
**THE CONCEPT OF FORESEEABILITY UNDER THE UN CONVENTION
ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS***

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Contents

Section one: The concept of foreseeability in the common law countries, the civil law countries and ULIS:

- I. The concept of foreseeability in the common law countries.
- II. The concept of foreseeability in the civil law countries.
- III. The concept of foreseeability in ULIS.

Section two: The concept of foreseeability under section 79 of CISG.

- I. The Concept of Unforeseeability.
 - A. The unforeseen event and the exceptional event.
 - B. The unforeseen event and the extraneous event.
 - (1) The extraneous character of the occurrence of the event.
 - (2) The event should not be overcome:
 - (a) The question relating to the impediment.
 - (b) The question relating to the obligation.
- II. Cases of unforeseeability.
- III. Criterion of unforeseeability
 - A. The subjective criterion
 - B. The objective criterion

Conclusion

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INTRODUCTION

The attempt to unify the law concerning the international sale of Goods has started in the twenties of this century. Since 1929, the Board of the International Institute for the Unification of Private Law in Rome (UNIDROIT) has played a very important role in this field, which resulted in 1964 in finalising two conventions: one relating to the Uniform Law on the International Sale of Goods (ULIS) and the other relating to the Uniform Law on the Formation of the contracts for the International Sale of Goods (ULFC). They went into force in 1972.

As number of the countries parties to these conventions was confined, particularly to the Western Europe, the UN General Assembly created in 1966 a specialised legislative body, i.e., the United Nations Commission on International Trade Law (UNCITRAL). The Commission was to have for its object the promotion of uniform rules in various fields of the International Trade law that includes, inter alia, sales.

In this respect, UNCITRAL has done important efforts, which finally led to the approval of the 1978 Draft Convention on the International Sale of Goods. In 1980, the UN convened in Vienna a Diplomatic Conference to propose a final text of CISG. After five weeks of intensive efforts, the Vienna Convention was approved. This convention entered into force January 1, 1988.

Needless to say, CISG represents the culmination of fifty years of deep research. It reflects the deep comparison of sale rules in varied legal systems (particularly the common law system and civil law system) and the successful attempts to conciliate between these legal systems in order to adopt uniform solutions that satisfy the needs of international commerce.

Concerning the concept of foreseeability, CISG pointed it out in many provisions, eg, sections: 10/1, 25, 42/a, 60/a, 74 & 79. This work deals only with the latest provision (s. 79), that relates to the exemption from liability. As a requirement of exemption under section 79 CISG, the non-performing party shall, inter alia, prove that his failure to perform was due to an impediment 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".

This topic has been dealt with in different ways in the common law countries and in the civil law countries. CISG (s. 79), as well as its predecessor ULIS (s. 74), follows neither the approach of the common law countries nor

that of the civil law countries. Instead, it creates a new method by amalgamating the aforementioned approaches. By doing so, the international draftsmen wanted to create harmony between the two main legal systems throughout the world.

This work scores on the unforeseeability as a requirement for relief from the liability under section 79 CISG. The other requirements which should be met in order to apply section 79 will not be dealt with in detail. This work will consider them only when it seems necessary to clarify the concept of foreseeability.

Hopefully, to get a fruitful research, it is useful to clarify the topic in question according to the following plan:

Section one: The concept of foreseeability in the common law countries, the civil law countries and ULIS.

Section two: The concept of foreseeability under section 79 of CISG.

Section One

The Concept of Foreseeability in the Common law Countries, the Civil Law Countries and ULIS

1. The Concept of Foreseeability in the Common Law Countries

First of all, it should be pointed out that the common law, unlike the civil law, proceeds from the basis that liability for non-fulfillment of contractual obligations is strict; the creditor is not bound to show that the debtor was at fault in failing to perform his contractual duty.

The principle of contractual rigidity⁽¹⁾ was well known in the early common law; impossibility of performance was not recognised as an excuse for exempting a contracting party. In 1646, the King's Bench Division, in *Paradine v. Jane*, indicated this principle. It clearly stated:.... But when the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract...⁽²⁾

This rule dominated the law in this field for more than two centuries. In 1863, the King's Bench Division recognised the so-called impossibility doctrine⁽³⁾; (The discharge of the contract as a result of the physical destruction of its subject matter).

Later on, the common law courts also recognised the so-called doctrine of frustration⁽⁴⁾. This doctrine operates to discharge a contract where there has been such a fundamental change of circumstances that performance of it would

- 1- However, some exceptions to this rigid rule are existed. For details, see: H.W.R. Wade, *The Principle of Impossibility in Contracts*, Law Q. Rev., vol. LVI, 1940, p.520. F. C. Woodward, *Impossibility of Performance, as an Excuse for Breach of Contracts*, Colum. L. Rev., Vol. 1, 1901, pp. 529 530. G.D. Schaber & C.D. Rohwer, *Contracts in a Nutshell*, 3rd ed., St. Paul, Minn, West Publishing Co., 1990, pp. 365, 366.
- 2- 82 Eng. Rep. 897 (K.B. 1647).
- 3- 122 Eng. Rep. 309 (K.B. 1863).
- 4- E. McKendrick, *Frustration and Force Majeure - their Relationship and comparative Assessment*, in *Force Majeure and Frustration of Contracts*, edited by E. McKendrick, L.Loyd's of London Press Ltd., London, 1991, pp. 38, 39, and Case Cited.

be radically different from what was contemplated by the parties at the time of conclusion ⁽¹⁾. On the other hand, it does not operate if the event renders the performance of the contractual duty merely burthensome ⁽²⁾. The contract will not, therefore, be discharged on account of the occurrence of the ordinary risks of business ⁽³⁾ e.g. rises or falls in prices or depreciations of currency, unless, of course, the parties have agreed otherwise ⁽⁴⁾.

It is clear that this doctrine of frustration is a further step from the principle of the absolute contract (paradine rule) and even from the common law standards of impossibility. It operates in cases where performance is still physically possible but, of course, the purpose of the contract is frustrated owing to the occurrence of an event.

The contract is discharged, in principle, where the frustration event is totally unexpected and such as the parties could not reasonably have foreseen⁽⁵⁾.

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- 1- R. Goff, Force Majeure and Frustration, in *La Vendita Internazionale, La Convenzione di Vienna Dell'11 Aprile 1980*, Milano - Dott. A. Giuffre Editor, 1981, p.320. M. Brassey, *The Effect of Supervening Impossibility of Performance on a Contract of Employment*, Acta Juridica (1990), Juta & Co., Ltd., Cape Town, Welton, Johannesburg, 1991, p.43.

