

PESTALOZZI



ATTORNEYS AT LAW

Force Majeure and Hardship under the CISG

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Non-Performance under the CISG

Uniform definition of breach of contract

If the seller/buyer fails to perform any of his obligations under the contract or the Convention, the buyer/seller may... (see articles 45 / 61)

No distinction

It is irrelevant whether there is non-delivery, defective or late delivery

Fundamental breach of contract

Avoidance of contract or delivery of substitute goods only in cases of fundamental breach (see *article 25*)

No fault

The infringed party is entitled to remedies for breach of contract even if the other party is not at fault – causal liability

Grounds for Exoneration ?

Exemptions from strict liability

Contractual
Agreement

Contractual limitation of liability or exemption clauses

Article 79

Non-performance due to force majeure

Article 80

Non-performance is caused by acts or omissions of the other party

Force Majeure under the CISG

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 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. [...]

Force Majeure under the CISG

General

Exemption from the obligation to pay damages



Non-performance
of contractual
obligations



Delivery of non-
conforming goods



Knowledge
allocation



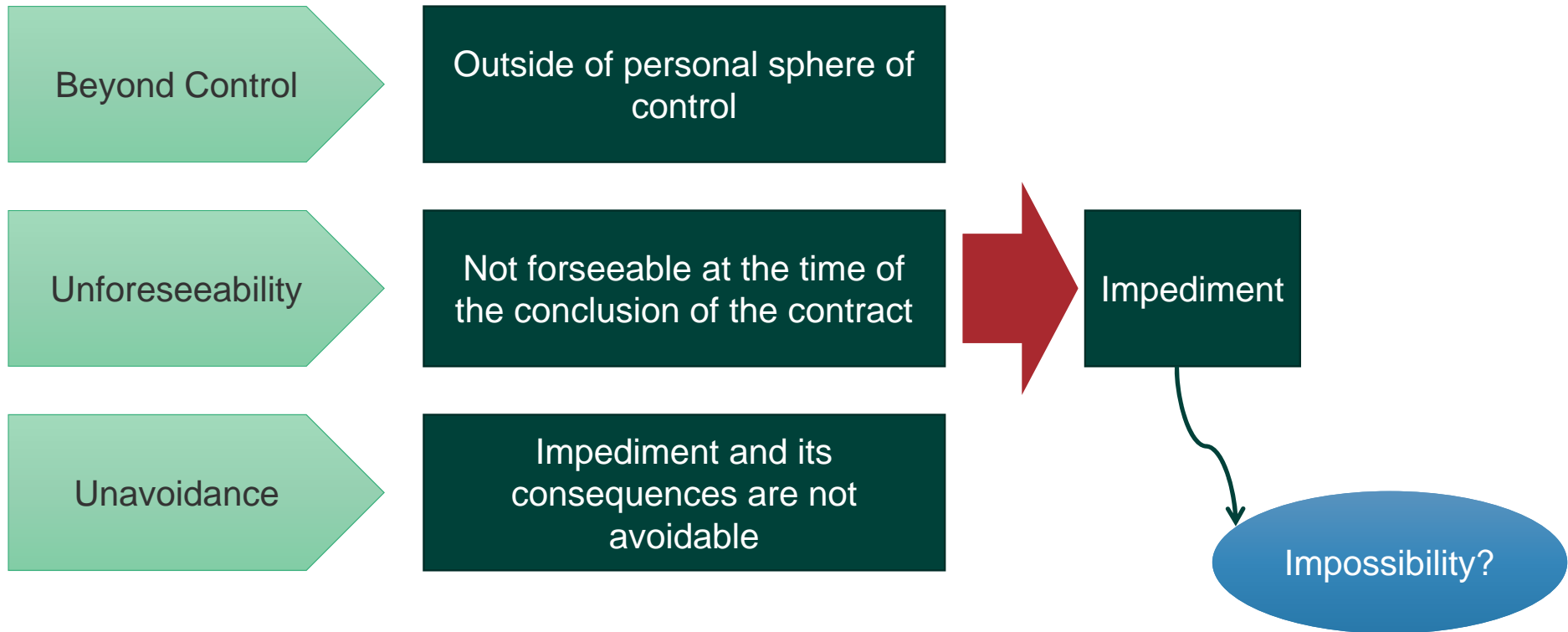
Accessory
obligations?

