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International Sales Contracts for Force Majeure (Analysis of Supply Chain Disruption Due to the Red Sea Crisis 2023–2024)

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Abstract

The Red Sea crisis, which peaked during the 2023-2024 period, has caused significant disruptions to international trade flows, particularly due to the increased attacks by Houthi groups on commercial vessels in the Red Sea and Gulf of Aden regions. This disruption has caused many global shipping companies to reroute through the Cape of Good Hope in South Africa, which has increased delivery times by 10-14 days and drastically raised international logistics costs. These conditions raise fundamental questions regarding the application of force majeure clauses in international sales contracts, particularly in the context of CISG 1980, Incoterms 2020, and various international contractual standards. This study analyzes how the global-scale geopolitical disruption can meet the elements of impediment beyond control, unforeseeability, and unavoidability as required by Article 79 of the CISG. The study also evaluates the contractual responsibilities of the seller and buyer regarding delivery delays, increased freight costs, and potential breach of contract in Incoterms schemes such as FOB, CIF, and DDP. Through a normative-comparative approach, this study finds that this crisis meets the qualifications of force majeure due to its unpredictable nature, external character, and unavoidable circumstances, thus the affected party has grounds for exoneration as long as they can prove the causal relationship between the event and the inability to fulfilll contractual obligations. Additionally, the research highlights the need to strengthen risk allocation clauses, hardship clauses, and price adjustment mechanisms in international contracts to anticipate future geopolitical disruptions. The main conclusion of the research emphasizes that the Red Sea crisis of 2023-2024 not only tests the elasticity of the force majeure regime in the CISG but also highlights the urgency of updating global trade contract designs to be more adaptive to modern geopolitical and maritime security risks.

1. Introduction

The Red Sea Crisis 2023–2024 marks one of the largest disruptions in the history of modern international trade. This disruption began with the actions of the armed Houthi group, which stopped and attacked ships crossing the Bab-el-Mandeb Strait in Yemeni waters. This geopolitically dimensioned crisis paralyzes global shipping routes, weakens maritime security, and shakes the global supply chain. Under the pretext of solidarity with Palestine amid the escalation of the Gaza conflict, the Houthi group forced thousands of cargo ships to divert from the Suez Canal route, which usually serves about 12-15% of global maritime trade, to a longer route around the Cape of Good Hope at the southern tip of Africa.[1] As a

[1] Ashok Kumar, "Weaponising the Supply Chain: Yemen's Blockade and the Contradictions of Maritime Logistics Capital," *Antipode* 58, no. 1 (January 1, 2026): e70107, https://doi.org/https://doi.org/10.1111/anti.70107.

consequence, delivery times have increased by 10-14 days, shipping costs have surged by up to 300%, and maritime insurance premiums have sharply risen, squeezing the profit margins of exporters and importers worldwide, including developing countries that heavily rely on sea routes.[2]

The impact of this crisis is not merely operational; it also raises complex legal issues that have not yet been fully addressed by the applicable international contract framework. Giant shipping companies like Maersk, MSC, and CMA CGM were forced to reroute their fleets, adding an average distance of 3,500-4,000 nautical miles per voyage. The impact ripples thru the entire global supply chain ecosystem, from raw material producers, exporters, importers, to end consumers, triggering delivery failures in international sales contracts worth billions of US dollars.[3]

In such situations, international law provides a mechanism for the release of obligations through the concept of force majeure, which is specifically regulated by Article 79 of the United Nations Convention on Contracts for the International Sale of Goods (CISG). This article allows the party that fails to perform to be exempt from legal claims if the failure is caused by obstacles beyond their control. Nevertheless, Article 79 of the CISG was designed in the context of the 1980s and was essentially intended for conventional physical disruptions such as natural disasters, not for prolonged and complex geopolitical crises like those occurring in 2023–2024. Based on CISG Advisory Council Opinion No. 7 (2010), four cumulative elements must be met for an event to be classified as force majeure: the existence of an impediment, the impediment is beyond the control of the party failing to perform, the impediment could not have been reasonably foreseen at the time the contract was concluded, and the affected party could not reasonably avoid the impediment or its consequences.[4]