It should be noted that this English doctrine of Frustration was traditionally rested upon the implication of a term into the contract to the effect that, in the circumstances which have occurred, the contract should be discharged. (See for instance: *F. A. Tamplin Steamship Co., Ltd. V. Anglo Mexican Petroleum Products Co., Ltd.* (1916) 2 A.C. 397, pp.403, 404).

But this theory of implied condition has been abandoned by the English courts, since it is artificial in its operation.

- 2- R. Goff, supra fn 5, p. 321. G.D. Schaber, Supra fn 1, p. 366. J. Bell, *The Effect of Changes in Circumstances on Long-term Contracts*, (English Report), in *Contract Law Today, Anglo-French Comparisions*, edited by D. Harris & D. Tallon, Clarendon Press, Oxford, 1989, p. 209.
- 3- *The Pioneer Shipping Case* (1982) A.C. 724, 752. Chity on Contracts, 26th ed., Vol. 1 (General Principles.), Sweet & Maxwell, London, 1989, p.1018.
- 4- See the dictum of Viscount Simon in *British Movietonews Ld. v. London and District Cinemas Ld.* (1952), A.C. 166, p. 185. E. Hirschberg, *The Impact of Inflation and Devaluation on Private Legal Obligations*, Bar - Ilan University, Ramat - Gan, Israel, 1976, p.167.
- 5- H. Al-Fazari, *Athar Azzoruf Attaria alal Iltizam al-Aqdi fil Qanoun Al-Mogaran* (Effect of the Unforeseen Events on the Contractual Obligation in Comparative Law), doctorate thesis, Al-Jiza Press, Alexandria, 1979, p. 329, J. Bell, supra fn 6, 208.

However, the doctrine of frustration may operate in cases where the contracting parties foresee or ought to have foreseen the event⁽¹⁾. In each case, it is a matter of construction whether the foreseeability of the event means, in absence of specific stipulation in the contract, that each party should take the risk of that event (rendering performance impossible or totally different from what was contemplated at the time of contracting) or whether, in absence of such intention, the doctrine of frustration should apply to discharge the contract⁽²⁾.

In the United States of America, the courts adopted the aforementioned approach of the British courts: the contract was considered absolute; a party may not be excused even if his failure to perform was due to an act of God⁽³⁾. However, exceptions to this rule were recognised as the case was in England⁽⁴⁾.

Concerning the question of frustration, it may be said that the leading decision in this field was that rendered in 1916 by the California Supreme Court in *Mineral Park Land Co. V. Howard*⁽⁵⁾.

Unlike the situation in England, the case of excuse for non-performance has been dealt with by codified provisions⁽⁶⁾. Section 2-615 of the Uniform Commercial Code (UCC) of USA deals with the question of impracticability. It provides in part:

"Except so far as a seller may have assumed a greater obligation...(a) Delay in delivery or non-delivery in whole or in part by a seller who complies with paragraphs (b) and (c) is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a

- 1- See for instance: *Totem V. Gamboa*, (1939), 1 K.B., p. 132. E. Hirshberg, supra fn 8, pp. 170, 171. S.B. Mansour, *Onsur Al-Thabat wa Amel Al-Taghayyor fil Aqd IImadani*, (Stability Element and Chngement Factor in the Cvil Contract), Dar Al-Fikr Al-Lubnani, Beirut, 1987, p.279.
- 2- *Chity on Contracts*, supra fn 7, p. 1027. E. Hirschberg, supra fn 8, p. 205. E. Mckendrick, supra fn 4, p.33.
- 3- See this rigid rule in *Central Trust Co. V. Wabash, St. Louis & Pacific R.R. Co.* 31 Red. 440 (1887). W.J. Conlen, *Intervening Impossibility of Performance as Affecting the Obligations of Contracts*, U. Pa. L. Rev., Vol. 66, 1917-1918, p.31.
- 4- W. J. Conlen, *Supra* fn 12, pp. 31, 32.
- 5- H. O. Hunter, *Modern Law of Contracts*, Warren, Gorham & Lamont, Boston - New York, 1986, at 12-43.
- 6- However, it should not be forgotten that the English Law Reform (Frustrated Contracts) Act 1943 deals only with the remedial consequences of the frustration of a contract.

contingency the nonoccurrence of which was a basic assumption on which the contract was made...⁽¹⁾.

The expression impracticable encompasses, in addition to the traditional objective impossibility doctrine, cases in which performance is burdensome though objectively possible.

The language of section 265 (related to frustration) of the Second Restatement of USA clearly reflects the influence of section 2- 615 UCC. It reads:

"Where, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the non - occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language of the circumstances indicates the contrary"⁽²⁾.

In order to apply any of these sections, some requirements should be satisfied⁽³⁾. The term that the event rendering the performance impracticable should be unforeseen is not required. On the contrary, it does not matter whether the event was foreseeable, or even foreseen, by the non- performing party⁽⁴⁾. Instead, the court should test whether or not the non - occurrence of this event was a basic assumption upon which the contract was made.

- 1- Quoted from: H.O. Hunter, *supra* fn 14, at 12-46. See also the official UCC commentary on this section in: A. H. Kritzer, *Guide to Practical Application of the United Nations Convention on Contracts for the International Sale of Goods*, Kluwer Law and Taxation Publishers, Deventer, Boston, 1989, pp. 512-514.
- 2- Quoted from: The American Law Institute, *Restatement of the Law Second, Contracts* 2nd, Vol.2, American Law Institute Publishers, St. Paul, Minn., 1981, pp. 334, 335. See sections (261-272) thereof.
- 3- *Id.* E. A. Farnsworth, *United States Contract Law*, Transnational Juris Publications, Inc., Ardsley - on - Hudson, New York, 1991, pp. 154-159. Comment, *Commercial Frustration A Comparative Study*, *Texas Int'l L. Forum*, Vol.3, No.2, 1967, pp. 280-284.
- 4- J.G. Ryan, *U.C.C.S. 2-615: Excusing the Impracticable*, *B.U. L. Rev.*, Vol. 60, No.3, 1980, p.578. J.D. Calamari & J.M. Perillo, *The Law of Contracts*, 3rd. ed., West Publishing co., St. Paul, Minn., 1987, p. 570. G.D. Schaber, *Supra* fn 1, pp. 369, 370.

