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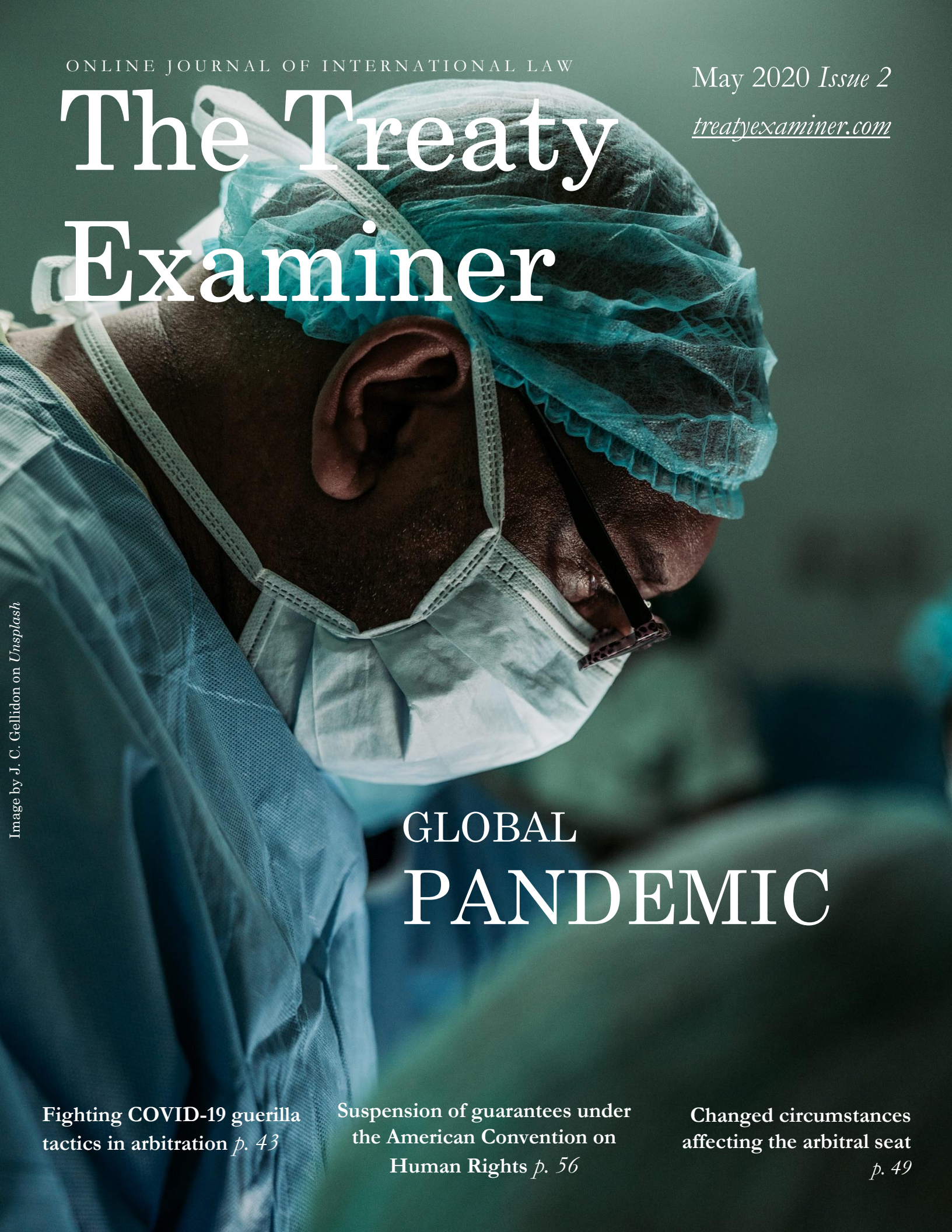

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GLOBAL PANDEMIC

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Editorial

The new respiratory virus discovered in Wuhan at the end of 2019 has sent a freezing shockwave throughout world trade and human society. The coronavirus disease 2019 (COVID-19) has made even the most basic forms of physical interaction dangerous, forcing businesses and citizens to make do with online alternatives. With no definite end in sight, the fear of sickness, death or irreparable economic damage has also invaded the international legal order.

This edition of *The Treaty Examiner* (Global Pandemic) is dedicated to the effects and implications of the COVID-19 pandemic on international law as a whole. From changes in the conduct of arbitration to breaches of international human rights law, *Issue 2* seeks to unravel the global legal disorder that has followed the pandemic. The journal received articles and commentaries relating to a variety of subjects on international law and arbitration, all addressing how COVID-19 has affected the international community.

In sum, this *Issue* seeks to provide a substantiated analysis of the present crisis, and examine the international legal norms that will serve as steppingstones to rebuild our society after this hardship has come to an end.

Juan Pablo Hernández
Editor-in-Chief

The Treaty Examiner, Issue 2 (May 2020), pp. 39-42

COVID-19 and non-refoulement

Juan Pablo Hernández*

Abstract

The refusal by some States to grant asylum to Rohingya refugees could violate international refugee law.

During the past months, the COVID-19 crisis has led States to adopt desperate measures to mitigate human suffering. However, as recent news has shown, many of these measures have in fact worsened ongoing ordeals. On 23 April 2020, Bangladesh declared in no uncertain terms that '[n]*ot a single Rohingya will be allowed to enter*' and refused to allow ships carrying Rohingya refugees into Bangladeshi territory.[1] Similar measures have been adopted by Malaysia.[2] These are the same Rohingya who have fled Myanmar to escape ongoing crimes against humanity and, allegedly, genocide.[3] In the past, Bangladesh provided Rohingya refugees safe haven from persecution, assistance that allowed the Prosecutor of the International Criminal Court to launch an investigation into possible international crimes committed in Rakhine State.[4] The precarious position

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[1] Pierfilippo Natta, *COVID-19 Is No Excuse to Abandon Basic Principles Protecting Refugees and Asylum Seekers*, 4 May 2020, available at https://thediplomat.com/2020/05/covid-19-is-no-excuse-to-abandon-basic-principles-protecting-refugees-and-asylum-seekers/.

[2] The Straits Times, *Malaysia Turns Back Rohingya Boat over Coronavirus Fears*, 18 April 2020, available at https://www.straitstimes.com/asia/se-asia/malaysia-turns-back-rohingya-boat-over-virus-fears-0.

[3] Human Rights Council, *Report of the Independent International Fact-Finding Mission on Myanmar*, 12 September 2018, available at https://www.ohchr.org/Documents/HRBodies/HRCouncil/FFM-Myanmar/A_HRC_39_64.pdf.

[4] International Criminal Court, *Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar* (ICC-01/19), more information available at https://www.icc-cpi.int/bangladesh-myanmar.

of the Rohingya has been confirmed, with reports of malnourishment, dehydration and vulnerability to the inherent risks of sea travel.[5]

International refugee law recognizes that persons are vulnerable to persecution from the same State that was supposed to protect them. As a result, under the 1951 United Nations *Convention Relating to the Status of Refugees* (Refugee Convention), persons outside their country of nationality or habitual residence who are unable or unwilling to return due to a well-founded fear of persecution ('refugees') and find themselves in the territory of a Contracting State must be granted basic protections, including the right of *non-refoulement*.[6] Non-refoulement, as recognized by the Refugee Convention and customary international law, provides that a State must not force refugees to return (*refouler*) to a territory where their life or freedom could be threatened.[7] Non-refoulment is the cornerstone of international refugee protection and is essential to prevent torture and cruel, inhuman or degrading treatment. As persons fleeing their home country on well-founded fear of genocide, the Rohingya are to be considered refugees under the Convention and therefore not subject to refoulement.

In that light, are Bangladesh and Malaysia acting in violation of international law? To start with, neither Bangladesh nor Malaysia are parties to the Refugee Convention.[8] However, a basis for liability could be derived from customary international law or general human rights law. The United Nations High Commissioner for Refugees has warned that States' sovereign power to regulate entry cannot result in a denial of people's right to seek asylum from persecution, even when facing a pandemic.[9] Similar

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[5] Amnesty International, *COVID-19 No Excuse to Sacrifice Rohingya Lives at Sea*, 17 April 2020, available at https://www.amnesty.org/en/latest/news/2020/04/covid-no-excuse-sacrifice-lives-more-rohingya-seek-safety-boat/.

[6] See Articles 7 to 34 of the Refugee Convention.

[7] See Article 33(1) of the Refugee Convention.

[8] Refugee Convention, Ratification Status as of 5 May 2020, available at https://treaties.un.org/Pages/ViewDetailsII.aspx?src=TREATY&mtdsg_no=V-2&chapter=5&Temp=mtdsg2&clang=_en.

[9] UN High Commissioner for Refugees (UNHCR), Key Legal Considerations on access to territory for persons in need of international protection in the context of the COVID-19 response, 16 March 2020, available at: https://www.refworld.org/docid/5e7132834.html.

statements have been issued by the International Organization for Migration[10] and the Council of Europe's Commissioner for Human Rights.[11]

Under international human rights law, the non-refoulement obligation allows no exceptions.[12] It is true that Article 33(2) of the Refugee Convention excepts cases where there are reasonable grounds to regard the refugee as a danger to the security of the refouling State. However, even assuming that the Refugee Convention could be invoked by Bangladesh and Malaysia, applying the exception here would border on *abus de droit*, especially if the motives are pretextual. The object and purpose of the Refugee Convention, including the refoulement prohibition, is to protect persons who are otherwise exceptionally vulnerable due to their being outside ordinary national State protection,[13] and a restriction to a right cannot serve to impair the essence of the right.[14] Refouling the refugees would force them to venture the perilous sea, malnourished and dehydrated, without the necessary medical equipment to withstand COVID-19 and with refuge only in a country that is persecuting them based on their ethnicity. Reports indicate that at least 60 Rohingya have died on their journey.[15] Most importantly, the alleged danger posed by the refugees (COVID-19 infection) comes from a world crisis outside of the refugees' control that is already affecting Bangladesh and Malaysia.[16]

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[10] International Organization for Migration, *IOM Calls for European Solidarity and Action on Mediterranean Rescue Amid COVID-19*, 9 April 2020, available at https://www.iom.int/news/iom-calls-european-solidarity-and-action-mediterranean-rescue-amid-covid-19.

[11] Council of Europe's Commissioner for Human Rights, *During Virus Crisis States Should Ensure Rescue at Sea and Allow Safe Disembarkation*, 16 April 2020, available at https://www.coe.int/en/web/portal/-/during-virus-crisis-states-should-ensure-rescue-at-sea-and-allow-safe-disembarkation.

[12] United Nations High Commissioner for Refugees, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol*, available at https://www.unhcr.org/4d9486929.pdf, para. 11.