Requirements for Force Majeure

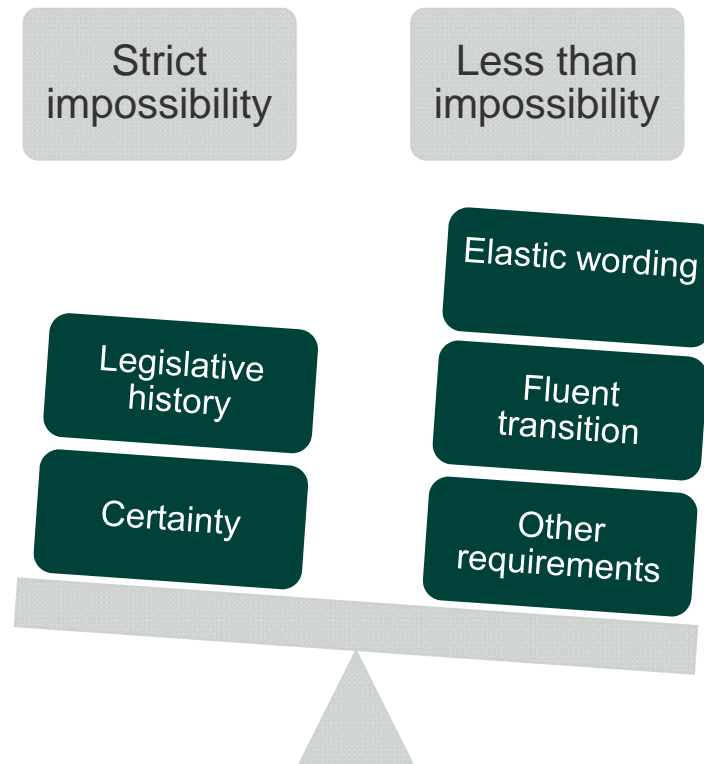
Article 79

(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 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. [...]