Professor Lookofsky, in contrast, argues that the non occurrence of a contingency cannot fairly be said to be a basic assumption of the agreement if its occurrence is reasonably foreseeable. If a contingency is foreseeable-he continues-, it and its consequences are taken outside the scope of section 2 - 615 of UCC. (See his article on "Fault and No-Fault in Danish, American and International Sales Law. The Reception of the 1980 United Nations Sales Convention", *Scand Stud L*, Vol.27, 1983, p.125.

II. The Concept Of Foreseeability In The Civil Law Countries

The principles *pacta sunt servanda* "the contract should be kept" is respected in the *Code Civil* of France⁽¹⁾. However, a party, in certain cases may be confronted by such a change in circumstances that he is either unable to perform his obligation or, if he does, it will become extremely burthensome to him.

There is a basic principle in the French Civil Law, as in all Civil Law systems, that a promise of the impossible is null and void⁽²⁾ i.e. a party can not be required to perform the impossible.

Section 1147 & 1148 of the *Code Civil* speak of the debtor's exemption by a reason of the so-called, in France, force majeure; the debtor must prove that his non - performance was due to an event not reasonably foreseeable by the parties at the time that the contract was entered into. The concept of force majeure is not defined in the *Code Civil*⁽³⁾. Professor David, however, has given the following definition:

"According to the doctrine of force majeure, a contract will be rescinded... and no liability will be incurred by a party to it for the non - performance by such party of his obligations under the contract, *by reason of an event which could not have been reasonably foreseen by the parties at the time when the contract was entered into*. Performance of the contract must be absolutely impossible, and must not be merely onerous for a party, in order to constitute force majeure"⁽⁴⁾.

It is clear from this definition that the doctrine of force majeure would not be applied in any case, unless an event rendered performance of the contract absolutely impossible. In other words, if the performance became merely burdensome, the debtor could not ask relief under the *Code Civil*⁽⁵⁾. The court of cassation has also followed this approach⁽⁶⁾.

1- See Section 1134.

2- B. Nicholas, French Law of Contracts, Butterworths, London, 1982, p. 194.

3- D. Smith, Impossibility of Performance as an Excuse in French Law: The Doctrine of Force Majeure, Yale L.J., vol.45, 1935-1936, p.542.

4- David, Frustration of Contract in French Law, 28 J. Comp. Leg. & Intl. L. (3d ser.) 11 (1946), pp. 11,12, Cited in comment, supra fn 18, pp. 288, 289. The emphasis is added by the present writer.

5- W. Swadling, The Judicial Construction of Force Majeure Clauses, in Forc Majeure, supra fn 4, p. 6. M. Brassey, supra fn 5, p. 25.

6- D. Smith, supra fn 22, pp. 457, 458. Isabelle de Lamberterie, The Effect of Changes in Circumstances on Long-term Contracts, (French Report), in contract Law Today, supra fn 6, p.228.

With regard to public law contracts, however, the *Conseil d'Etat* developed a different approach. This *Conseil* has created the so-called *la theorie de l'impre`vision* ⁽¹⁾.

According to this doctrine, the terms of the public law contract may be adjusted once an event occurs rendering performance burdensome (not impossible).

It should be made clear that in order to apply both the doctrine of force majeure and the doctrine of *l'imprevision* in France, the occurrence of the event should not be reasonably foreseen⁽²⁾.

In Germany, the starting point is that the party is excused whenever performance has been rendered impossible through no fault of him. In cases of hardship of performance, the courts have developed the doctrine of *Wegfall der Geschäftsgrundlage* (failure of the basis of the contract)⁽³⁾. Under the latter theory, the courts have a latitude to make an equitable adjustment of the terms of the contract⁽⁴⁾.

In case of changed circumstances, the German Courts invoke sections 157 & 242 of the BGB which provide that the contract must be interpreted and performed in good faith⁽⁵⁾. In other words, the court, in such cases, ask itself whether a party could reasonably and in good faith expect performance from the other party under the new circumstances ⁽⁶⁾.

To sum up, the French doctrines of exoneration operate on basis of the

1- Ibid, p. 231. D. Smith, Supra fn 22, p.458.

2- W. Swadling, supra fn 24, p. 6. D. Smith, supra fn 22, pp. 454, 457. M. D. Aubrey, Frustration Reconsidered: Some Comparative Aspects, Int'l Comp. L. Rev., Vol.12, 1963, p.1176. H. Smith, Frustration of Contract: A Comparative Attempt at Consolidation, Colum. L. Rev., Vol.58, No.3, 1958 p.303.

3- E. J. Cohn, Manual of German Law, Vol.1, Oceana Publications, Inc., London, 1968, p. 120. H. Smith, Supra fn 27, p. 297, M.D. Aubrey, supra fn 27, p. 1178.

4- K. Rodhe, Adjustment of Contracts on Account of Changed Conditions, Scand Stud L, Vol.3, 1959, pp. 167, 181, 183 & 184.

5- E. J. Cohn, Supra fn 28, pp. 80, 120. H. Smith, supra fn 27, p. 297. H. Cartwright, The Law of obligations in England and Germany, Int'l Comp. L.Q., Vol.13, 1964, pp. 1330, 1335, & 1336, S.B. Mansour, supra fn 10, p. 282. K. Rodhe, supra fn 29, p. 169.

6- R. David, English Law and French Law, London - Stevens & Sons/Culacutta - Eastern Law House, 1980, p.123.

concept of unforeseeability, which the German doctrines on the basis of the concept of good faith.

III. The Concept Of Foreseeability In ULIS

First of all, it should not be forgotten that the concept of foreseeability was mentioned in the 1935 draft of the UNIDROIT. Under this draft, a party was exempted from his obligation "by an unsurmountable obstacle which he was not taken to foresee at the time of the conclusion of the contract; municipal laws were free to increase the limited number of events according to their own views"⁽¹⁾.

As this formula didnot lead to a uniform solution, UNIDROIT, in section 77 of its final draft, proposed "a unitary formula founded on the intent of the parties"⁽²⁾.

Obviously, the special Commission which prepared the 1956 draft followed the same approach. The Hague Conference also approved this same approach.

Beneath the heading "Exemptions", section 74/1 of ULIS provides :

"Where one of the parties has not performed one of his obligations, he shall not be liable for such non-performance if he can prove that it was due to circumstances which according to the intention of the parties at the time of the conclusion of the contract, he was not bound to take into account or to avoid or to overcome; in the absence of any expression of the intention of the parties, regard shall be had to what reasonable persons in the same situation would have intended".