[13] Erika Feller, Workshop on Refugees and the Refugee Convention 60 Years On: Protection and Identity, The Refugee Convention at 60: Still Fit for its Purpose?, United Nations High Commissioner for Refugees, 2 May 2011, available at https://www.unhcr.org/4ddb679b9.pdf.

[14] UN Human Rights Committee, General Comments Adopted by the Human Rights Committee Under Article 40, Paragraph 4, of the International Covenant on Civil and Political Rights, General Comment 27 on Freedom of Movement (Article 12), 1 November 1999, at paragraph 13; Article 5(1) of the 1966 International Covenant on Civil and Political Rights.

[15] Frontier Myanmar, *60 Rohingya Die, Hundreds Rescued from Boat After Weeks at Sea*, 17 April 2020, available at https://frontiermyanmar.net/en/60-rohingya-die-hundreds-rescued-from-boat-after-weeks-at-sea.

[16] Data on COVID-19 infection as of 5 May 2020, available at https://www.covidvisualizer.com/.

The legal principles at play appear to favor granting asylum to the Rohingya, especially considering the allegations of genocide. In the words of Clare Algar, Senior Director of Research, Advocacy and Policy at Amnesty International,[17] '[t]*he battle against COVID-19 is no excuse for regional governments to let their seas become graveyards for desperate Rohingya people*.'

[17] See *supra* note 5.

The Treaty Examiner, Issue 2 (May 2020), pp. 43-48

Fighting COVID-19 guerilla tactics in arbitration: Do not suspend, adapt

Emanuel Retana*

Abstract

The COVID-19 pandemic has landed a significant blow on national litigation systems. On the other hand, arbitration as a dispute settlement mechanism is in many ways suited to overcome this crisis. While some parties might try to take advantage of the circumstances to delay procedures, the right efforts by counterparties, arbitrators, and institutions should prove a point in favor of adapting and not suspending arbitrations.

I. Introduction

There is no doubt that the COVID-19 pandemic has had an unprecedented impact on our way of life. As businesses struggle to survive and people do their best to keep their commercial relationships afloat, one reality seems unavoidable: legal disputes will arise. Whether it is businesspeople having their contracts revised or avoided, or investors suing violations to BIT standards out of a government's handling of this crisis, claims are sure to ensue.

In some countries, including Guatemala,[1] the litigation system has virtually stopped as the constitutional right of access to justice seems to be quarantined with the rest of the population. In most cases, this is a natural result of the Judiciary's lack of

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[1] Judicial procedures, except for criminal ones, have been suspended in Guatemala since 16 March 2020 by order of the Supreme Court.

resources which impede judges and litigators from carrying a process remotely. The same is not true for the commercial arbitration system, which, in more than one way, has found it easier to adapt to the current circumstances to guarantee efficiency in dispute resolution.[2]

However, not everything is clear bright blue skies as this pandemic has created an opportunity for ill-intentioned practitioners to unjustifiably delay arbitrations. As a new weapon in their guerrilla tactics arsenal, some practitioners, accustomed to the excessive procedural maneuvers that some national systems allow – and incentivize, even – are attempting to use the COVID-19 crisis as an excuse to suspend arbitrations. These attempts, when notoriously frivolous, should be stopped either by arbitrators or by the efforts of diligent legal representatives.

II. The Role of Parties, Arbitrators, and Institutions

It goes without saying that no industry, discipline, or profession is completely unaffected by this crisis, especially in places with strong government restrictions. However, the current technologies provide many disciplines with the possibility to migrate into the virtual world. This possibility is certainly available for commercial arbitration if parties, arbitrators, and institutions are willing to put in the work.

Now, what exactly is the work? For parties and legal representatives, the first task should be one of true introspection. Are they capable of preparing or maintaining an arbitration under the current circumstances? Does their current technology and way of business allow them to collect and prepare evidence efficiently and extensively while working from home? Are parties able to communicate safely and directly with their lawyers? Which evidence are they intending to produce, and could this evidence be made readily available for virtual examination by arbitrators? Parties and their legal representatives should answer these questions honestly and objectively before deciding to begin an arbitration, or whether to suspend or maintain a procedure which has already begun.

As for arbitrators, their task, as it has always been, is to protect the integrity of the arbitration procedure, with the extensive powers that arbitration agreements and

[2] For example, the Singapore International Arbitration Centre (SIAC) is promoting the use of virtual hearings. See SIAC, *COVID-19 Information for SIAC Users*, available at: https://www.siac.org.sg/images/stories/press_release/2020/%5bANNOUNCEMENT%5d%20COVID-19%20Information%20for%20SIAC%20Users.pdf.

national laws grant them to do so. Faced with the change of circumstances that the COVID-19 pandemic has brought upon their ongoing arbitrations, the arbitral tribunal will have more issues to decide within its jurisdiction: are all the parties in the arbitration capable of effectively presenting their case? And is the tribunal itself capable of administering justice while satisfying the requirements of due process?

While answering these questions arbitrators should not solely focus on how they are used to handle arbitral procedures. As this pandemic has proven, the old ways are bound to change. Instead, arbitrators should research all the technological resources available to suit the necessities of each case.[3] Thus, the standard for suspending an arbitral procedure should not be unjustifiably lowered, this decision should always balance the extraordinary circumstances with the right to prompt and effective justice. By doing so, arbitral tribunals defend good faith practitioners against unfounded attempts at delaying justice made by opportunistic counterparties.

As for arbitral institutions, this should be considered a test and the commercial arbitration market should pay close attention to the work implemented by different arbitration centers. Those institutions who were quick to respond should be considered good prospects for the future, while those institutions that took a step back or no steps whatsoever and remained silent should be reprimanded by the laws of offer and demand.

Undoubtedly, arbitration centers should prepare sanitary measures if their offices are to remain open[4] and make those measures available to parties and arbitrators alike. But this is the least they should do. Arbitration centers should also offer institutionalized solutions like virtual arbitration recommendations,[5] as well as maintain constant communication with arbitrators and parties as to give them the proper preparation to make proper use of the tools provided.

Institutional arbitration is not a cheap method of dispute resolution, and therefore arbitration centers are very much obligated to keep guaranteeing their *customers*' money's worth, that is if they wish their business model to survive. These

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[3] Recently, A2J Tech Store and Peruvian Young Arbitrators held workshops on the use of tools for virtual hearings, which are available on Peruvian Young Arbitrators' Facebook.

[4] ICC, HKIAC, and LCIA are amongst those who have already taken measures.

[5] ICC *Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic*, Annexes I and II.

centers should do as much as is in their hands so as not to allow this pandemic to be used as a guerilla tactic by litigators.

Now, all of this is not to say that every arbitration must go on. Conversely, it must be recognized that some parties, arbitrators, or institutions are being or will be affected by this pandemic as to the point where suspending the arbitration is the only available measure. This is particularly true for those cases in which parties, arbitrators or institutions do not have the necessary means to maintain effective digital communication, in which evidence needs to be examined physically for whatever reason, or in which the parties, their legal representatives or the arbitrators simply cannot sustain the tasks comprised within their respective roles due, exclusively,[6] to the current circumstances.

III. Virtual Hearings as a Real Solution

Arbitration is already a system with a strong virtual-electronic presence. Notices of arbitration, claims, respondent memos, counterclaims and basically every submission may be presented electronically. Most of the parties' communications amongst themselves and with arbitrators happen through emails. It is even recommended to hold procedural hearings in a virtual manner.[7] Is the same still applicable for evidentiary and hearings on the merits?

Normally, Moot Courts are the ones to borrow experience from real life commercial arbitration, but this time the opposite would be quite useful. During the last 4 months, various prestigious Moot Court competitions found their current models frustrated by governments' restrictions on travel and academic events. Instead of postponing or cancelling their events, administrators and participants alike found a way to adapt into the world of virtual hearings.[8]

Certainly, there are many differences between an academic exercise and a real-life arbitration hearing. However, the real-life economic interest of the parties involved should stand in favor of looking for ways to celebrate these hearings, while still

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[6] Not out of pure negligence or a simple desire not to fulfill their responsibilities.

[7] See Article 24 of the ICC Rules of Arbitration.

[8] For example: The 27th edition of the Willem C. Vis International Commercial Arbitration Moot; XII edition of the Moot Madrid: *Competición Internacional de Arbitraje y Derecho Mercantil*; 7th edition of the *Competencia de Arbitraje Internacional de Inversión*.

maintaining governmental restrictions. In many cases, particularly in international arbitration, virtual hearings will even allow the parties to save resources which they would have normally spent in traveling and lodging expenses for representatives, witnesses, and arbitrators.

Nevertheless, this savings, many argue, still come at a cost. As the Moot Courts participants probably realized, delivering a convincing intervention through a screen is certainly a challenge. In real-life arbitration practice this is also true, and it will be equally as challenging to interview witnesses, question experts and examine evidence, in general.

Challenging, yes, but not impossible. Organizations are already putting their minds at work to provide practitioners and arbitrators with the best advice as to how to conduct these hearings in an effective manner.[9] Arbitrators should also do their best to go beyond the natural implications of virtual communication, and preserving the substance of communications maintained via videoconference.

Additionally, if we were to hold that the entire result of a hearing depends on the power a person has to *perform* convincingly in public, the entire legitimacy of commercial arbitration as a fair method of dispute resolution would crumble to pieces. But then again, practitioners should not be unprepared against the barriers presented by virtual communication.

As soon as possible, arbitral institutions, the parties, and the arbitrators should agree on the virtual communication service they wish to conduct their hearings on. When this is all settled, parties (and their representatives), arbitrators and administrative staff should familiarize themselves with the intricacies of this system.

As for the parties and their legal representatives, they should prepare and practice their interventions while using the respective service. This will provide a useful experience which could allow them to anticipate any possible setback. Also, when possible, legal representatives should communicate with witnesses via the selected service to acclimate them to the procedures, functions and even the interface of the *app*. The same applies to any other evidence which needs to be presented electronically.

As for the arbitrators and administrative staff, as soon as the videoconferencing *app* is selected, they should hold their internal communications through it. This will also allow them to familiarize themselves with the functions and interface of the *app*, which

[9] Such as A2J's efforts, see *supra* note 3.

is especially important with arbitrators who are not used to the ever-changing world of virtual conferencing.

Arbitrators could even consider to hold some sort of "*practice hearing*", in which the parties would not present any argument or evidence on the case, but with the sole purpose of agreeing on all the possible details of how the actual hearing will be conducted. Allocating times, establishing rules for communication between representatives, procedures for objecting during witness testimony, media and document sharing, procedures for party or witness questioning by the tribunal, amongst others.