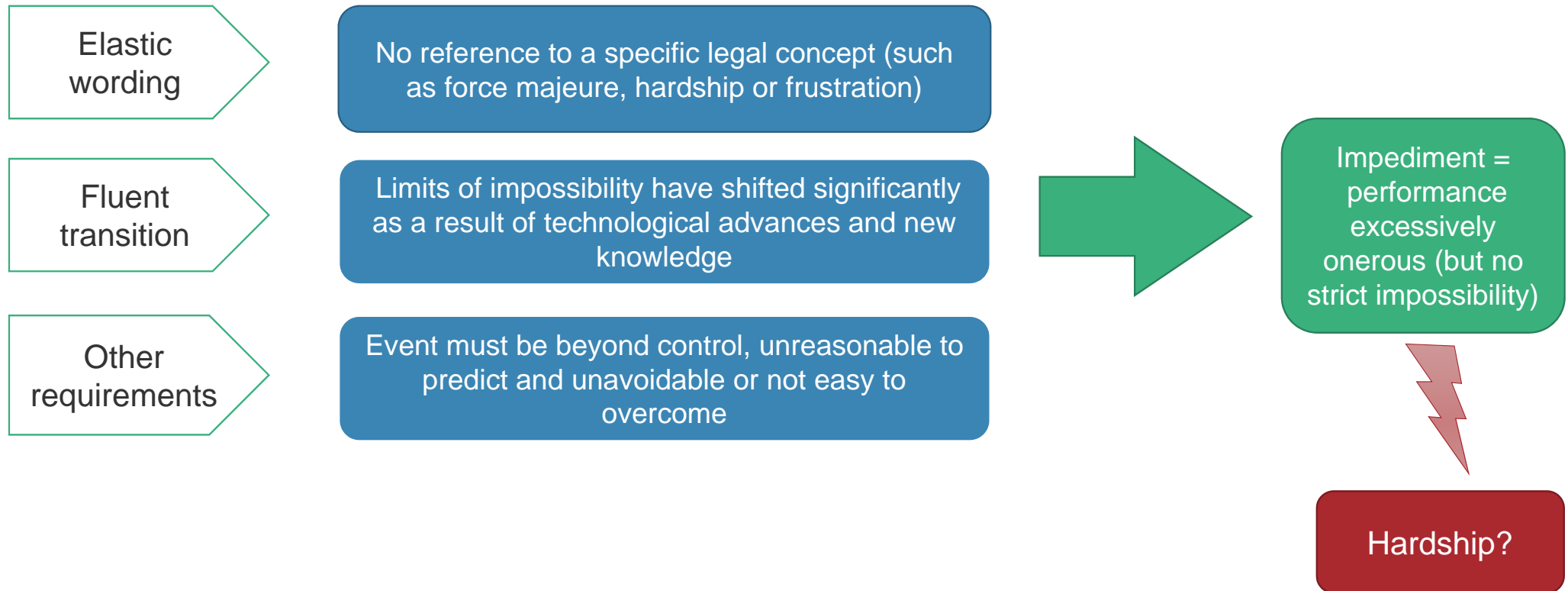
Requirements for Force Majeure



Impediment = Impossibility ?



Impediment = Impossibility ?



Hardship

General

Performance of the contract has become excessively onerous or difficult due to unforeseen circumstances after the conclusion of the contract

Legal Framework

UNIDROIT Principles

- An event fundamentally alters the equilibrium of the contract
 - after contract conclusion;
 - could not be reasonably taken into account;
 - beyond control and
 - risk was not assumed

Domestic Law

- Frustration
- Imprévision
- Wegfall der Geschäftsgrundlage
- Clausula rebus sic stantibus

ICC Hardship Clause 2003

1. *A party to a contract is bound to perform its contractual duties even if events have rendered performance more onerous than could reasonably have been anticipated at the time of the conclusion of the contract.*
2. *Notwithstanding paragraph 1 of this Clause, where a party to a contract proves that:*
 - a. *the continued performance of its contractual duties has become excessively onerous due to an event beyond its reasonable control which it could not reasonably have been expected to have taken into account at the time of the conclusion of the contract; and that*
 - b. *it could not reasonably have avoided or overcome the event or its consequences, the parties are bound, within a reasonable time of the invocation of this Clause, to negotiate alternative contractual terms which reasonably allow for the consequences of the event.*
3. *Where paragraph 2 of this Clause applies, but where alternative contractual terms which reasonably allow for the consequences of the event are not agreed by the other party to the contract as provided in that paragraph, the party invoking this Clause is entitled to termination of the contract.*

Threshold for Force Majeure and Hardship in Practice

Considerations

- Short term sales contract or long term installment contract?
- Financial ruin of the debtor?
- Speculative market?
- Explicit or implicit assumption of risk?

Case Law:

- *Belgium, 19 June 2009 Hof van Cassatie (Scafom international case)*
- *Bulgaria, 12 February 1998 Arbitration Case 11/1996 (Steel ropes case)*
- *Germany, 28 February 1997 Appellate Court Hamburg (Iron molybdenum case)*
- *France, 12 June 2001 Appellate Court Colmar (Air conditioner case)*

Threshold for Hardship

Hof van Cassatie

Found that changed circumstances which were not foreseeable when the contract was concluded and which cause an unreasonable obstacle to the performance may, under certain circumstances, constitute an impediment according to article 79.

*Bulgarian Chamber
of Commerce and
Industry*

Negative development in the market, problems with storage, fluctuations of the currency and decrease of trade volume are part of the economic risk assumed by the buyer; such events are not unforeseeable.

*Appellate Court
Hamburg*

Transaction concerned a highly speculative market. The Court found that under the specific circumstances, a price increase of 300% did not exempt the seller from his duty to perform. In addition, the seller bears the risk of receiving the delivery from his suppliers (procurement risk).

*Appellate Court
Colmar*

Long term contract (contract term was eight years in this particular case); the buyer bears the risk of price fluctuation.



Case-by-case analysis

Conclusion

Force Majeure

- **Event renders the performance impossible**

- **Impediment is beyond control of the debtor**

- **Impediment could not reasonably have been foreseen**

- **Impediment and its consequences could not have been avoided**

- **Impediment is the exclusive reason of the non-performance**

Hardship

- **Event fundamentally alters the equilibrium of the contract**

- **Performance becomes excessively onerous (but not impossible)**

- **Impediment discovered after contract conclusion**

- **Impediment could not reasonably have been foreseen**

- **Impediment is beyond control of the debtor**

- **Extremely high threshold (case-by-case analysis, but more than 100%)**



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