It is clear that this provision letterly refers neither to the "force majeure" formula (which is prevailing in the Civil Law Countries) nor to the "Act of God" formula (which is known in the Common Law Countries)⁽³⁾. Instead, it took, as Professor J. Vilus mentions⁽⁴⁾, the "middle road" by connecting the subjective

1- Report of the Special Commission on the ULIS draft of 1956, in the Diplomatic Conference on the Unification of Law Governing the International Sale of Goods, Vol. 2- Documents, Government Printing Office, the Hague, 1966, p.39.

2- Id.

3- Th. Habib, Dirasah fi Qanoun Al-Tijarah Al-Dawliyyah (Study in the International Trade Law), Cairo, 1975, p. 410.

4- J. Villus, Provisions Common to the Obligations of the Seller and the Buyer. in International Sale of Goods, Dubrovnik Lectures, edited by P. Sarcevic & P. Volken, Ocean Publications, Inc. New York. London, Rome. 1986, p.254.

and objective circumstances. This section covers the common law doctrine of frustration and, at the same time, the civil law doctrines such as force majeure.

The decide that the non - performing party was exempted, the judge should enquire whether he (the party in default) ought, in the light of the parties, intention at the time of contracting, to have taken the circumstances into consideration or should have either overriden or overcome these circumstances⁽¹⁾. Simply, if the party in default, when concluding the contract, foresaw the occurrence of the circumstances and didnot stipulate them in his contract, his plea for exemption from the liability of his non-performance would be denied; the party's failure to take the circumstances into account means that he assumes the risks of their occurrence. The same decision would be held, if the non - performing party did not do what was necessary to prevent the circumstances from impeding the fulfillment of the contract.

In deciding this matter, the judge should ascertain the intention of the parties: If it was expressed in the contract, it would be considered to be decisive in the first instance, that is, the reference should be made to the terms of the contract imposing liability or providing exemption clauses that make the intention of the parties clear, provided that these terms are valid in accordance with other provisions of ULIS (e.g. 8 & 16).

The second sentence of section 74/1 substitutes a "reasonable person" test, where the intention is not clear; "in the absence of any expression of the intention of the parties, regard shall be had to what reasonable persons in the same situation would have intended".

One government observed, in response to section 85 of the 1956 draft, which is equally relevant to the final text (s.74) of ULIS, that "that prior to this typical intent account should be taken of the intent which it may be presumed, in the light of the circumstances, the parties would have had if they had considered the obstacle more closely to the true intent which the parties had than the typical or normal"⁽²⁾.

Professor Tunc ⁽³⁾ argues that the "reasonable person" test, which is an

1- A. Tunc's Commentary on the Hague Conventions of the 1st July 1964 on the International Sale of Goods and the Formation of the Contract of the Sale, in the Diplomatic Conference on the Unification of Law Governing the International Sale of Goods, Vol.1- Records, Government Printing Office, the Hague, 1966, p.383.

2- The Diplomatic Conference, Supra fn 32, p. 158.

3- A. Tunc's Commentary, supra fn 36, p. 384.

objective one, is more rational than that of fictitious or hypothetical intent in relation to what could have been contemplated.

According to this criterion, it is necessary to distinguish between those circumstances impeding performance for which the obligee is liable for not having avoided or overcome when an ordinary contracting party would have foreseen that they should have avoided or overcome them and those for which he is not liable since an ordinary contracting party would not have foreseen that he would have to avoid or overcome them⁽¹⁾.

This process of reducing the problem to a matter of construction of the contract is well-known in the common law countries ⁽²⁾.

On the other hand, section 74 reflects the characteristic civil law approach of dealing with the matter of impossibility; paragraph 1 of this provision requires the party in default, in order to exclude his liability, to "negative fault by showing that his non - performance is attributable to a cause beyond his foresight or control" ⁽³⁾.

To sum up, it is correctly said that section 74 in dealing with the matter of exemption adopted a compromise approach between the ideas of both the common law and civil law systems.

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- 1- Id. Report of the Special commission on the ULIS draft of 1956, supra fn 32, p. 40.
 - 2- R. H. Graveson & others, The Uniform Laws on International Sales Act 1967, A Commentary, Butterworths, London, 1968, p. 95, A.H. Hudson, Exemption and Impossibility under the Vienna Convention, in Force Majeure, Supra fn 4, p. 183.
 - 3- B. Nicholas, Force Majeure and Frustration, Am. J. Comp. L., Vol. 27, 1979, p. 237.

Section Two

The Concept Of Foreseeability

Under Section 79 Of CISG

Section 79/1 of CISG provides:

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

The foreseeability is the ability to known in advance⁽¹⁾; it is to wait for something to come⁽²⁾. In this context, everything seems to be foreseen, and so "nothing new under the sun". Therefore, every event, even the most seldom one, is not absolutely unforeseen.

All events hindering performance of the contract are foreseeable to one degree or another. Such events took place in the past and can be expected to occur again in the future. The parties of a contract, therefore, have envisaged the possibility of the event which did occur⁽³⁾.

The adoption of this meaning of foreseeability, in this field, results in unexpected outcomes; section 79 of CISG will not be applied at all. The concept of unforeseeability should, therefore, be given a strict legal meaning. In addition, cases of unforeseeability will be determined on the basis of this ground. The criterion of unforeseeability should be discussed, too.

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- 1- A. S. Hornby and others, Oxford Advanced Learner's dictionary of Current English, 25th impression, Oxford University Press, 1987, p.337.
 - 2- M.S. Isbir & B. Jnaydi, Al-Shamil, (Dictionary of the Arabic Language Science and its Expressions), Dar Al-Awda, Beirut, 1981, pp.280, 370.
 - 3- (A/CN. 9/116, annex II), Commentary on (section 50 of) the draft Convention on the International Sale of Goods, Published in UNCITRAL Yearbook, Vol.7 (1976), United Nations, New York, 1977, p. 130. (Doc. A/CONF. 97/5), Secretariat Commentary on (Section 65 of) the Draft Convention on Contracts for the International Sale of Goods, published in the Official Records, United Nations, New York, 1981, p.55.