The universe of available videoconferencing *apps* is not a limited one. With enough timing and effort, any arbitral tribunal, party, and legal representative interested in an efficient and effective arbitration procedure would be able to find one to suit their needs.

IV. Final Remarks

There are many reasons as to why a businessperson would prefer arbitration over national litigation. Certainly, the possibility to adapt to a crisis created by a pandemic was not on anyone's top of mind. Nevertheless, the flexible nature of arbitration as a dispute settlement mechanism must be put to the test in the interest of justice.

While the unavoidable bureaucratical nature of national litigation deprives interested parties from their right of access to justice, arbitral tribunals should be taking every available step to render prompt justice in arbitration procedures. In institutional arbitration, these efforts by arbitrators should be accompanied by strong support from arbitration centers.

But the biggest responsibility sits on the shoulders of the disputing parties and their legal representatives. During this highly uncertain times, businesspeople and lawyers alike should recognize the ever-growing value of legal certainty. And on the interest of said certainty, both claimants and respondents should make a genuine effort to see their arbitrations through, whenever that is possible.

Even, or even especially, during these troubling times, the good faith battle for that final award must go on.

The Treaty Examiner, Issue 2 (May 2020), pp. 49-55

Changed circumstances affecting the arbitral seat

Juan Pablo Hernández*

Abstract

COVID-19 has caused a debate to spark about the possibility to invoke hardship and force majeure in international commercial contracts. This article explores the extent to which those contractual excuses can apply to international arbitration agreements, specifically as regards the selection of arbitral seat. It is argued that the pandemic would generally not justify an arbitral tribunal to change the selection of seat of arbitration.

I. Introduction

The COVID-19 crisis has become a popular justification to excuse contractual obligations. Such grounds to suspend performance, exempt from damages, adapt terms or even terminate contracts, are extensively recognized in contract law. One further ambit where the effects of the crisis could become relevant is international arbitration, due to its contractual character.

Due process requires having a reasonable opportunity to present one's case.[1] It follows that undue obstacles to that right may make a change in the procedure necessary. For that reason, some legal systems allow inconvenience to justify changing the forum, under specified circumstances.[2] However, justifying a change of the arbitral

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[1] Principle 3.1 of the ALI/UNIDROIT Principles of Transnational Civil Procedure, available at https://www.unidroit.org/english/principles/civilprocedure/ali-unidroitprinciples-e.pdf.

[2] R Brand, *Forum Non Conveniens* (MPEPIL, 2019), at 1-3.

seat due to mere inconvenience has not received a sympathetic ear in international arbitration.[3]

On the other hand, what happens when the problem escalates beyond a mere inconvenience and becomes a real obstacle to due process or an existential threat to the arbitration itself? In our present times, given the extraordinary obstacles to human interaction and threats to human life and health, the doctrine of changed circumstances becomes relevant in all ambits, including the arbitral procedure. This article addresses the applicability, requirements and effects of the *rebus sic stantibus* principle on the selection of arbitral seat in international arbitration.

II. The Importance of Selecting an Arbitral Seat

Beyond the physical place where the parties and the tribunal will meet, the arbitral seat is the 'juridical domicile' of the arbitration.[4] The selection of the arbitral seat brings with itself not only the physical venue of the arbitration, but also the legal system that makes the proceedings effective. The arbitration law of the seat normally operates as *lex arbitri*, *i.e.*, the law governing the arbitration.[5] These laws determine the extent to which national courts at the seat can intervene into the arbitration, exercising supervisory jurisdiction (*e.g.*, to select an arbitrator in absence of an agreed default mechanism).[6]

Additionally, the selection of the seat determines which courts have the power to annul the resulting award, and under which conditions.[7] This is crucial, since annulment at the seat is a ground for refusing to enforce an award under Article V(1)*(e)* of the 1958 *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (New York Convention) and Article 36(1)*(a)(v)* of the UNCITRAL Model Law of International Commercial Arbitration (Model Law). The closeness between the seat and the arbitration also has effects in the choice of law for the arbitration agreement: in absence of party selection, the law of the arbitral seat normally governs the substantive validity of the agreement to arbitrate (Article V(1)*(a)* of the New York Convention).

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[3] G Born, *International Commercial Arbitration* (Kluwer Arbitration Internationa, 2014), p. 2075-2080.

[4] See *supra* note 3, p. 1542.

[5] B Nigel, C Partasides, A Redfern, M Hunter, *Redfern and Hunter on International Arbitration* (OUP, 2015), pp. 166-169.

[6] See *supra* note 5, pp. 167-168.

[7] See Article V(1)*(e)* of the New York Convention and Articles 34, 36(1)*(a)(v)* of the Model Law.

Thus, selecting the seat has central importance in the way arbitration will be conducted and the effectiveness of the resulting awards.

III. Changing the Seat?

In general, the parties are free to change the arbitral seat.[8] Arbitration is consensual and the arbitration agreement is a contract, so parties can modify its terms. A change in the place of arbitration should follow the same formal characteristics as required by the *lex arbitri* for the original arbitration agreement.

Whether a *third party* can change the arbitral seat is less certain. Countries with pro-arbitration regimes (such as those adopting the Model Law or ratifying the New York Convention) are under an obligation to recognize the parties' choice of arbitral procedure. Articles II and V(1)*(d)* of the New York Convention point out that arbitration agreements must be enforced in their totality and that the non-compliance with the parties' selected procedure is a ground to refuse enforcement of the resulting award. If the parties selected a seat, changing it could result in an unenforceable arbitral award.

On the other hand, the arbitration agreement is still a contract. As with other classes of contracts, a change of circumstances can result in the need to 'revise' or 'adapt' the agreement and allow it to display its full effects (*rebus sic stantibus*).[9] It is recognized that this principle is generally applicable to arbitration agreements and the selection of arbitral seat, although the circumstances in which it can apply are strict and exceptional.[10] Examples cited of cases that would justify changing the seat include changes in the seat's legal framework making the arbitration unworkable, or factual developments making the right to present one's case unduly difficult to implement, for one or both parties. In the words of Professor Gary Born, changing the seat is reasonable '*where a state undergoes radical political and/or legal transformation, fundamentally altering the statutory and judicial regime for international arbitration and raising serious questions*

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[8] See *supra* note 3, pp. 2072, 2073.

[9] See Articles 6.2.1-6.2.3 of the UNIDROIT Principles of International Commercial Contracts.

[10] The availability of hardship or *force majeure* largely depends on the existence of that defense under the law that governs the substantive validity of the arbitration agreement (*lex compromissi*). See H Berglin, 'The Iranian Forum Clause Decisions of the Iran-United States Claims Tribunal' (1987) *Arbitration International*, Volume 3, Issue 1, p. 46; G Born, *International Arbitration: Cases and Materials* (Wolters Kluwer, 2015), p. 421 (stating that the impossibility or frustration of the arbitration agreement is a matter of substantive validity).

about one party's ability to securely or fairly present its case, either in the arbitral proceedings or a subsequent annulment action'.[11]

An example that illustrates the exceptional character of this measure is the *Himpurna* case.[12] A court in Jakarta issued an order enjoining an arbitration proceeding and setting a fine of US$ 1 million per day if this order was breached. In response, the arbitral tribunal changed the physical venue from Indonesia to the Netherlands, without changing the *juridical* seat of the arbitration.

Thus, even in a case where the seat has become a hostile environment to the arbitration and the parties may be in danger of arbitrary action by the State, changing the seat may not be necessary. It is notable that the repercussions of the injunction (as an administrative or penal measure) did not pose an immediate threat to the *arbitration* itself (such as declaring the illegality of the resulting award or repealing the arbitration law). Thus, it was only necessary to change the physical place for hearings rather than the legal environment of the arbitration.

As explained by Professor Lalive, applying the requirements of hardship or *rebus sic stantibus* by analogy to arbitration agreements, the circumstances that give rise to the need to adapt the choice of seat must have been *(a)* reasonably unforeseeable at the time the arbitration agreement was concluded *and (b)* of such magnitude as to make the conduct of the arbitration unduly burdensome or prevent the normal and orderly course of the proceedings according to general principles of arbitration.[13]

It must be pointed out that the selection of a seat does not obligate the parties or the arbitrators to conduct proceedings, physically, in that country. As stated before, the seat is a juridical rather than a physical place. Therefore, if the change of circumstances can be avoided by conducting the arbitration in another country or online, then the principle of *rebus sic stantibus* would not authorize an adaptation of the arbitration agreement. This requirement of 'unavoidability' is not unheard of in the

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[11] See *supra* note 3, p. 2083.

[12] For more information on the case, see *Himpurna California Energy Ltd v. PT Persero Perusahaan Listruik Negara*, Procedural Order in Ad Hoc Case of 7 September 1999, Yearbook of Commercial Arbitration, Volume XXV (2000).

[13] P Lalive, 'On the Transfer of Seat in International Arbitration' in J Nafziger, S Symeonides, *Law and Justice in a Multistate World: Essays in Honor of Arthur T von Mehren* (Brill, 2002), p. 518.

context of contractual hardship.[14] This also ensures that in most cases, changing the seat will only be necessary when there is a change in the legal or political environment of the seat. When the change affects the physical suitability or convenience of the seat of arbitration, international law generally recognizes a form of the *forum non conveniens* doctrine – one allowing the tribunal to change the physical *venue* rather than the juridical *seat*.[15]

IV. Power to adapt arbitration agreements?

Whether the arbitral tribunal can change the arbitration agreement gives rise to mindboggling questions. The jurisdiction and powers of arbitral tribunals are primarily based on and limited by the arbitration agreement.[16] Therefore, to argue that the arbitral tribunal can change its constitutional document is, on its face, a ridiculous proposition. Recognizing a wide power to adapt arbitration agreements would create the malicious incentive that arbitrators can amplify or limit their own competence without regard to the parties' intent, which ultimately contradicts the most basic principles of international arbitration. In contractual terms, whether all arbitration agreements are subject to an implied *clausula rebus sic stantibus* is questionable.

However, there is a difference between expanding the tribunal's jurisdiction and changing the seat. Jurisdiction comes from the parties' consent to submit the dispute to arbitration. The consent to arbitrate is the central requirement of an arbitration agreement, without which the arbitration has no existence. Therefore, as the consent to arbitrate *creates* the arbitrator, the arbitrator should never be entitled to change that consent, to modify its own existence. Manifesting consent to arbitrate is a power that only the parties have, and without that consent the arbitral tribunal lacks all authority.

On the other hand, changing the seat entails changing the procedural framework of the arbitration. In general terms, determining the arbitral procedure is a power wielded by arbitrators.[17] Selecting the arbitral seat is not an essential requirement for the

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[14] See Article 79 of the 1980 United Nations *Convention on Contracts for the International Sale of Goods* (CISG) and the 2020 model hardship clause of the International Chamber of Commerce (ICC).