The academic debate regarding Article 79 of the CISG has so far revolved around the tension between contractual certainty and legal flexibility in responding to unforeseen events. Schlechtriem and Wittum (2022)[5] and Brunner (2009) argue that Article 79 is stricter than the conventional force majeure doctrine and explicitly excludes economic hardship from its

[2] Theo Notteboom, Hercules Haralambides, and Kevin Cullinane, "The Red Sea Crisis: Ramifications for Vessel Operations, Shipping Networks, and Maritime Supply Chains," *Maritime Economics & Logistics* 26, no. 1 (2024): 1–20, https://doi.org/10.1057/s41278-024-00287-z.
[3] Zoe, "Maersk, CMA, Hapag-Lloyd and Other Shipping Lines Face Challenges," Linkway Freight, 2024, https://linkwayfrt.com/2024/09/26/maersk-cma-hapag-lloyd-and-other-shipping-lines-face-challenges/.
[4] Chiara Crivelli, "Mixed Contracts in International Sales Law: A Comparative Study of the CISG and the UCC," *SSRN Electronic Journal*, 2025, https://doi.org/10.2139/ssrn.5448835.
[5] Ingeborg Schwenzer and Patrick Wittum, "The CISG and European Private Law: When in Rome, Do as the Romans Do," *European Review of Private Law*, 2022, 835–70, https://doi.org/https://doi.org/10.54648/erpl2022039.

scope.[6] On the contrary, Flambouras (2002)[7] and Atamer (2017)[8] criticize this rigid approach as unresponsive to the realities of modern trade, where geopolitical upheavals or pandemics can fundamentally undermine the economic foundation of a contract. This tension is further complicated by the fact that Article 79 lies between the doctrine of frustration in common law and the clausula rebus sic stantibus in civil law, without fully adopting either.

Previous studies on force majeure have indeed expanded the scope of this concept beyond natural disasters, but they remain partial, failing to identify the types of international contracts most affected, not analyzing risk allocation based on specific Incoterms schemes such as FOB, CIF, and DDP, and not examining how actions by non-state actors can fulfilll the cumulative elements of Article 79 CISG. In the context of the COVID-19 pandemic, Januarita & Sumiyati (2020)[9] and Sowmya (2022)[10] have shown that systemic disruptions can be categorized as force majeure in a partial form, opening the argument that geopolitical instability could potentially meet the same criteria in international shipping contracts.

Existing literature also tends to focus on universal disruptions, rather than geographically localized disruptions that have systemic impacts, such as the Red Sea Crisis. The most significant gap that remains unresolved is the absence of a comprehensive analysis of the intersection between Article 79 of the CISG, Incoterms 2020, and armed conflict by non-state actors, particularly concerning the ambiguity of the risk transfer point when the shipping route must be changed, the operationalization of the commercial impracticability standard in the context of freight cost surges of 300-400%, and the potential of the UNIDROIT hardship doctrine as a supplementary instrument when the threshold for full exemption under Article 79 is not met.

This research provides two dimensions of original contribution to the literature on international trade law. Doctrinally, this research challenges the conventional interpretation of Article 79 of the CISG by arguing that geopolitical disruptions caused by non-state armed actors, such as the Houthi attacks, can cumulatively fulfilll the elements of impediment beyond control, unforeseeability, and unavoidability, as long as the causal relationship between the event and the contractual failure can be proven. From a comparative analytical-normative perspective, this research identifies an inherent regulatory gap in Incoterms 2020, which is structurally not designed to accommodate geopolitical disruptions, and asserts that contractual legal certainty in such conditions can only be achieved thru the integration of explicit force majeure clauses, hardship mechanisms based on the UNIDROIT Principles 2016,

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[6] Jacek Bil and Executive Education, "Towards a Multi-Factor Quantum Model for Supply Chain Disruption Damages in International Commercial Arbitration," *SSRN Electronic Journal*, 2026, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=6830658.