I. THE CONCEPT OF UNFORESEEABILITY

The question of foreseeability or unforeseeability is closely associated with the mental conception⁽¹⁾. The occurrence of an event may be foreseen either as possible or as propable. The question of possibility does not matter in this field. The question of propability, in contrast, is considered to be crucial. Hence, the strict meaning of unfireseeability is that the event, which results is impeding performance of the contract, should not be foreseen as propable, even it was foreshadowed as possible. Logically, if the event was foreseen as propable, a contracting party might not conclude the contract, or he might make it on different conditions. Obviously, a party of a contract, at the time of the conclusion, will take all the foreseen events into consideration. If he did not do so, he would be considered liable for his default, and he should, consequently, be responsible in damages for his failure to perform.

Nicholas says that under section 79 of CISG, the most important element is "the test of reasonable exception"⁽²⁾. It should be noted that the question of impediment (i.e. whether the party in default should have taken the impediment into account) seems to suggest, as Professor Hudson argues, "more than merely foreseeing but also to require some measure of forethought and prior planing towards the avoidance or reduction of the harm if it strikes"⁽³⁾.

In this respect, the relationship between the concept of unforeseeability of the event and the other parallel concepts should be made clear. These other concepts are : the exceptional character of the event, and the extraneous character of this event.

A. The Unforeseen Event and the Exceptional Event:

First of all it should be pointed out that section 79 of CISG doesnot provide that the event should be exceptional in nature. However, taking up this question may be fruitful :

The UN Economic Commission for Europe (ECE) has laid down general

1- S.B. Mansour, supra fn 10, p. 25.

2- B. Nicholas, Impracticipity and Impossibility in the U.N. Convention on Contracts for the International Sale of Goods, in International Sales: The United Nations Convention on Contracts for the International Sale of Goods, (Parker School) edited by N. M. Galston & H. Smit, Matthew Bender, New York, 1984, at 5-9 & 5-14.

3- A.H. Hudson, Exemption and Impossibility under the Vienna Convention, in Force Majeure and Frustration of Contracts, supra fn 4, p.186.

conditions of sale fore may kinds of transactions. All of them include special provisions on relief. Some of these provisions state the exceptional character of the event : Contracts for the Sale of Cereals, for instance, provide in part :

"19. Reliefs

19.1 Where the fulfilment of the contract in whole or in part is rendered absolutely and permanently impossible by exceptional circumstances, beyond the control of the parties and arising after the conclusion of the contract, the contract or the unfulfilled part thereof shall be cancelled but neither party shall be liable to pay damages..."⁽¹⁾.

This provision and the like may be used in applying section 79 of CISG (infra pp. 19 & 20). Thus, it is useful to discuss the relationship between the condition of unforeseeability and the exceptional character of the event.

The exceptional event is an abnormal one; it is that event which rarely takes place. The question of describing the event as exceptional, therefore, heavily relies on how often it occurred: the more often the event occurred, the more likely it would be unexceptional (normal) in character and vice versa.

The concept of unforeseeability, as mentioned above (pp. 12, 13), relies on the question whether or not the occurrence of the event was foreshadowed as probable. This probability, in turn, almost depends on how often the event occurred too: the more often the event happened, the more likely this same event would be unforeseen.

Some learned writers⁽²⁾ argue that the event which infrequently took place is exceptional and consequently unforeseen. The event that frequently occurred, in contrast, is neither exceptional nor unforeseen.

It is true that the unforeseen event is an exceptional one. But the matter that the exceptional occurrence is an unforeseen one is in question⁽³⁾. The

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- 1- Cited in J. O. Honnold. Uniform Law for International Sales under the 1980 United Nations Convention, 2nd ed., Kluwer Law and Taxation Publishers, Deventor, Boston, 1991, p.540.
 - 2- S.B. Mansour, Supra fn 10, p. 37, F. Al-Noymi, Nazariyat Azzurout Attaria bain al-Sharia Wal Qanon (Unforeseen Events Doctrine in Sharia and Law), M.A. Thesis, Dar Al-Jahiz Press, Baghdad, 1969, pp.124, 125, and reference cited.
 - 3- H. Haddad, Qanon Al-Tijara al-Dawli (The International Commercial Law), Addar Al-Muttahida lil Nashr, Beirut, 1980, p.344.

earthquakes, volcanos, and floods are generally considered exceptional events. It does not follow, however, that these same events are always unforeseen. The geological observation station sometimes gives information concerning the event before its occurrence. In such a case, it is quite impossible to say that any of these circumstances is unforeseen.

To conclude, every unforeseen event is exceptional in character. But the contrary is not always true. Thus, the condition that the event should be unforeseen necessarily implies the exceptional character of that event. It is, therefore, well settled in the CISG that section 79 thereof mentions the unforeseeability of the event but it does not mention its exceptional character.

B. The Unforeseen Event and the Extraneous Event:

The extraneous character of the event means that neither the occurrence nor the overcoming of the event is attributed to the non - performing party.

(1) The Extraneous Character of the Occurance of the Event:-

This character implies that the event should be beyond the control of the non - performing party: Firstly, the non - performing party may not cause the occurrence. Admittedly, in the field of fulfilling the contract, either party may not avail himself of his wrongs; the impediment must not be due to the fault of the non - performing party⁽¹⁾.

It should be noted that there is no difference between whether the impediment was due to physical causes (e.g. earthquakes) or to legal causes (e.g. a law prohibiting dealing with either party)⁽²⁾.

In order to deny exemption, it is not always necessary that the event is induced by the non - performing party. In other words, it suffices that his conduct essentially contributes to the occurrence of that event.

Obviously, if the event was wholly or partially caused by the non - performing party, it would be difficult to held that it was unforeseen by him.

Secondly, the non - performing party may avoid the occurrence of the event.

1- H. Haddad, Remedies of the Unpaid Seller in International Sale of Goods under ULIS and 1980 UN Convention, Law & Arbitration Centre, Amman-Jordan, 1985, p. 152. J.B. Marcantonio. Unifying the Law of Impossibility, Hastings Int'l & Comp. L. Rev., Vol. 8, No.1, 1984, p.57.

2- H. Haddad, Supra fn 51, p. 151.

This duty, which is explicitly provided in section 79 of CISG, varies according to the subject - matter of the contract and to the content of the obligation thereof. Taking into account the content, nature, and surrounding circumstances of the contractual obligation, the debtor may be required to behave in a very cautious way.

It is clear that the foreshadowed event is considered to be easily avoided. By contrast, if the event is unforeseen, its avoidance will mostly be impossible⁽¹⁾. Anyway, a party seeking exemption under section 79 should prove that he could not reasonably be expected to have avoided the impediment hindering his performance of the contract. A party in default should do his best in order to prevent the occurrence of the event. The owner of a factory, for example, may avoid the strike of his workers by increasing their salaries or improving the conditions of the work. Failing to do this, his petition for exoneration will be rejected.

