT Principles so that the remedies of doctrine of impossibility can be applied uniformly.

Where any contract to which this Act applies contains any provision which, upon the true construction of the contract, is intended to have effect in the event of circumstances arising which operate, or would but for the said provision operate, to frustrate the contract, or is intended to have effect whether such circumstances arise or not, the court shall give effect to the said provision and shall only give effect to the foregoing section of this Act to such extent, if any, as appears to the court to be consistent with the said provision.

[78] Paul M. Bugden & Simone Lamont-Black, *Goods in Transit* 652 (Sweet & Maxwell 2013) para. 25–032. *See also Mohamed v. Alaga & Co.* [1998] 2 All E.R. 720.

[79] Atamer (n. 18) para. 41, 1070.

[80] Haycroft Waksman, *Restitution and Frustration*, J.B.L 207, 225 (1984).

[81] Lord Goff of Chieveley & Gareth Jones, *The Law of Restitution* 450 (7th ed., Sweet & Maxwell Ltd 2009).