[15] See Article 20(2) of the Model Law; Article 14.2 of the 2018 HKIAC Administered Arbitration Rules; Article 16.3 of the 2014 LCIA Arbitration Rules; Article 21.2 of the 2016 SIAC Arbitration Rules; Article 18(2) of the ICC Arbitration Rules.

[16] See *supra* note 5, p. 71.

[17] See Article 19(2) of the Model Law.

existence and validity of the arbitration agreement. Most arbitral institutions as well as the Model Law already recognize that arbitrators can select the seat if the parties have not made a choice.[18]

The problem arises when a choice has been made. Not respecting the parties' chosen procedure, including the seat, could make the award unenforceable. The power to adapt the selection of arbitral seat could only be recognized where the change of circumstances all but *invalidates* the original selection – for instance, if the seat declares arbitration illegal. In those cases, one could argue that there is no 'valid' seat selection to speak of, which empowers the tribunal to fill the gap. That way, there would be no need to invoke a so-called 'implied *clausula rebus sic stantibus*'. If the supervening event threatens to render the arbitration agreement null and void, inoperative or incapable of being performed, the tribunal should be able to sever the arbitration from the seat to preserve the parties' consent to arbitrate – replacing the original choice for one that gives full effect to the parties' intent. The tribunal would not be overriding the parties' wishes – it would be insulating that intent from the consequences of the changed circumstances. This approach is analogous (though not identical) to the validation principle in the context of choices of law.[19]

Changing the seat in most cases is unnecessary and results in unreasonable procedural unfairness from the perspective of international arbitration. If the arbitration has been rendered too difficult or impossible, it would not be hard to convince the parties to make the change themselves. A unilateral decision by the tribunal to change the seat is highly controversial and a procedural chimaera, one that could be prohibited under the applicable laws. Therefore, it should be avoided in most if not all cases.

This discussion could be different if the arbitral *institution*[20] rather than the tribunal makes the change. Moreover, some institutional rules define a 'default' seat.[21] This could be a generally good alternative that reduces discretion in the task of selecting

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[18] See Article 14 of the 2018 HKIAC Administered Arbitration Rules; Article 16.2 of the 2014 LCIA Arbitration Rules; Article 21.1 of the 2016 SIAC Arbitration Rules.

[19] See Principle XIV:3 of the Translex Principles.

[20] Under the ICC Arbitration Rules, it is the ICC Court that selects the arbitral seat in the absence of a choice by the parties. See Article 18(1) of the ICC Arbitration Rules.

[21] Under the LCIA Arbitration Rules, in default of party agreement, the arbitral seat is London, England, unless the tribunal determines that another seat is more appropriate. See Article 16.2 of the 2014 LCIA Arbitration Rules.

the new seat. As can be noted, the power to 'change' the seat will depend on the procedural framework of the arbitration itself.

V. Implications for COVID-19

Could the COVID-19 pandemic justify changing a seat of arbitration? This is a case-by-case inquiry into the fulfilment of the three identified requirements (unforeseeability, gravity, unavoidability).

As for foreseeability, if the arbitration agreement was concluded before the first cases of COVID-19 were reported, there is a solid case to argue that the change of circumstances was unforeseeable. The foreseeability of restrictions to the possibility of conducting a regular arbitration would increase as time goes on.

On the other hand, the requirements of gravity and unavoidability would most likely not be met. COVID-19 prevention imposes physical hurdles to the ability to hold hearings and take evidence. These are obstacles that can be avoided by a regular exercise of the tribunal's power to determine the procedure (*e.g.*, by holding virtual hearings). Changing the seat, as stated above, is necessary almost exclusively when the *legal* or *political* environment of the seat changes – for instance, when the seat unexpectedly expands the non-arbitrability doctrine or grounds of annulment, or when a political conflict between the seat and the expected place of enforcement makes the enforcement of the award uncertain. As can be noted, these are rather extraordinary circumstances. Despite its unforeseeability, magnitude and undeniable economic consequences, it is questionable that the COVID-19 pandemic, of itself, could trigger the need to change the arbitral seat.

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COVID-19: Suspension of guarantees under the American Convention on Human Rights

Marco Tulio León*

Abstract

The coronavirus pandemic has forced States to suspend guarantees under the American Convention on Human Rights. This article explores the requirements to suspend human rights guarantees in a manner consistent with international law, as well as their interpretation in the Inter-American Human Rights System.

I. Introduction

When the very existence of a State, its security or the public order are in danger, international human rights law (IHRL) allows the restriction or suspension of certain guarantees to preserve the political community as a whole. Generally, those situations are named "states of exception" or "states of emergency". Under the provisions of the 1969 *American Convention on Human Rights* (Convention), the State Parties must observe certain restraints and requirements when they avail themselves of the right of suspension of guarantees. Since due to the coronavirus pandemic a great number of the American States have resorted to these measures,[1] this article will present and examine those requirements and their interpretation and application by the Inter-American

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[1] United Nations Treaty Collection, *International Covenant on Civil and Political Rights. Depositary Notifications (CNs) by the Secretary-General of the United Nations under Article 4(3) (Treaty Reference IV-4)*, updated as of 25 May 2020, available at https://treaties.un.org/Pages/CNs.aspx?cnTab=tab2&clang=_en.

Commission of Human Rights (the Commission) and the Inter-American Court of Human Rights (the Court).

II. The Legal Criteria for the Suspension of Guarantees

Article 27, paragraph 1, of the Convention reads as follows:

> 1. In time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the ground of race, color, sex, language, religion, or social origin.

According to the Commission, for the establishment of a state of emergency, the States Parties have to comply with these requirements of IHRL: the restrictions on certain rights or guarantees must *(i)* respect the principle of legality, *(ii)* be necessary in a democratic society and *(iii)* be proportionate to the aim pursued – in this case, the protection of health and life.[2]

Regarding the first requirement, Article 30 of the Convention states:

> The restrictions that, pursuant to this Convention, may be placed on the enjoyment or exercise of the rights or freedoms recognized herein may not be applied except in accordance with *laws* enacted for reasons of general interest and in accordance with the purpose for which such restrictions have been established (emphasis added).

The Court, interpreting Article 30 of the Convention, has established that it refers to the formal concept of law, *i.e.*, '*a general legal norm… passed by the democratically elected legislative bodies established by the Constitution, and formulated according to the procedures set forth by the constitutions of the States Parties for that purpose*'.[3] However, the same Court has determined that this requirement does not preclude the delegation of authority in this area, but that possibility must be enshrined in the Constitution and the exercise of that power must be subject to effective control.[4] This last finding recognized the power

[2] Inter-American Commission on Human Rights, *Pandemic and Human Rights in the Americas*, Resolution No. 1/2020, 10 April 2020, p. 10.

[3] Inter-American Court of Human Rights, *The word "laws" in article 30 of the American Convention on Human Rights*, Advisory Opinion OC-6/86, 9 May 1986, at paragraph 38.

[4] See *supra* note 3 at paragraph 36.

granted in certain American States to the executive branch to enact law decrees or executive decrees suspending some guarantees in specific cases.[5]

Additionally, regarding the necessity of the declaration of a state of emergency, the State must prove that a real, serious, imminent, and exceptionally grievous danger exists that threaten its very independence or security and justifies that measure.[6]

III. The Suspension of Specific Guarantees and Its Limits

In its paragraph 2, Article 27 of the Convention establishes a list of guarantees that cannot be suspended in any case. Thus, except those mentioned in that provision, all the other rights guaranteed by the Convention could be suspended. That paragraph states as follows:

> 2. The foregoing provision does not authorize any suspension of the following articles: Article 3 (Right to Juridical Personality), Article 4 (Right to Life), Article 5 (Right to Humane Treatment), Article 6 (Freedom from Slavery), Article 9 (Freedom from Ex Post Facto Laws), Article 12 (Freedom of Conscience and Religion), Article 17 (Rights of the Family), Article 18 (Right to a Name), Article 19 (Rights of the Child), Article 20 (Right to Nationality), and Article 23 (Right to Participate in Government), or of the judicial guarantees essential for the protection of such rights.

About the last phrase of this paragraph, the Court has established that the judicial guarantees essential for the protection of the rights that cannot be suspended or derogated, '*include habeas corpus (Art. 7(6)), amparo, and any other effective remedy before judges or competent tribunals (Art. 25(1)), which is designed to guarantee the respect of the rights and freedoms whose suspension is not authorized by the Convention*'.[7]

Under Article 27, as interpreted and applied by the Commission, the restraints imposed on guarantees subject to suspension must comply, at least, with the following parameters: legality, necessity, proportionality, timeliness, compatibility with other obligations under international law and nondiscrimination.[8]

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[5] See, *e.g.*, Article 138 of the Constitution of Guatemala; Article 187 of the Constitution of Honduras; Articles 212 to 216 of the Constitution of Colombia; and others.

[6] See *supra* note 2, p. 10; Claudio Grossman, 'A framework for the examination of states of emergency under the American Convention on Human Rights' (1986) *American University International Law Review*, Volume 1, Issue 1, p. 42.

[7] Inter-American Court of Human Rights, *Judicial guarantees in states of emergency (Arts. 27(2), 25 and 8 American Convention on Human Rights)*, Advisory Opinion OC-9/87, 6 October 1987, at paragraph 41.

[8] See *supra* note 2, pp. 8, 10 and 11.

The legality requirement is understood as interpreted in the preceding paragraphs. Proportionality requires '*that suspension of rights or guarantees is the only means of addressing the situation, and that it cannot be dealt with by the use of the regular powers of government, and that the measures taken do not cause greater harm to the right that is suspended in comparison with the benefit obtained*'.[9] The necessity parameter can be understood as incorporated in the previous one since it requires that the suspension or restriction of rights is the only option to deal with the emergency due to the lack of a less drastic one. The temporality or timeliness requirement means that the measures taken must be in force only '*for the period of time strictly required by the exigencies of the situation*'.[10] The next requirement, referring to other obligations under international law adopted by a State Party in question, establishes that the suspension of guarantees provided for in Article 27 shall not be inconsistent with other conventional or customary obligations binding the State Party. In this regard, other provisions of human rights treaties, such as Article 4 of the 1966 *International Covenant on Civil and Political Rights* (ICCPR), have to be taken into account when resorting to a state of emergency or suspension of guarantees.[11] Finally, Article 27(1) requires that the measures adopted '*do not involve discrimination on the ground of race, color, sex, language, religion, or social origin*'.

IV. Formal Obligations and Interpretation of Article 27 of the Convention

Article 27, paragraph 2, of the Convention, establishes:

> 3. Any State Party availing itself of the right of suspension shall immediately inform the other States Parties, through the Secretary General of the Organization of American States, of the provisions the application of which it has suspended, the reasons that gave rise to the suspension, and the date set for the termination of such suspension.