Needless to say, for section 79 of CISG to be applied, the event rendering the impediment should logically be unforeseen and unavoidable; if the event was only un-foreshadowed (and it was able to be avoided), any pleading for exemption would logically be denied. The learned writer Al-Sanhouri⁽²⁾ correctly says that the matter of unavailability is much more important than that of unforeseeability: once the occurrence is unavoidable, it will make no difference whether it was foreseen or not. The government of Czechoslovakia⁽³⁾, in its comment on section 50 of the draft convention on the international sale of goods (which is parallel to the final text of section 79 of CISG), said that the requirement of an inevitability usually covers the requirement of unforeseeability. The latter requirement should, therefore, be excluded from this provision.

In my opinion, both conditions: that of unforeseeability and that of unavailability should be satisfied in order to exonerate the non - performing party. This is supported by the legislative history of section 79 of CISG⁽⁴⁾ as well

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- 1- H. Al-Fazari, supra fn 9, p. 337, H. Amer, Al-Quwwa Al-Mulzima lil Aqd, (Binding Force of the Contract), Masr Press, Cairo, 1949, p.83.
 - 2- A. Al-Sanhouri, Al-Wasit, Vol.1, 2nd ed., Dar Al-Nahda Al-Arabiyya, Cairo, 1964, p.722. A.H. Hudson, supra fn 46, p.186.
 - 3- (A/CN. 9/125), published in UNCITRAL Yearbook, Vol. 8 (1977), United Nations, New York, 1978, pp. 113, 114.
 - 4- (Doc. A/CONF. 97/5), supra fn 44, p. 55, paragraphs 3 & 7.

as by many learned scholars⁽¹⁾. The language of section 79 itself does not support this outcome. To achieve this goal, the phrase "or to have avoided" should, I believe, be substituted by the following phrase: "and to have avoided".

Briefly, the duty to avoid the occurrence of the impediment coincides with the extraneous character of that event⁽²⁾.

(2) The Event Should not be Overcome:

One of the requirements that a party should establish in order to successfully plead exemption under section 79 of CISG is that, he could not reasonably be expected to have overcome the impediment (hindering the performance of his contractual obligation) or its consequences.

This requirement implies that an event took place and the non-performing party could not override the impediment (resulting from this event) or even its consequences though he did all what was in his power. It is, therefore, closely associated with the requirement of the external character of the impediment⁽³⁾. In this respect, the distinction should be made between two questions: one relating to the impediment itself, and the other relating to the obligation.

(a) The Question Relating to the Impediment:-

This matter concerns the time prior to the performance of the contractual obligation; it pertains to the attitude of the debtor. The question which should be raised here is that: Did the debtor take the necessary preventive measures in order to overcome the impediment and its consequences? Only if the answer is positive, the debtor may be liberated from the liability for his failure to perform his duty. It is obvious that regard should be made to the nature of the impediment and to the content of the contractual duty. If the debtor, for

1- See for instance; B. Nicholas, supra fn 46, at 5-4. J.D. Honnold, supra fn 48, p. 531, J. Villus, supra fn 35, p 253. J.B. Marcantonio, supra fn 51, p. 57. A.H. Kritzer, supra fn 16, p. 515. D. Tallon, Exemptions, in Commentery on the International Sales Law, the 1980 Vienna Sales Convention, by C.M. Bianca and Others, Giuffrè, Milan, 1987, p.578. M. Shafiq, Ittifaqiyat Ilomam Ilmutahida Bish'an Ilbaya Iddawli lil Bada'ia. Dirasah Bi Qanon Al-Tijara Addawli. (United Nations Convention on the International Sale of Goods. Study in the International Commercial Law), Dar Al-Nahda al-Arabiyya, Cairo, 1988, pp.253, 254.

2- D. Tallon, supra fn 57, p. 581.

3- Ibid.

example, failed to overcome the effect of a thunder storm or a thunderbolt on the goods located in his store (by using a lighting rod), he could not plead relief under section 79 of CISG.

Regarding the duty of the debtor to take the preventive procedures, he must give notice to the other party of the impediment and its consequences on his contractual obligation⁽¹⁾. (Section 79/4 of CISG clearly provides this duty). This notice should take place within a reasonable time after the party in default knew or ought to have known of the impediment. Otherwise, the non - performing party should be considered liable for damages resulting from his failure to perform this duty to report.

Having in mind his contract with the debtor, the creditor may do further transaction(s) with others. The buyer (x) of certain goods from a seller (y), for instance, may resell them to someone else (z). Anyway, the creditor (x) might not conclude any more contract concerning the goods sold if he received, in the right time, a notice of the impediment hindering the performance of the debtor (y).

(b) The Question Relating to the Obligation:-

In order to successfully seek exoneration under section 79 of CISG, the non - performing party must prove, inter alia, that he could overcome neither the impediment nor its consequences though he did his best. However, it is not easy to decide what is possible and what is impossible to overcome. This issue raises the question of distinction between impossibility and hardship⁽²⁾. The matter whether the impediment should render impossible the performance of the contractual obligation is not clear enough under section 79 of CISG.

We mentioned earlier (supra p. 7) that the force majeure doctrine requires that the event renders performance absolutely impossible. In the United States of America, section 2 - 615 of UCC, relating to relief of the seller, requires that the occurrence of the contingency renders performance impracticable (not impossible) (supra p.6). Similarly, the doctrine of frustration in the common law countries does not require that the circumstances render performance impossible (supra p. 5).

Professor Nicholas⁽³⁾ affirms that section 79 of CISG reflects the language

1- H. Al-Fazari, supra fn 9, p. 348. S. B. Mansour, supra fn 10, p. 348.

2- D. Tallon, supra fn 57, P. 581.

3- B. Nicholas, supra fn 46, at 5-4, and see also the article of the same writer on "The Vienna Convention on International Sales Law, Law Q. Rev., Vol. 105, 1989, p.235.

of civil law which speaks in term of force majeure. Professor Tallon⁽¹⁾ argues that the elements of exemption under section 79 of CISG constitute the traditional components of force majeure. Professor Noan⁽²⁾ says that section 79 of CISG provides for cases of force majeure.

This means that the impediment should render performance of the contractual duty impossible⁽³⁾.

Moreover, Professor Haddad⁽⁴⁾ makes it clear that the expression impediment rather means impossibility of performance. He further says that this may be the intention of the CISG draftsmen though the term "impossibility" was intentionally excluded⁽⁵⁾.