[7] Dionysios Flambouras, "Comparative Remarks on CISG Article 79 & PECL Articles 6: 111, 8: 108," *Guide to Article*, 2002.

[8] Yeşim M Atamer, "Why Judicial Control of Price Terms in Consumer Contracts Might Not Always Be the Right Answer – Insights from Behavioural Law and Economics," *The Modern Law Review* 80, no. 4 (July 1, 2017): 624–60, https://doi.org/https://doi.org/10.1111/1468-2230.12277.

[9] Ratna Januarita and Yeti Sumiyati, "Legal Risk Management: Can the COVID-19 Pandemic Be Included as a Force Majeure Clause in a Contract?," *International Journal of Law and Management* 63, no. 2 (November 12, 2020): 219–38, https://doi.org/10.1108/IJLMA-05-2020-0140.

[10] Chippa Sowmya, "COVID-19 and Its Impact on International Trade: A Force Majeure Clause Analysis," *Issue 1 Indian JL & Legal Rsch.* 4 (2022): 1.

price adjustment clauses, and the selection of Incoterms schemes tailored to the risk management capacities of the parties involved.

Based on this foundation, this research formulates two main questions: whether the Red Sea Crisis 2023-2024 can be classified as force majeure under Article 79 CISG in the context of the elements of impediment beyond control, unforeseeability, and unavoidability, and whether the contractual risk distribution mechanisms based on the Incoterms scheme are still adequate to ensure legal certainty for the parties in the context of geopolitical disruption.

2. Methods

This research is a normative legal research that examines law as a system of norms by analyzing the principles, doctrines, and applicable provisions of international contract law. The normative approach was chosen because the main object of the study is the provisions of positive law, specifically Article 79 of the CISG, Incoterms 2020, and the general principles of international trade law related to force majeure clauses in the context of supply chain disruptions due to the Red Sea crisis 2023–2024.[11] This research employs two approaches simultaneously, namely the normative approach and the comparative approach.[12] The normative approach is used to examine and interpret the applicable legal provisions related to force majeure, specifically the three cumulative requirements of impediment beyond control, unforeseeability, and unavoidability as regulated in Article 79 of the CISG. The normative analysis is directed to test whether the empirical facts of the Red Sea crisis, including the Houthi group's attacks, the decision to reroute shipping, and the spike in freight costs, simultaneously meet these three elements, while also examining the fulfillment of the causal nexus between the crisis event and the party's inability to fulfilll contractual obligations as a condition for obtaining exoneration. Meanwhile, a comparative approach is used to compare the regulation and application of the concept of force majeure in various legal systems and international instruments, including the CISG 1980, UNIDROIT Principles of International Commercial Contracts (PICC) 2016, Incoterms 2020, the doctrine of frustration in the common law system, and the provisions of Civil Law as a comparative legal system.

The legal materials used in this research consist of three categories.[13] First, primary legal materials that are binding, including the CISG 1980 text, particularly Article 79, Incoterms 2020, UNIDROIT PICC 2016, the Indonesian Civil Code Articles 1244–1245, and relevant international arbitration decisions related to force majeure. Second, secondary legal materials that provide explanations of primary legal materials, including academic literature, official commentary on the CISG and UNIDROIT PICC, international legal journals, or reports from international organizations such as UNCTAD, ICC, and IMO related to the impact of the Red Sea crisis. Third, tertiary legal materials in the form of legal dictionaries and glossaries of international trade law terms as supporting materials.

The collection of legal materials is conducted thru library research by tracing and inventorying legal materials from various sources, including international legal databases, as

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[11] Ulrich Fastenrath, "Relative Normativity in International Law," in *Sources of International Law*, 1st ed. (London: Routledge, 2017), 153–88, https://doi.org/https://doi.org/10.4324/9781315087795.