This provision is similar to Article 4(3) of the ICCPR and imposes a formal obligation over the States to notify its decision to the other States Parties through the Secretary General of the Organization of American States. Moreover, that provision requires the States to justify the suspension of guarantees since they must provide the reasons that gave rise to the state of emergency and to set the duration of such measure, requirements that are linked to the substantive parameters of necessity and timeliness that are mandated by Article 27(1) of the Convention.

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[9] See *supra* note 2, p. 10.

[10] Article 27(1) of the Convention.

[11] See *supra* note 6, p. 52.

Article 27 of the Convention must be interpreted not only according to the general rule of interpretation of treaties[12] but also under the special rules of interpretation laid down in Articles 29 and 30 of the same Convention. It is worth mentioning certain aspects of these two Articles: **First**, Article 29 enshrines the rule of restrictive interpretation, the negative counterpart of the *pro homine* or *pro persona* principle of interpretation, *i.e.*, that no rule contained in the Convention can be interpreted as restricting or excluding other human rights recognized by other treaties or municipal law or that are inherent in the human personality; thus, any rule imposing restrictions on rights must be narrowly construed.[13] **Second**, Article 30 establishes another limit to the suspension of guarantees, since it requires the enactment of a law or another rule of similar character.[14]

Finally, Article 29(c) establishes a substantive limitation stating that the guarantees derived from representative democracy as a form of government shall not be suspended and within those guarantees are the judicial procedures essential for the protection of the rights that cannot be suspended or derogated.[15] The Court has pointed out that the existence and effectiveness of these guarantees derive from Article 27(1) of the Convention, since that provision establishes a '*general requirement that in any state of emergency there be appropriate means to control the measures taken, so that they are proportionate to the needs and do not exceed the strict limits imposed by the Convention or derived from it*'.[16] Consequently, if the rule of law and a republican government are to be maintained to avoid the abuse of power during a state of emergency, and to secure the full restoration of the guarantees suspended after the cessation of the situation that gave rise to it, a strong and functional judiciary is required.

[12] Articles 31 and 32 of the 1969 *Vienna Convention on the Law of Treaties*.

[13] See *supra* note 6, p. 40.

[14] See *supra* page 56.

[15] See *supra* note 7, at paragraph 34 *et seqq*.

[16] See *supra* note 7, at paragraph 21.

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Unauthorized trade in endangered species under international environmental law

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Abstract

As scientists struggle to discover the animal host that caused COVID-19 to 'jump' to humans, recent reports indicate that illegal trade in pangolins, endangered species considered to be natural reservoirs of coronaviruses, has flourished online. This article explores the legal status of trade in endangered species under international law and the potential liability of social media sites that have provided an outlet for such practices.

I. Introduction

Amid desperate research on the possible origin of the SARS-COV-2 virus that causes COVID-19, news has arisen of unidentified individuals selling pangolins on social media and instant messaging platforms such as Facebook and WhatsApp.[1] Such commercial activities, involving the sale of live pangolins as well as their parts for human consumption, have attracted media attention and legal scrutiny during the last few weeks. Pangolins, which belong to the order *Pholidota*, are listed in Appendix I of the 1973 *Convention on International Trade in Endangered Species of Wild Fauna and Flora*

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[1] Independent, *Endangered Pangolins for Sale on Facebook amid Potential Link to Coronavirus*, 8 May 2020, available at: https://www.independent.co.uk/environment/coronavirus-pangolins-outbreak-endangered-species-wildlife-trafficking-a9504776.html; TechCrunch, *Facebook Users are Buying and Selling Pangolin Parts, Even Though It's Illegal*, 6 May 2020, available at: https://techcrunch.com/2020/05/06/facebook-exotic-animal-sales-pangolin-animal-trafficking/.

(CITES), the so-called 'blacklist' of endangered species.[2] Most topically, pangolins are known, among other species such as the horseshoe bat,[3] to be natural reservoirs of coronaviruses.[4] Unauthorized (and potentially illegal) sale of pangolins and similar consumption practices have triggered international concerns about how the SARS-COV-2 virus 'jumped' from its natural reservoir to humans and whether similar contagious viruses could make the same transition in the future. This article explores the status of Appendix I species under CITES and the potential liability of social media sites for unauthorized sale of those species on their platform.

II. Trade of Endangered Species under International Law

International law draws a distinction between the concepts of 'species' and 'specimen' – while species is an abstract term, referring to the scientific concept of '*a population or series of populations of organisms capable of freely interbreeding with one another under natural conditions*',[5] specimen refers to a member of the species, either animal or plant, or a recognizable part or derivative thereof.[6] States customarily retain territorial jurisdiction over *specimens*, but international law governs (and sometimes protects) the abstract *species* itself.[7] A species declared 'endangered' for the purposes of international law is to be considered the common heritage of mankind and not subject to ordinary rules of trade, usage or appropriation.[8]

In that sense, CITES defines a list of species that are excluded from trade and protected due to their endangered status: Appendix I. According to Article II of CITES, trade in Appendix I species is subject to special authorization which can only be granted '*in exceptional circumstances*'. This rule applies to '[a]*ll trade in specimens of species included in*

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[2] P Sand, *International Protection of Endangered Species* (MPEPIL, 2012), at paragraph 11.

[3] See D Rihtarič, P Hostnik, A Steyer, J Grom, I Toplak, 'Identification of SARS-like Coronaviruses in Horseshoe Bats (*Rhinolophus hipposideros*) in Slovenia' (2010) *Nature Public Health Emergency Collection*, Volume 155, pp. 507-514.

[4] T Lam, M Shum, H Zhu, Y Tong, X Ni, Y Liao, W Wei, W Cheung, W Li, L Li, G Leung, E Holmes, Y Hu, Y Guan, 'Identifying SARS-CoV-2 Related Coronaviruses in Malayan Pangolins' (2020) *Nature* (unedited article accepted for publication), available at: https://www.nature.com/articles/s41586-020-2169-0.

[5] See E Wilson, *The Diversity of Life* (Belknap Press HUP, 2010).

[6] See *supra* note 2, at paragraph 1.

[7] See *supra* note 6.

[8] See *supra* note 6.

Appendix I',[9] which, under CITES, covers export, re-export, import and introduction from the sea.[10] The CITES prohibition, then, applies to *international* trade, as opposed to transactions within State borders (which would presumably be governed by that State's national law).[11] This is confirmed by the preamble of CITES, stating as one of its purposes to prevent '*over-exploitation* [of endangered species] *through international trade*', and by Article XIV(1)*(a)*, providing that Contracting States are free to apply more restrictive endangered species protection internally or even to prohibit commerce in such species altogether.

Special rules apply to specimens depending on their origin and purpose: for instance, Appendix I specimens are to be treated as belonging to Appendix II (subject to less strict regulation) when bred in captivity (for animal species) or artificially propagated (for plant species) for commercial purposes.[12] Trade prohibitions do not apply if the specimen is a personal or household effect, except as provided in Article VII(3).[13] In any event, States of import shall be satisfied that specimens are not being imported or introduced from the sea '*for primarily commercial purposes*'.[14]

Pangolins, introduced to Appendix I in 2017,[15] are among a wide variety of species that are protected from unauthorized international trade. However, with the recent reports of social media pangolin trafficking, it appears that the provisions of CITES have not fully deterred practices that deplete pangolin populations worldwide.

III. Liability for Social Media Sites under International Law

Could Facebook or WhatsApp, as the 'outlet' for the potentially illegal trade in pangolins, be held liable for a breach of CITES? As a starting point, CITES is an international treaty and therefore only Contracting States are directly subject to liability

[9] Article III(1) of CITES (emphasis added).

[10] Article I*(c)* of CITES.

[11] See, for instance, the United States Endangered Species Act (ESA) – for more information, see the *FAQ* on permits involving endangered species issued by the United States Fish and Wildlife Service, available at: https://www.fws.gov/endangered/permits/faq.html.

[12] Article VII(4) of CITES.

[13] Article VII(3) of CITES.

[14] Articles III(3)*(c)*, III(5)*(c)* of CITES.

[15] See CITES, *Press Release: New CITES Trade Rules Come Into Effect as 2017 Starts*, 2 January 2017, available at: https://www.cites.org/eng/new_CITES_trade_rules_come_into_effect_as_2017_starts_02012017.

in case of breach. Since Contracting States are under an obligation to prevent trade in Appendix I species as provided by Articles II and III of CITES, except as permitted in exceptional circumstances or as otherwise provided by CITES, uncontrolled trade across a Contracting State's borders would trigger liability under the convention. In other words, an unauthorized act of 'trade' as understood in CITES would constitute a breach of the convention *by the State*, not by the private entity undertaking the act.[16]

Similarly, it is possible that current transactions affecting pangolins or similarly endangered species would not even involve 'trade' as understood under Article I of CITES – *i.e.*, export, re-export, import or introduction from the sea.[17] Such a transaction would not trigger the provisions of CITES but would rather be subject to national law.[18] Even if the transaction were to fall within the definition of 'trade', liability would still attach under national rather than international law.[19] The subject of corporate liability under international law is a novel issue in current development. Scholars are presently tackling the issue of whether human rights violations or similar breaches of customary international law by corporations are to be taken as breaches of *international law* proper, or as breaches of national law to the extent that they incorporate international norms.[20] For instance, recent Canadian case law has recognized that, since international law is part and parcel of Canadian law, corporations could, in principle, be held liable for breaches of customary international law.[21]

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[16] See Article 2(1)(a) of the 1969 *Vienna Convention on the Law of Treaties* and Article 2(1)(a) of the 1986 *Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations*, providing that treaties bind States and international organizations.

[17] See *supra* note 10.

[18] Article XIV(1)*(a)* of CITES.

[19] Article VIII of CITES.

[20] A Franklin, *Corporate Liability under Customary International Law* (2019) Völkerrechtsblog, available at: https://voelkerrechtsblog.org/corporate-liability-under-customary-international-law/.

[21] The Supreme Court of Canada states that the view that corporations are not subject to customary international law '*misconceives modern international law*'. International law contains customary rules that prohibit certain conduct, regardless of whether the perpetrator is a State (presumably referring to human rights violations and international crimes). The Court reminds the parties that, while States are the main subjects of international law, the international legal order has '*so fully expanded beyond its Grotian origins that there is no longer any tenable basis for restricting the application of customary international law to relations between States*'. In the Court's view, human rights are '*discrete legal entitlements* (...) *to be respected by everyone*', not only by the State. The Court cites writing by Professor Koh making the compelling argument that, considering that international criminal law imposes criminal liability on corporations, it would be absurd to argue that it cannot impose civil liability as well. See *Nevsun Resources Ltd v. Araya* [2020] Canada, Supreme Court, at paragraphs 105-113.