In contrast, Mr. Hjernner (Sweden), in stating his government opinion on section 65 of the draft convention (which is equivalent to the final text of section 79 of CISG), argues that paragraph 1 of this section does concern neither with force majeure nor with impossibility⁽⁶⁾. Instead, it pertains, he continues⁽⁷⁾, to a "quite different issue of circumstances beyond the control of one of the parties".

Professor Kritzer⁽⁸⁾ says that the test for an exemption under section 79 of CISG is more liberal than that adopted under the force majeure doctrine where performance should be rendered impossible. At the same time, this same test is, he continues⁽⁹⁾, stricter than the standard of the commercial impracticability of UCC.

Taking into consideration the international character of CISG, the need to promote uniformity in its application, and the observance of good faith in international trade (s. 7 of CISG), the national forums, when interpreting section 79, will define the special concept of the impediment.

1- D. Tallon, supra fn 57, p. 578.

2- H.A. Grigera Naon, *The UN Convention on Contracts for the International Sale of Goods, in the Transnational Law of International Commercial Transactions*, edited by N. Horn & C.M. Schmitthoff, Kluwer-Deventer/ The Netherlands, 1982, p.122.

3- B. Nicholas, supra fn 46, at 5-16. A.H. Hudson, supra fn 47, p.186.

4- H. Haddad, supra fn 51, p.151.

5- Id.

6- (A/CONF. 97/C. 1/L. 243) published in the Official Records, supra fn 44, p.409.

7- Id.

8- A. H. Kritzer, supra fn 16, p.501.

9- Id.

The concept of the impediment, anyway, does not raise problems: By virtue of section 6 of CISG, the contracting parties may add to their contract on international sale of goods special provisions concerning this topic. Besides, the general conditions that are already set by specialized international bodies include provisions on this matter too. In compliance with section 9 of CISG, these general conditions may be used in applying this convention⁽¹⁾. These conditions generally offer the concept of the impediment and its effect on the contractual obligation.

In any event, the interpretation of the impediment should not result in making section 79 of CISG applicable to cases where performance of the contract is mere burdensome⁽²⁾. These cases of the hardship of performance are covered by the so-called, in the French administrative law, *la theorie de l'impre'vision*. Many attempts have been made, in Vienne conference, to enact provision on this doctrine or at least on some applications of it. All these attempts were rejected⁽³⁾ on the basis that many countries throughout the world still refuse this doctrine⁽⁴⁾. Thus, this doctrine might not be applied under CISG⁽⁵⁾, unless the contracting parties agreed to that effect (section 6 CISG). Furthermore, the national forums can not apply this doctrine, even if the proper domestic law codifies it. To held otherwise, one of the most important purposes of the convention will be undermined, namely, the purpose of promoting uniformity in the application of this convention.

To sum up, once the party in default failed to avoid the impediment, he must do his best to overcome its consequences on his duty to perform. If he also failed to do this, he should try to alleviate these consequences. This means that

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- 1- On this topic, see the excelent discussion made by J.O. Honnold, *supra* fn 48, pp. 541, 542, and the reference cited.
 - 2- A.H. Hudson, *supra* fn 47, p. 186. M. Shafiq, *supra* fn 57, p.253.
By contrast, Professor Lookofsky (*supra* fn 19, p.131), argues that the impediment "could be interpreted as denoting (1) objective impossibility, (2) objective impossibility plus economic force majeure, or (3) some more flexible standard".
 - 3- (A/CONF. 97/C. 1/L. 199/Rev. 1), published in the Official Records, *supra* fn 44, pp. 381, 382. (A/CN. 9/87), Progress Report of the Working Group on the International Sale of Goods on the Work of its Fifth Session, published in UNCITRAL Yearbook, Vol. 5(1974), United Nations, New York, 1975, p.39 paragraph 108.
 - 4- M. Shafiq, *supra* fn 57, p. 253.
 - 5- On this point, see the excelent discussion of D. Tallon, *supra* fn 57, pp. 591-595.

the debtor must do all in his power to carry out his obligation and may not await events which might later justify his non - performance⁽¹⁾. If the flood, for instance, blocked the railroads only, and the debtor was still able to transport the goods sold via sea, his petition for relief would be rejected.

Once again, the condition of unforeseeability of the event is not per se sufficient to apply section 79 of CISG. The non - performing party is required to reasonably try to overcome the event and its consequences. Thus, it is correctly said that the unforeseeability of the event is considered to be the other side of the inability to resist this same event⁽²⁾. The formula of section 79 of CISG may not lead to this effect. Therefore, the phrase of section 79/1 "or overcome it or its consequences" may, I see, be modified as follows: "and overcome it and its consequences".

II. CASES OF UNFORESEEABILITY

The concept of unforeseeability may relate either to the event itself or to its consequences. In principle, the unforeseen event implies the fact that the consequences thereof are not foreseen too. If the war, for instance, was foreseen, the raise of prices would also be considered foreseen. However, the consequences of the contingency may sometimes be considered unforeseen though the contingency itself was foreshadowed.

In regard to the matter of unforeseeability of the event or its results, one may have four cases in mind:

1. that the event and its consequences were unforeseen,
2. that the event and its consequences were not unforeseen,
3. that the event was unforeseen but the result was foreseen,
4. that the event was foreseen but its result was not.

The first two cases do not raise any problem: Where both the event and the consequences thereof were not foreshadowed the petition for relief would be answered (provided, of course, that the other conditions of exoneration were fulfilled) (first case). In contrast, the debtor would not be excused, if the event and its consequences were foreshadowed (second case).

Likewise, no exemption would be given, if the result was foreseen though the

1- (A/CN. 9/116, annex II), supra fn 44, p. 130.

2- S. B. Mansour, supra fn 10, pp. 44, 45, and reference cited.

event itself was not (third case): The raise of prices or the fall of the purchasing power of currency may be expected regardless their reasons⁽¹⁾. That the contract concluded though the result was foreseen means either the debtor assumed the risk of this result or he was, to some extent, at fault to take preventive measures against this same result. In both cases, it is clear that the debtor will not be granted relief.

The result of a foreseen event may exceed its normal limit (fourth case). Will the debtor, in such a case, be liberated ?

In this regard, the most important point which the judge (or the arbitrator) must address is, I see, the consequences of the event, viz, its effect on the debtor's ability to perform. The result of the event must be considered crucial as well as the event itself. Thus, if the result of the event was not foreshadowed, it would lead to the same legal effect; that effect which is normally brought about by the unforeseen event itself.