[12] Juan Espíndola, "What Comparisons Can Do for Normative Theory," *Educational Theory* 74, no. 3 (June 1, 2024): 312–20, https://doi.org/https://doi.org/10.1111/edth.12636.

[13] C O'Neill and J Gillespie, *Legal Research: How to Find & Understand the Law*, 20th ed. (El Segundo: NOLO, 2024), https://books.google.co.id/books?id=MewWEQAAQBAJ.

well as shipping industry reports and freight rate data for the 2023–2024 period. The analysis is conducted qualitatively thru three sequential stages. The first stage is the identification and inventory of all legal provisions, doctrines, and jurisprudence relevant to the elements of force majeure. The second stage is interpretation and qualification, namely applying the normative framework of Article 79 CISG to the empirical facts of the Red Sea crisis to determine whether the crisis meets the qualifications of force majeure that provide a basis for exoneration for the affected party. The third stage is comparison and synthesis, which involves comparing the results of interpretations across international legal instruments and legal systems to produce comprehensive conclusions and formulate recommendations for strengthening the design of international trade contract clauses to be more adaptive to geopolitical risks and maritime security in the future.

3. Results and Discussion

3.1. Does the Red Sea Crisis 2023–2024 Constitute Force Majeure Under Article 79 CISG? A Legal Analysis of Impediment, Foreseeability, and Avoidability

Force Majeure is present as a legal assumption regarding an event that prevents the parties entering into an agreement or contract from being held responsible for a situation beyond their control or ability to fulfilll contractual obligations. The presence of force majeure opens up the opportunity for the parties to not be held accountable for situations that arise from external factors. This definition considers that force majeure is an impediment to events such as natural disasters.[14] However, findings show that situations arising from outside the internal parties to the agreement can also include pandemics or geopolitical events.

The argument that the Red Sea Crisis 2023–2024 exceeds the level of risk commonly assumed in international trade must be built on a proper understanding of the normative construction of Article 79 CISG. This provision is not designed to relieve a party from every commercial difficulty, but only from obstacles that are objectively beyond the limits of risk that can be anticipated and allocated at the time the contract is signed. In this framework, the concept of the threshold of exemption becomes a crucial analytical instrument: a new event can qualify for exemption if it exceeds what is called the assumed risk allocation, namely the implicit risk distribution inherent in every international trade contract based on prevailing market conditions. The Red Sea Crisis, marked by systematic attacks by the Houthi group on cross-border commercial vessels, resulted in the de facto closure of the Suez Canal as the main route for global trade. A condition that is qualitatively different from ordinary shipping cost fluctuations, localized regional geopolitical instability, or conventional piracy risks that have long been part of the risk calculations in international shipping. This qualitative difference is the starting point of the argument that this crisis has the potential to exceed the commercial risk limits assumed in standard trade contract.

However, proving that the Red Sea Crisis exceeds the threshold of foreseeable risk faces substantial analytical challenges, especially considering the gradual escalation of the conflict. The foreseeability standard in Article 79 of the CISG refers to the predictive ability of a reasonable and experienced business operator in the relevant sector at the time the contract is

[14] Yuanyuan Guo, Hazlina Shaik Md Noor Alam, and Nur Khalidah Dahlan, "Comparative Research on Force Majeure System in Contract Law," *International Journal of Criminal Justice Sciences* 19, no. 1 (2024): 99–116, https://doi.org/10.5281/zenodo.19106.