International criminal law (ICL) has been a pioneer in this regard. Although in the inception of ICL corporate criminal liability would have been inconceivable,[22] some modern international courts have declared themselves competent to impose criminal liability directly on corporations.[23] Precedent by the International Criminal Tribunal for Rwanda demonstrates that corporate shareholders can be held criminally liable for crimes committed by those within their effective control.[24] Although before the International Criminal Court the principle of *individual* criminal responsibility still reigns, the Rome Statute allows the individual members of corporate structures to be held liable for crimes committed within the corporation's chain of command.[25]

To be sure, the issue of (civil) corporate liability outside of ICL is still open. However, as this piece of *lex ferenda* becomes *lex lata*, scholars must look closely at how

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[22] The words of the International Military Tribunal sitting at Nuremberg are illustrative of the early adoption by ICL of the principle of individual criminal responsibility: '*Crimes against International Law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of International Law be enforced*.' See *Judgment of 1 October 1946* [1946] International Military Tribunal at Nuremberg, p. 447.

[23] In 2014, the Special Tribunal for Lebanon found that legal entities, such as corporations, could be tried for contempt charges under its criminal statute. In making that finding, the Tribunal reviewed the rules of interpretation under international law, human rights law and international criminal law and procedure. See *Decision on Interlocutory Appeal Concerning Personal Jurisdiction in Contempt Proceedings* [2014] Appeals Panel, Special Tribunal for Lebanon, available at: https://www.stl-tsl.org/crs/assets/Uploads/20141002_F0012_PUBLIC_AP_Dec_on_InteLoc_Appl_Jurisdic_Cont_Proceed_EN_AR_FR_Joomla.pdf?, at paragraphs 33-64; See also Human Rights Committee, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts*, UN Doc A/HRC/4/35, 19 February 2007, at paragraph 22: '*...corporate responsibility is being shaped through the interplay of two developments: one is the expansion and refinement of individual responsibility by the international ad hoc criminal tribunals and the ICC Statute; the other is the extension of responsibility for international crimes to corporations under domestic law. The complex interaction between the two is creating and expanding web of potential corporate liability for international crimes, imposed through national courts*.'

[24] In 2003, the International Criminal Tribunal for Rwanda convicted the director of Radio Télévision Libre des Mille Collines, Ferdinand Nahimana, for incitement of genocide. The acts in question involved radio broadcasts calling for the extermination of Rwandan Tutsis. The Tribunal found Nahimana liable due to his editorial control over the radio, even though Nahimana himself did not make any statements amounting to genocide incitement. See *Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze, Judgment and Sentence* [2003] International Criminal Tribunal for Rwanda, Trial Chamber I, pp. 325-333.

[25] See Articles 25(1) (clarifying that the International Criminal Court only has jurisdiction over natural persons and establishing the principle of individual criminal responsibility), 25(3)*(a)*, *(b)* (as regards indirect perpetration, *i.e.*, perpetration of a crime through another person, and ordering, soliciting and inducing of international crimes), and 28 (establishing command and superior responsibility for international crimes in military and civilian contexts) of the Rome Statute.

international law reacts to corporate acts that, if taken by a State, would breach international legal obligations.

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Limitation of liability and 'corona clauses': Allocation of risks in international commercial contracts before and after COVID-19

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Abstract

The emergence of COVID-19 has created a myriad of problems in the field of international contract law. This article analyzes contractual clauses capable of addressing the COVID-19 crisis, including exclusion and limitation clauses, force majeure *provisions and the newly-arisen 'corona clauses'.*

I. Introduction

It is widely known that parties, through their contracts, can allocate the costs and risks that they are likely to encounter in a specific transaction. The risks that the parties must address will depend on the nature of the transaction. In some occasions the allocation of risks is expressly drafted in the contract, while there are other occasions in which the parties did not agree upon or foresee specific risks. In such scenarios, the law applicable to the contract will help the parties, the judge or arbitral tribunal to allocate the risk and determine which party must assume it.

The present article will address allocation of risk clauses under the 1980 United Nations *Convention on Contracts for the International Sales of Goods* (CISG) as applied to contracts concluded before and after the COVID-19 pandemic.

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II. Risk Allocation Before COVID-19

Limitation and exclusion clauses are common in international commercial contracts. Such clauses are a way in which the parties allocate risks, in the understanding that if one of the parties breaches the contract, the clause will either *(a)* exclude their liability or *(b)* limit it to a specific amount.

Along with other clauses intended to limit risks, such as guarantees, limitation and exclusion clauses used to be the common contractual clauses drafted in commercial transactions before COVID-19.

The most common remedy for breach of contract are damages, which justifies the existence of limitation and exclusion clauses that usually target liability for damages. Because damages are difficult to measure in a precise manner before a breach occurs, the parties may wish to deal with the risk beforehand. The reasons why the parties may want to predict that risk will vary depending on the situation, but most of the time it is to know in advance the amount in payment that a judge or an arbitral tribunal can order.

The limitation and exclusion of liability agreed to by the parties to a contract for the international sale of goods is a matter governed but not settled by the CISG. Regarding claims to compensation for the breach of contractual obligations, primarily regulated by Article 74 of the CISG, parties are free to limit or exclude by agreement the amount that can be claimed and the circumstances under which damages can be claimed.

Commonly, when parties agree on exclusion or limitation of liability clauses, they modify the regime established in the CISG. Parties are empowered to do so under Article 6 of the CISG, which states that the parties may exclude the application of the Convention or derogate from or vary the effect of any of its provisions. This Article allows the parties to modify or derogate the provisions of the convention, including Articles 74 to 79.

Although Article 6 of the CISG gives the parties freedom to derogate remedial provisions, it is important to mention that the obligee must retain at least a minimum adequate remedy; meaning that the limitation and exclusion clauses must not create a situation where performance of the contract becomes optional, subject only to the will

of the obligor. That scenario is not possible under CISG since it will contravene both the general principle of reasonableness and good faith in international trade.[1]

a) Limitation clauses

The parties to a contract can express their limitation of liability in different ways: fixed sum, ceiling or cap, percentage of the performance in question, or deposit retained. Parties may limit their liability to a certain amount of money, but also to a certain type of losses: direct damages, consequential damages; and may limit liability to a certain type of conduct, such negligence or fault.[2]

b) Exclusion of liability clauses

Through exclusion of liability clauses, the risk is totally transferred to one of the parties. This type of clauses is more difficult to negotiate since it implies that one of the parties, in case of a future dispute, will not be responsible for any damages.

III. Risk Allocation After COVID-19

During the COVID-19 crisis, one of the few areas that has not yet fully stopped is international commerce. Although there have been many restrictions in customs and the free movement of goods, international trade has kept on going, even evolving through e-commerce. Therefore, the work for lawyers who draft contracts continues to be challenging each day.

Nowadays, the challenges for the international commercial contracts relies on the foreseeability of allocation of risks. Before COVID-19, price was the main consideration while negotiating the contracts; but now, after COVID-19, the minimization of risk has become the most important aspect to negotiate in the contract.[3]

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[1] CISG Advisory Council Opinion No. 17, *Limitation and Exclusion Clauses in CISG Contracts,* page 11.

[2] See *supra* note 1, page 4.

[3] MILLIGAN, Ellen, et. alt., *Corporate Contracts Get a Rewrite for the Post-Pandemic Era,* Bloomberg Businessweek, available at: https://www.bloomberg.com/news/articles/2020-05-06/l-brands-wework-fights-point-to-pandemic-premium-in-deals-ahead?utm_campaign=likeshopme&utm_content=www.instagram.com%2Fp%2FCA31cBhnGJ8%2F&srnd=businessweek-v2&sref=xuVirdpv&utm_medium=instagram&utm_source=url_link

Companies involved in ongoing negotiations are discussing whether to include or exclude pandemics in their *force majeure* provisions, which in many occasions are boilerplate clauses in many deals. The reason of the inclusion or exclusion of such clauses is the fact that the buyer or the seller my demand to pay more or give up something else for the ability to walk away from a deal in the event of a second wave of the coronavirus or some future viral outbreak. It must be taken in consideration that the pandemic is no longer unforeseeable.

The purpose of this article is not to examine *force majeure* clauses, which is a topic related to the COVID-19 situation; but what is certain is that in the actual COVID-19 times and in post-COVID-19 contracts, liability clauses will be more present in international commercial contracts and therefore judges and arbitral tribunals will be analyzing more such clauses since disputes will arise.

Nowadays, parties are incorporating so-called 'corona clauses' to their contracts, especially in loan agreements and real estate contracts.[4] This 'corona clause' is the new name for clauses that tend to free businesses affected by viral outbreaks. But at the end of the day, the nature of the 'corona clause' is a risk allocation clause equivalent to limitation of liability, exclusion of liability of *force majeure* clauses.

During the upcoming months and years, there will be disputes arising on what is predictable and foreseeable, but if today's contracts include "pandemics" or "viral outbreaks", risk will not only be allocated to buyers or sellers, but also to the lawyers that drafted the contract.

Pre-COVID-19 clauses have led to disputes over agreements struck before the crisis hit. Post-COVID-19 contracts will be more explicit about acts of god and what scenarios can be considered as *force majeure* events or events that can be considered as a limitation or exclusion of liability.

IV. Gap-filling Provisions under the CISG

As stated before, under Article 6 of the CISG, parties may exclude the application of the Convention or derogate from or vary the effect of any of its provisions. Despite the

[4] DOBSON, Amy, *Watch out for the "corona clause" being added to real estate contracts,* Forbes, available at: https://www.forbes.com/sites/amydobson/2020/03/30/watch-out-for-the-corona-clause-being-added-to-real-estate-contracts/#5c35574e16c5; RENNISON, Joe, *"Corona clause" creeps into businesses' loan documents,* Financial Times, available at: https://www.ft.com/content/5ef2d920-686a-11ea-800d-da70cff6e4d3

limitation imposed by the CISG on the contractual liability of the parties, such as the foreseeability rule contained in Article 74, the duty to mitigate in Article 77 and the exemptions due to an impediment in Article 79, there is no provision on the CISG that address specifically the parties' agreement on the limitation or exclusion of liability for failure to perform the contract.[5]

The parties' agreement on the limitation or exclusion of their own liability falls under the scope of the CISG, since it is a matter connected with the rights and obligations of the buyer and seller arising from the contract and it is related with the scope of the buyer's or seller's remedies for breach of contract. Since there is an internal gap in the CISG relating to the type of agreements we are discussing about, the gap must be filled in accordance to Article 7(2), meaning that questions regarding such clauses must be primarily settled in conformity with the general principles on which the CISG is based.[6] And only in absence of any general principles, the questions can be settled in conformity with the applicable law or rules of law.