III. CRITERION OF UNFORESEEABILITY

We mentioned earlier (Supra p. 12) that the unforseeability relates to the matter of mental conception. The unforseeability therefore requires a certain person through whom the rate of conception may be defined. This person may be either the contracting party himself (subjective criterion), or someone else whom this work should define afterwards (objective criterion).

A. The Subjective Criterion:-

The judge (or the arbitrator) normally decides each case depending on its surrounding circumstances. The topic which this work is discussing here concerns the special character of the debtor. The reference should, therefore, be made to the intent of this debtor only. In doing so, regard should be given to the personal circumstances of the debtor, e.g., his position in society, mental capability, education...etc.

Under this criterion, the debtor is not required to do more than what he is actually able to. Besides, this criterion investigates the matter of unforseeability with the debtor himself. So, it is considered to be fair and logical.

However, this criterion is criticised⁽²⁾: Firstly, the investigation of

1- S. B. Mansour - supra fn 10, p. 34.

2- H. Al-Fazari, supra fn 9, p. 340. A. Al-Sanhouri, supra fn 54, pp. 883, 884.

unforeseeability with the debtor is a psychological matter which is not easy to be ascertained. Thus, this criterion may lead to imprecise results.

Secondly, as each debtor has his own circumstances, the adoption of this subjective criterion results in different solutions; the same event may be considered foreseen by some debtor but not by another. Moreover, the intelligent debtor will be penalized for his acuteness (as he can foreshadow the event, he will not be exempted), while the naive debtor will avail himself of this character of him (he may be granted the exemption, since he can not predict the event).

For this criticism, another criterion has been created, that is, the objective one.

B. The Objective Criterion:-

Concerning this criterion, the question of unforeseeability is not defined according to the personal circumstances of the debtor. Instead, it is ascertained depending on the objective circumstances in the given transaction.

This criterion does require the debtor to be neither genius nor simple. It requires him to be in the middle and to behave as a reasonable person.

For the event to be decided whether it was unforeseen or not, the judge (or the arbitrator) should investigate this question with a reasonable person⁽¹⁾ who faced the same situation of the debtor: No exoneration would be given if the reasonable person was able to foreshadow the event, even if the debtor himself could not actually foresee it. In contrast, the debtor may be relieved when the reasonable person was not able to foresee the event, even if the debtor himself could foresee it⁽²⁾.

Obviously, this criterion is criticised too. It leads to a strange result, that is, the debtor may be exonerated from liability for his failure to perform, though he foresaw the event.

In brief, these two criteria are criticised. Fortunately, CISG does not letterly follow any of them; instead it adopts a different criterion which escapes the aforesaid criticism:

According to section 79/1 of CISG, the non - performing party may escape liability for the non - fulfillment of any of his obligations if he proves, inter alia,

1- S. B. Mansour, supra fn 10, p. 27, A. Al-Sanhouri, supra fn 54, p. 885.

2- H. Al-Fazari, supra fn 9, p. 341.

"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".

From this sentence, it is clear enough that the ability of the party in default to foresee the event is respected. The criticism of the objective criterion is, therefore, avoided. It should not be forgotten that the reference in the equivalent section of ULIS (s. 74) has been made, for the first instance, to the intention of the two parties (supra p. 10); while CISG only rests on whether the non - performing party could reasonably foresee the impediment.

On the other hand, the word "reasonably" represents the advantages of the objective criterion and, at the same time, escapes the disadvantages of the subjective criterion.

For the question of foreseeability to be appreciated, the reference should be made to the criterion of the reasonable person⁽¹⁾, that is, "halfway between the inveterate pessimist who foresees all sorts of disasters and the resolute optimist who never anticipates the least misfortune".⁽²⁾ However, the subjective circumstances of the non - performing party, as mentioned above, should be considered. Thus, the question of reasonableness of the foreseeability varies with the circumstances of the particular case⁽³⁾; it is a matter of appraisal that the judge (or the arbitrator) is to decide depending on the circumstances of the case⁽⁴⁾.

In regard to the question of avoiding or overcoming the impediment or its consequences, it is clear that the criterion of appreciation is the same as for foreseeability, i.e., the reasonable person test. This matter will not be appreciated "in terms of what might be theoretically possible but rather in terms of what might be commercially expected from a man acting in good faith"⁽⁵⁾.

From section 79/1 of CISG, it is obvious that the matter of foreseeability of the occurrence of the event should be appreciated at the time the contract was concluded. Only if the event was unforeseen at that time, a party could be

1- M. Shafiq, supra fn 57, p. 254.

2- D. Tallon, supra fn 57, pp. 580, 581.

3- On this point, see: R. Goff, supra fn 5, p.320.

4- D. Tallon, supra fn 57, p. 581. J. M. Lookofsky, supra fn 19, p. 134, and reference cited.

5- A. H. Hudson, supra fn 47, p. 185.

excused under section 79 of CISG. (This is also the case under section 74 ULIS) (supra p. 10). It does not matter whether the event, for any reason, became foreseen afterwards.

By contrast, the time of concluding the contract is irrelevant in deciding the question of avoiding or overcoming the impediment or its consequences. In other words, this question should be considered at the time following the making of the contract⁽¹⁾, namely the time when the occurrence has taken place⁽²⁾.

The foreseeability should address not only the occurrence of the event per se but also the time of this occurrence⁽³⁾. In order to successfully plead section 79 of CISG, the non - performing party should prove that it was not reasonably foreseeable that the event (hindering performance) should occur during the course of the contract.

1- H. Haddad, supra fn 51, p. 156.

2- Id. J.O. Honnold, supra fn 48, p. 531.

3. D. Tallon, supra fn 57, p. 581.

CONCLUSION

In conclusion, it is worth emphasizing the following notable remarks:

1- It has been made clear that many conditions should be met in order to successfully apply section 79 of CISG. The condition of the unforeseeability of the event hindering performance of the contract is considered to be the most important one; it excludes some other parallel conditions i.e. the condition that the event should be exceptional in character.

2- In addition to the condition of unforeseeability, other terms should be satisfied in order to plead exemption under section 79 of CISG, i.e., that the non-performing party "could not reasonably be expected to... or to have avoided or overcome it or its consequences". The present writer argues that this formula is ambiguous. Therefore, he proposes the following amendment; the formula of this sentence should be as follows: "he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract and to have avoided and overcome it and its consequences".