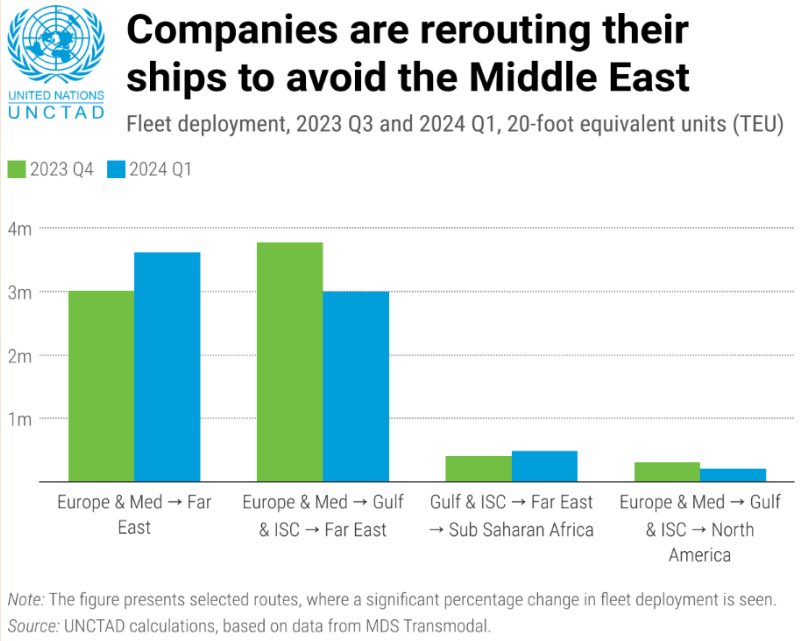
signed, not the predictive ability of the average member of the general public.[15] In this context, there is a significant difference in legal treatment between contracts concluded before October 2023, when the Gaza conflict had not yet erupted and the involvement of the Houthis in disrupting commercial shipping was unpredictable, and contracts signed after November 2023, when Houthi attacks had become a widely documented fact in maritime intelligence reports and official warnings from international shipping authorities. For contracts that fall into the second category, the claim of unforeseeability becomes legally very weak, as experienced business operators are considered to have anticipated such risks and reflected them in contract clauses, price adjustments, or more comprehensive insurance mechanisms. On the other hand, for contracts in the first category, the argument that systematic attacks by non-state actors on multilateral shipping routes constitute an event that exceeds reasonable commercial risk assumptions can be built on a much stronger foundation, although it must still contend with the counter-argument that Yemen's instability since 2015 should have been a background risk factor considered by prudent international traders.

The fulfillment of the exception threshold under Article 79 of the CISG in the context of the Red Sea Crisis is contextual and cannot be generalized. This event objectively possesses characteristics that exceed conventional commercial risks, namely its systemic nature, protracted duration, involvement of active military threats against global shipping infrastructure, and disruption to routes accounting for approximately 12-15% of global maritime trade.[16] However, the fulfillment of this threshold must still be proven factually and individually for each contract, considering three critical variables: the date of contract signing relative to the escalation chronology, the presence or absence of an explicit force majeure clause that specifically regulates the distribution of geopolitical risk beyond the default provisions of Article 79, and the extent to which the party claiming the exception has fulfilled reasonable mitigation obligations as mandated by Article 77 CISG. In this framework, the Red Sea Crisis does not automatically activate the exception under Article 79, but it opens a legitimate argument that for certain contracts, particularly those signed before the escalation and lacking an explicit force majeure clause regarding this event, should be considered as exceeding the threshold of risk that can be reasonably allocated in international trade, thus meeting the threshold required for liability exemption under Article 79 CISG.

The Red Sea has become one of the most important maritime routes or corridors in international trade. Connecting the Indian Ocean with the Mediterranean Sea thru the Suez Canal, making it the shortest route linking East Asia, South Asia, and the Middle East with markets in Europe and North America. It is estimated that around 12-15% of the total volume of world trade, including more than 8% of global LNG and about 12% of the total oil traded internationally, passes through this route each year. Having an important role in international trade, this route has become the busiest shipping lane in the world, with easy access thru the Suez Canal known as the Sea Lines of Communication (SLOC). However, this area passes