In conclusion, issues regarding pre- and post-COVID-19 contracts can be resolved by the uniform commercial treaties and principles. However, it is important to take in consideration that what must prevail over treaties and international principles is the will of the parties. Contracts are more than words; they reflect the parties' intent and the costs and risks for the parties involved. That is the reason why every word in the contract must be well thought-out and drafted.

[5] See *supra* note 1, page 5.

[6] Specifically, the principles of freedom of contract and full compensation may be helpful.

The Treaty Examiner, Issue 2 (May 2020), pp. 71-79

CISG hardship exemption in the time of COVID-19

Juan Pablo Hernández*

Abstract

Much has been written to address how the COVID-19 crisis can constitute hardship or force majeure *for international commercial contracts. This article addresses how those situations are to be considered under the 1980 United Nations Convention on Contracts for the International Sale of Goods (CISG) and provides additional considerations relevant as to the gravity of the crisis for the purposes of hardship.*

I. Introduction

Much ink has been spilled to explain how the economic paralysis caused by the COVID-19 pandemic could constitute hardship or *force majeure* for international contracts. As infection rates escalate, States have been forced to take measures that impede international trade and place unduly obstacles to contract performance. As one of the most successful treaties governing private transactions, the 1980 United Nations *Convention on Contracts for the International Sale of Goods* (CISG) has recently drawn interest in the field of changed circumstances.[1] This article explores whether the pandemic triggers the doctrine of hardship, as well as its effects on CISG-governed contracts.

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[1] I Khan, 'COVID-19 Exemptions for Sellers/Exporters under the UN Convention on Contracts for the International Sale of Goods (CISG)' (2020) *Jurist*, available at: https://www.jurist.org/commentary/2020/05/israr-khan-cisg-covid19/; G Alper, 'COVID-19: Force Majeure Under CISG' (2020) *Jurist*, available at: https://www.jurist.org/commentary/2020/05/gizem-alper-force-majeure/; O Wright, B Boylan, 'The UN Convention on Contracts for the International Sale of Goods' (2020) *Law.com*, available at: https://www.law.com/corpcounsel/2020/03/18/the-un-convention-on-

II. Hardship under the CISG

It is no secret that the CISG does not contain a provision expressly addressing issues of hardship. The closest equivalent is Article 79(1), which provides as follows:

> 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.

Article 79's language heavily resembles provisions of other, more recent uniform instruments providing for a *force majeure* exemption, *i.e.*, applicable to cases where performance has become impossible and not simply too onerous. Compare with Article 7.1.7(1) of the UNIDROIT Principles of International Commercial Contracts:

> 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.

For the longest time, scholars and practitioners interpreted the absence of an express provision on hardship as a sign that the CISG was not intended to provide a legal effect for situations where the performance of a contract becomes unreasonably onerous.[2] Indeed, some passages of the CISG's drafting process in connection with Article 79 of the CISG appear to indicate an intent to exclude hardship from the convention's coverage. For instance, the introduction of the term 'impediment' in Article 79 appears to have intended to exclude hardship-like theories of changed circumstances.[3] Likewise, during drafting, the Norwegian delegation proposed including a provision stating that exemption due to a temporary impediment becomes permanent if, after the cessation of the impediment, the circumstances have changed so much that performance would be unreasonable. The French delegation raised the

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contracts-for-the-international-sale-of-goods/?slreturn=20200502030152; B Lincoln, 'Australia: The UN CISG and its Implications for Australian Businesses During the COVID-19 Pandemic' (2020) *Mondaq*, available at: https://www.law.com/corpcounsel/2020/03/18/the-un-convention-on-contracts-for-the-international-sale-of-goods/?slreturn=20200502030152.

[2] See, for instance, V Heuzé, *La Vente Internationale de Marchandises* (LGDJ/Montchrestien, 2000); for a discussion on the (apparent) exclusion of hardship, see C Brunner, *Force Majeure and Hardship under General Contract Principles: Exemption for Non-Performance in International Arbitration* (Kluwer International, 2009), p. 216, footnote 1100.

[3] See J Honnold, *Documentary History of the Uniform Law for International Sales* (Kluwer, 1989), pp. 185, 252.

concern that such a provision would show support for theories of hardship and *imprévision*. In the end, the proposal was not accepted.[4] Finally, a proposal was made to include a provision explicitly governing hardship, which provided as follows:[5]

> If, as a result of special events which occurred after the conclusion of the contract and which could not have been foreseen by the parties, the performance of its stipulations results in excessive difficulties or threatens either party with considerable damage, any party so affected has a right to claim an adequate amendment of the contract or its termination.

The drafting history shows that this proposal was simply not accepted.[6]

Despite this original uncertainty about hardship under the CISG, the CISG Advisory Council has pointed out that these passages of the *travaux préparatoires* do not demonstrate an all-out exclusion of hardship.[7] The word 'impediment' does not equate to 'impossibility', but to an obstacle that hinders performance.[8] Indeed, the drafting history of the CISG reveals that Article 79 was not intended as a *force majeure* provision, but as a 'unitary notion of exemption' that could also cover hardship events.[9] As such, the majority opinion in scholarly circles is that the CISG does indeed cover hardship situations, provided that the event complies with Article 79(1), *i.e.*, that the event is an 'impediment' to performance that the affected party could not have predicted and could not avoid or overcome.

III. Available Remedies: The Adaptation Debate

While the CISG's coverage of hardship *situations* is rather clear, the same cannot be said about the remedies available in case of hardship. The commonly cited remedy applicable to hardship situations is that of **adaptation**: the power of the parties to renegotiate or of a court or tribunal to unilaterally revise the affected obligation, and 'adapt' it to the new circumstances. Given that hardship applies to cases where the

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[4] CISG Advisory Council, *Opinion No. 7: Exemption of Liability for Damages under Article 79 of the CISG*, at paragraph 30.

[5] Y Ishida, 'CISG Article 79: Exemption of Performance, and Adaptation of Contract Through Interpretation of Reasonableness? Full of Sound And Fury, but Signifying Something' (2018) *Pace International Law Review*, Volume 30, Issue 2, p. 362.

[6] See *supra* note 3, pp. 460, 350.

[7] See *supra* note 4.

[8] See *supra* note 4, comment 3.1.

[9] See *supra* note 4, at paragraph 29.

balance between the exchanged performances has become fundamentally disrupted, because one of the performances has become too difficult, it makes sense that the remedy is to 'rebalance' the bargain. This is precisely the remedy provided under the UNIDROIT Principles under Article 6.2.3(4)*(b)*:

> If the court finds hardship it may, if reasonable,
>
> (…)
> *(b)* adapt the contract with a view to restoring its equilibrium.

Given the absence of a hardship provision under the CISG, the convention also does not make explicit an adaptation remedy in cases of hardship. If the proposition that Article 79 governs hardship is to be accepted, then the remedy is an exemption from damages, *i.e.*, that the affected party '*is not liable for a failure to perform any of his obligations*'. Indeed, the drafter's reluctance to the hardship doctrine appears to have been based, not on the possibility that the CISG would address hardship situations *per se*, but on the fear of introducing the concept that excessive onerousness should lead to a modification of the parties' agreement.[10]

Many scholars have proposed importing the remedies provided by the UNIDROIT Principles – adaptation and termination – either by claiming that the UNIDROIT Principles are '*general principles on which* [the CISG] *is based*' and therefore worthy of being employed to fill gaps[11] or as international trade usages under Article 9(2) of the CISG.[12] Other scholars have been more skeptical about the adaptation

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[10] Many passages of the *travaux* show the drafter's reluctance to include doctrines of hardship or *imprévision* in the CISG, instead opting for a doctrine of 'impediment', which would operate as a unitary notion of exemption in case of a change of circumstances. This suggests that the drafters were not against the CISG covering hardship events *per se*; they were against the *notion* of hardship, *i.e.*, the concept that an excessive increase in performance costs should lead to a modification or termination of the contract. See Article 6.2.3(4) of the UNIDROIT Principles. By including hardship events under Article 79 but not providing the ordinary hardship remedies, Article 79 is *not* a 'hardship provision': it is a provision that grants exemption in extreme cases of hardship, as long as they constitute a qualified 'impediment'. It should also be noted that Article 79 is also *not* a *force majeure* provision. The concept of 'impediment' in Article 79 must be interpreted autonomously, without reference to domestic terms or distinctions such as *imprévision*, *force majeure*, frustration or hardship (Article 7). Article 79's coverage of situations that, under national or uniform law, constitute 'hardship' is not an indictment but a sign of the provision's uniform character, and should not be taken as indication that Article 79 is to be interpreted with reference to extraneous materials and theories.

[11] C Brunner, B Gottlieb, *Commentary on the UN Sales Law* (Kluwer Law International, 2019), p. 580.

[12] P Schlechtriem, P Butler, *UN Law on International Sales* (Springer Berlin Heidelberg, 2009), p. 204, paragraph 91.

remedy, stating that it is neither necessary nor desirable in international sales contracts.[13] Others have even proposed deriving an adaptation remedy from Article 50 of the CISG, which provides a remedy of price reduction for the buyer when the seller delivers non-conforming goods.[14]

The better view is that the CISG does not permit adaptation as a remedy for hardship. Leaving aside the express language of Article 79 (which in itself is sufficient to exclude adaptation), it is clear that the drafters intended for Articles 79 and 80 to exhaust the issue of exemption from performance,[15] *i.e.*, there is no gap regarding hardship. The issue of modifying contracts is exhaustively regulated by Article 29 of the CISG, which provides that the parties are free to change the terms in mutual agreement. Therefore, it would be inapposite to allow external materials, such as the UNIDROIT Principles, to fill a gap that does not exist.[16]

Likewise, no discernable principle of contractual balance exists in the CISG that could apply to hardship situations. Article 50 applies in cases of non-conformity of goods, not of changed circumstances. While hardship-based adaptation seeks to create a new bargain to withstand the supervening event, Article 50 merely seeks to hold the breaching seller to the original agreement – the balance between the value and the price agreed at the time of contract conclusion. A supervening change in the market value of the goods cannot be remedied through Article 50 but would instead fall within the realm

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[13] I Schwenzer, E Muñoz, 'Duty to Renegotiate and Contract Adaptation in Case of Hardship' (2019) *Uniform Law Review*, Volume 24, pp. 167-170.

[14] Peter Schlechtriem, 'Transcript of a Workshop on the Sales Convention: Leading CISG Scholars Discuss Contract Formation, Validity, Excuse for Hardship, Avoidance, Nachfrist, Contract Interpretation, Parol Evidence, Analogical Application, and Much More by Harry M. Flechtner' (1999) *Journal of Law & Commerce*.