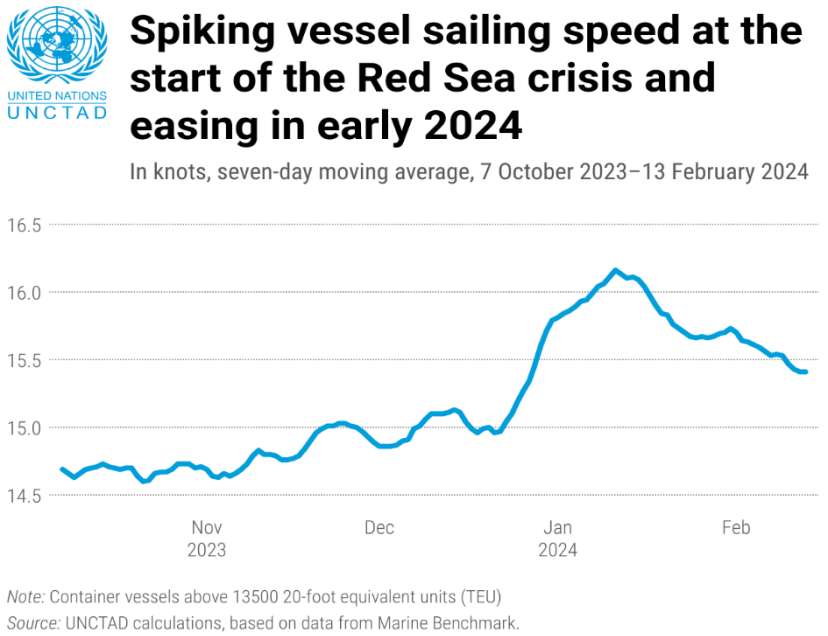
[15] Maarten Herbosch and Floris Mertens, "The Future of Mergers & Acquisitions? Risk Allocation in AI-Guided Transactions," *Forthcoming in European Business Organization Law Review*, 2026, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5275610.
[16] Notteboom, Haralambides, and Cullinane, "The Red Sea Crisis: Ramifications for Vessel Operations, Shipping Networks, and Maritime Supply Chains."

through a region with escalating conflicts. The Houthi group based in Yemen, in the context of supporting Gaza after the October 2023 conflict, began launching a series of attacks on commercial ships passing through the route. The initially sporadic attacks evolved into a systematic campaign that included the use of drones, ballistic missiles, and ship hijackings. This situation forces players in the international shipping industry, including major shipping companies such as Maersk, MSC, CMA CGM, and Hapag-Lloyd, to reroute their paths around the Cape of Good Hope in South Africa, adding approximately 3,000-4,000 nautical miles and 10-14 days of travel time per voyage.[17]



Picture 1. Change in cargo ship sailing routes to avoid the Middle East region (2023 Q3–2024 Q1).

[17] UNCTAD, "Navigating Troubled Waters Impact to Global Trade of Disruption of Shipping Routes in the Red Sea, Black Sea and Panama Canal," 2024, https://unctad.org/publication/navigating-troubled-waters-impact-global-trade-disruption-shipping-routes-red-sea-black.



Picture 2. The sailing speed of cargo ships due to the impact of the Red Sea crisis.

Article 79 of the United Nations CISG serves as the primary instrument in international trade when an event occurs beyond the control of the parties involved in the international agreement (force majeure). To qualify as a force majeure in shipping according to Article 79 Paragraph (1) of the CISG, international doctrine and jurisprudence consistently identify three cumulative elements that must be proven by the party claiming force majeure, namely Impediment beyond control (an obstacle beyond the control of the party failing to perform), Unforeseeability (the obstacle could not have been reasonably foreseen at the time the agreement was made), and Unavoidability (the obstacle could not be avoided or overcome along with its consequences).[18] These elements are cumulative, meaning that the failure to prove even one element can result in the entire force majeure claim being dismissed. This is as emphasized in various international arbitration rulings, such as in the China International Economic and Trade Arbitration Commission (CIETAC) Steel Case 2005 and ICC Case No. 11265 (Scrap Steel Case) 2003.[19]

It is also important to understand that Article 79 of the CISG has a different character from the concept of force majeure in any national legal system, especially the most well-known ones, namely Common Law and Civil Law.

Table 1. Comparison table of force majeure in CISG with Common law and Civil law legal systems.

Aspect	Article 79 CISG	Common Law	Civil Law

[18] Başak Başoğlu and Kadir Berk Kapancı, "The Impact of Force Majeure on Contracts for the International Sale of Commercial Goods Under Art. 79 of the CISG," *Annales de La Faculté de Droit d'Istanbul*, no. 77 (2026): 152–68, https://doi.org/10.26650/annales.2025.78.1682722.

[19] Anastasia Goryacheva and Natalia Kisliakova, "Non-Recognition of Dissenting Opinions in CAS as a Controversial and Unresolved Matter," *Journal of International Arbitration*, 2022, 233–62, https://doi.org/https://doi.org/10.54648/joia2022010.

Basis of liberation	Impediment Beyond Control	Frustation of Purpose	Cas Fortuit/Force Majeure
Standard of Proof	The party that fails to perform	The party that claims	The party that claims
Legal Consequences	Temporary or permanent release	The contract ends automatically	Varies by jurisdiction
Mitigation Obligation	Implicit as in Article 77 of the CISG	Yes, Common law duty	Varied
Notification obligation	stipulated in Article 79 (4) CISG	Not Explicit	Varies by system

In this case, the characteristic of Article 79 CISG that needs to be emphasized is that this article does not automatically terminate the contract, for example, unlike frustration in common law. The consequence is merely the release from the obligation to pay compensation during the period of impediment, while the obligation to perform substantively does not automatically cease. Various elements, such as Impediment Beyond Control, Unforeseeability, and Unavoidability, view force majeure as a permanent legal decision regarding natural disasters, while these elements, as outlined in Article 79 of the CISG, must be proven by the party claiming force majeure, especially in cases of geopolitical nature that are implementable and avoidable.

CISG jurisprudence consistently asserts that the fulfillment of the exception requirement under Article 79 demands a two-layered analysis that goes beyond merely stating that an event is beyond the control of the party involved. A fundamental distinction must be made between the triggering event that is objectively uncontrollable and the commercial consequences it produces, which possibly still fall within the reach of available commercial management. This distinction was first systematically articulated in ICC arbitration decisions and later codified in Schwenzer's analysis (2022)[20], which asserts that Article 79 does not protect a party from every impact of external events, but only from impacts that are objectively unmanageable thru available commercial instruments. In the context of the Red Sea Crisis, the application of this two-layer framework yields a conclusion that is not straightforward.

The most substantial counter-argument within this framework relies on the availability of reasonable commercial alternatives as a factor that can eliminate the claim for exemption under Article 79. The existence of external obstacles does not by itself meet the requirement of unavoidability if the affected party still has access to commercially operable mitigation mechanisms, including the use of alternative routes, renegotiation of delivery schedules, or

[20] Schwenzer and Wittum, "The CISG and European Private Law: When in Rome, Do as the Romans Do."

the utilization of maritime insurance instruments. In the context of the Red Sea Crisis, the route around Cape of Good Hope is technically available and has been used by most commercial shipping since early 2024, making the argument that the disruption was completely unavoidable legally weak. However, it cannot stop at the mere observation that alternatives are available; the relevant standard is whether those alternatives are commercially reasonable, and not just physically feasible. The addition of a 10-14 day transit time and a surge in freight costs by 300-400% accompanying the Cape of Good route constitutes a significant commercial burden, and the question of whether this burden remains within the bounds of commercial reasonableness that can be expected from the affected parties becomes a factual issue that must be decided on a case-by-case basis depending on the specific context of each contract.