[15] Article 79 and 80 are the only provisions in Section IV (*Exemptions*) of Chapter V.

[16] Article 7(2) only permits gap-filling through the general principles on which the CISG is made, and (logically) only if a gap is discernable. The UNIDROIT Principles of International Commercial Contracts do not necessarily reflect the CISG's underlying principles, as it is a later document and contains more detailed provisions on issues not regulated by the CISG (for instance, issues of validity, see Article 4 of the CISG). The remedy of adaptation of Article 6.2.3(4)*(b)* of the UNIDROIT Principles is most commonly found in civil law jurisdictions and therefore not sufficiently uniform to warrant regulation under the CISG. See L Di Matteo, A Janssen, U Magnus, R Schulze, *International Sales Law, Contract, Principles & Practice* (Nomos, CH Beck Verlag, Hart Publishing, 2016), p. 693; N Horn, *Adaptation and Renegotiation in International Trade and Finance* (Kluwer Law International, 1985), p. 22.

of hardship.[17] Likewise, a change in performance cost would fall within the realm of Article 79 rather than that of Article 50.[18] Interpreting Article 50 as a remedy for hardship creates unnecessary overlap. Likewise, interpreting from Article 50 a power to compel either party to perform something greater or different from what was agreed would be inappropriate. In cases of hardship, then, it is the principle of *pacta sunt servanda* that reigns: either to uphold the original bargain (if the impediment is of insufficient gravity) or suspend it (if the impediment complies with Article 79).

Thus, the safest bet for parties is to interpret that, consistent with Article 79, hardship cases trigger a remedy of exemption from liability for non-performance, not adaptation, which is not unheard of.[19] If the parties desire for adaptation to be the remedy, then the correct route is to contract out of Article 79 and agree on a tailored hardship clause.[20]

IV. Hardship Requirements as Applied to COVID-19

To argue a hardship under Article 79 of the CISG, two elements must be complied with: **First**, the event must not be within the sphere of risk of the obligor, and **second**, the event must fulfil the 'hardship threshold', *i.e.*, be an '*impediment*' that the obligor '*could not reasonably be expected* (…) *to have avoided or overcome it or its consequences*'.

As for the issue of risk, the general principle is that an expected change of circumstances cannot trigger a remedy, even if detrimental. This principle comes from the expectation of professional competence and diligence in international commerce: a diligent merchant will guard him or herself from foreseeable risks through physical and

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[17] See, for comparison, the chapeau of Article 6.2.2 of the UNIDROIT Principles: '*There is hardship where the occurrence of events fundamentally alters the equilibrium of the contract* (…) *because the value of the performance a party receives has diminished…*'.

[18] *Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods* (UNCITRAL, 2016), p. 375.

[19] It is not uncommon that hardship definitions do not provide for adaptation. For instance, see the 2003 ICC model hardship clause, which provides renegotiation or termination as remedies; or the 2020 ICC model hardship clause, which provides adaptation as a remedy as option 3B, while options 3A and 3C provide for termination (either party-declared or judge-declared). See https://iccwbo.org/content/uploads/sites/3/2020/03/icc-forcemajeure-hardship-clauses-march2020.pdf.

[20] Article 6 of the CISG allows the parties to exclude the CISG or derogate from any of its provisions. The parties can exercise their right to derogate under Article 6 to modify the effects of hardship through contractual agreement.

contractual arrangements.[21] This element has three cumulative considerations: **First**, the change of circumstances must not have been within the control of the obligor. If the hardship event was caused or could have been prevented by the obligor, then no remedy is deserved.[22] **Second**, the hardship event must not be an assumed risk in the transaction. If a party agreed to be liable for a particular risk (*e.g.*, to suffer the effects of changes in customs regulations) then that party cannot claim hardship based on that risk. In this sense, risks can be taken expressly or impliedly.[23] **Third**, assuming the risk was not taken or within the control of the obligor, it must be established that it was unforeseeable. This is because foreseen risks are considered to have been assumed by the incumbent party unless it was contractually allocated to the other.[24]

In the context of COVID-19, the issue of risk should not be problematic. It is clear that the pandemic and its effects are beyond the control of either party. Unless one of the parties took the risk of changing regulations or of market fluctuations, the effects of the pandemic cannot be qualified as an assumed risk. Finally, the foreseeability of the pandemic is a matter of timing. If the contract was concluded before November 2019, a pandemic of this size and gravity could not have been anticipated. If the contract was concluded after the first cases emerged in Wuhan, foreseeability becomes more likely – especially if the contract was concluded after the disease was declared a pandemic by the World Health Organization.

As for the hardship threshold, it must be assessed whether performance of the contract has become so burdensome that it cannot reasonably be expected of the obligor to maintain his or her end of the bargain. While some numerical approaches have been proposed, requiring an increase of 50%,[25] 100%[26] or even 150-200%[27] in the

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[21] See Principle I.2.3 of the Translex Principles, establishing the presumption of professional competence.

[22] See the text of Article 79(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****…*'.

[23] C Brunner, *Force Majeure and Hardship under General Contract Principles: Exemption for Non-performance in International Arbitration* (Kluwer Law International, 2019), pp. 423-426.

[24] UNIDROIT, *Principles of International Commercial Contracts (2016), Official Commentary*, Article 6.2.2, p. 220, comment 3(b).

[25] The 2004 version of the UNIDROIT Principles Official Commentary originally provided for a 50% cost increase as a rule of thumb for hardship. The comment was criticized and has been since removed.

[26] See *supra* note 23, p. 428.

[27] I Schwenzer, 'Force Majeure and Hardship in International Sales Contracts' (2008) *Victoria University of Wellington Law Review*, Volume 39, p. 717.

costs of performance, the truth is that these approaches are neither accurate nor necessary.[28] The better view is that the increased costs must be analyzed from case to case. When the affected party assumed a small margin of risk, obtained a small profit margin or is faced with financial ruin as a result of the impediment, the threshold of hardship can be relatively low.[29]

In the context of COVID-19, the gravity of the event will depend on what is the relevant 'hardship trigger': either the pandemic itself or the regulatory and political consequences it caused. If the latter is to be considered the hardship event, then an ordinary assessment of costs and risks is sufficient to address the applicability of hardship. However, the analysis changes if the event is the pandemic itself. An alternative method of determining hardship has been proposed, which puts on the forefront the question of life and health: If performance threatens human life or health, or has in fact caused death or serious harm, it is reasonable to assume that the hardship threshold has been met.[30] If performance puts the obligor or his or her employees in

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[28] A percentage-based standard of hardship is not a blanket solution. See, for instance, the *Iron Molybdenum* case, where an increase of 300% in procurement costs was insufficient to fulfil Article 79 of the CISG, due to the conclusion that the market fluctuation was within the bounds of the ordinary risk of the contract. Germany, Provincial Court of Appeal, *Iron Molybdenum Case*, 28 February 1997, available at: http://cisgw3.law.pace.edu/cases/970228g1.html. This case demonstrates that even a 200% increase in costs might not be sufficient to trigger hardship and, instead, the manpower must be focused on assessing the individual circumstances of the case and particularly whether the risk might be assumed to have been taken by the obligor.

[29] See *supra* note 23, p. 431-438.

[30] D Girsberger, P Zapolskis, 'Fundamental Alteration of the Contractual Equilibrium under Hardship Exemption' (2012) *Mykolo Romerio Universitetas*, pp. 130-131. See the example put forth by Professors Girsberger and Zapolskis: '*A contractor who is engaged in the building of houses in Alaska's wilderness needs to move a large quantity of stone from one side of a lake to another. The normal way is to move stones over a frozen lake by truck. Let us assume that this method is well known in Alaska and has been practiced for many years with no serious accidents reported. However, the ice cracked and the truck sank and the driver drowned. An additional inspection of the ice by a non-governmental agency showed that the other routes over the lake would have been safe as the ice was very thick. Alternative transportation methods did not exist because the area was surrounded by mountains and there was no other way to reach the point of construction.* (…) *Other cases may be added to this category. For example, in a case where the solo opera singer is advised by medical staff to skip a few concerts due to a minor breathing disorder, the singer could possibly insist on changing the concert tour schedule.* ***In such cases, even though the singer may not obtain a medical certificate prohibiting her to sing, the mere medical recommendation may serve as an indication of a possible excessively onerous performance due to the increased risk of further damage to the singer's health. It is thus submitted that in such cases, a fundamental alteration cannot merely be measured in numeric terms: in these cases, an excessively onerous performance (fundamental alteration of the contractual equilibrium) occurs not only due to increased costs in monetary terms (e.g. higher transportation costs) but rather due to the increased risk to people or property***.' (emphasis added) In cases where performance becomes too dangerous to realize, and actually threatens the life of the persons involved, the hardship threshold can be deemed to have been met. Human life

harm's way, by exposing them to COVID-19 contagion and potential death, then hardship is sure to have ensued. The fulfilment of this hardship alternative depends on the necessity of employing natural persons in performance; the likelihood of infection; and the likelihood of developing a severe or even fatal case of COVID-19.

As a final note on COVID-19, the most sensible remedy for hardship remains an exemption of liability. To start with, providing a different remedy would force the parties or the adjudicator to draw a distinction between 'excessive onerousness' and 'impossibility', a daunting task in the middle of this crisis.[31] Regulating inconsistent changed circumstances doctrines with different remedies is not a favorable policy solution to the issue – in the end, simplicity is the mother of certainty. Most importantly, adaptation is ill-suited to address a COVID-19-related hardship. COVID-19 has robbed us of the possibility to predict the near future and plan ahead. We are driving through the mist, and that is not an appealing prospect for an adjudicator to map out the parties' future relationship. If the contract is to be changed, it should be up to the parties to do it voluntarily, as they are in the best position to do so and they alone should bear the blame for an incorrect choice.

considerations vastly outweigh economic considerations behind contractual imbalance, as no party should be expected to endanger its own life or that of its employees to perform the contract. In fact, this criterion is consistent with the financial-ruin-approach: in both cases, performance threatens the existence of the party bound to perform. The mere (objective) threat that performance can destroy that party relieves it from the duty to undertake the agreed act.

[31] On the difficulty to differentiate between impossibility and excessive onerousness, see *supra* note 23, pp. 213-216. Given this difficulty, creating an artificial distinction between the two concepts results in the danger that claims can be rejected for formal reasons rather than on the merits if the claimant chooses the wrong changed circumstances doctrine. Adopting a unified approach to changes of circumstances – that of 'impediment', which has a single and simple remedy – is likely to provide more legal certainty in times of great change.

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