The analytical implication of the above framework is that the exception in Article 79 in the context of the Red Sea Crisis cannot be applied blanketly, but must pass a proportionality test that simultaneously considers the magnitude of the available alternative commercial burden with the financial and operational capacity of the party claiming the exception. The beyond control standard in Article 79 must be interpreted dynamically, meaning that a consequence that may initially be commercially manageable at the onset of a crisis can shift to being beyond commercial management if the crisis persists beyond a reasonable expectation. In this case, the extension of the Red Sea Crisis beyond one year and the ongoing uncertainty of its resolution strengthen the argument that this disruption is gradually shifting from a manageable risk category to an obstacle that exceeds reasonable commercial management capacity, particularly for medium-sized businesses that lack the financial flexibility to bear a long-term surge in logistics costs. Thus, the analysis of Article 79 in this context demands not only an assessment of the triggering event but also a continuous and contextual evaluation of the evolution of the commercial consequences it produces throughout the duration of the disruption.

Article 79 of the CISG sets a deliberately high threshold for exceptions, reflecting the fundamental principle that the principle of *pacta sunt servanda* remains the cornerstone of international contract law and that exemption from liability can only be justified in circumstances that truly exceed the capacity for reasonable commercial adaptation.[21] In this framework, the party claiming the exception must not only prove that the Houthi attack was an uncontrollable external obstacle. Because this only fulfills the first element of the cumulative conditions outlined in Article 79, what is far more legally decisive is the proof that the disruption to contract performance caused by the attack was unavoidable or insurmountable even thru commercially available alternatives. The availability of the Cape of Good route as a substitution path that is technically operational and has been widely used by the global shipping industry since early 2024 places a significant burden of proof on the party claiming the exception, according to CISG jurisprudence. A claim of unavoidability is made if an alternative for contract performance can still be identified and operationalized, albeit at a higher cost than originally anticipated. However, an analysis that stops at the mere observation of the availability of the alternative route will lead to overly simplistic conclusions

[21] Sam Mutsamwira, "Inadequacies of Article 42 CISG: Does the Answer Lie in Article 79?," *Canterbury Law Review* 31 (January 1, 2025): 123–49, https://doi.org/https://search.informit.org/doi/10.3316/informit.T2025020400001501241336394.

and will not fully reflect the normative complexity of Article 79, as the relevant standard is not merely physical availability but rather the commercial reasonableness of the alternative in question. The surge in shipping costs (freight) by 300-400%, the longer travel times, and the escalation of maritime insurance premiums accompanying the rerouting to Cape of Good Hope cumulatively result in a substantial commercial burden. Thus, it raises the question of whether the burden is still within the bounds of commercial reasonableness that can be expected from the affected parties, which must be evaluated contextually by considering the scale of the business, contract profit margins, and the financial capacity of the parties involved. Thus, this highlights the main issue, namely that a route "available" technically may not necessarily be a "reasonable" commercial alternative for all categories of international trade actors, and it is precisely in this gap that the most legitimate legal argument for the exception under Article 79 can be constructed.

If the seller uses the CIF or CFR scheme or term, the risk of delivery, including route selection, generally falls on the seller's responsibility. However, Article 79 of the CISG operates independently of Incoterms or even in CIF, if the route used suddenly becomes unsafe due to the actions of an uncontrollable third party, an impediment claim can still be made, with the change being the burden of proof and the scope of risk to be allocated.[22] Therefore, the implications of the Red Sea crisis 2023-2024 prima facie qualify as an "impediment beyond control" under Article 79 CISG, considering that the attack was carried out by non-state actors completely beyond the control of the contracting parties, the resulting impediment is external and not a usual risk that can be easily allocated in a standard trade contract, and the massive rerouting of international shipping demonstrates that the impediment is real and substantive, not merely a subjective perception.

Then the Red Sea crisis 2023-2024, as it relates to the element of unforeseeability, Article 79 Paragraph (1) of the CISG stipulates that the party claiming force majeure could not reasonably have been expected to take the impediment into account at the time of the conclusion of the contract.[23] This formula contains two important elements, namely the standard of reasonableness (reasonable person) and the point of reference in time (time of conclusion of contract). In this case, international arbitration jurisprudence has also established that the standard of unforeseeability does not mean that the obstacle is absolutely unforeseeable, but rather that a reasonable business person in the same position would not realistically consider that possibility as a basis for contract negotiation. The element of unforeseeability greatly depends on when a contract is related or relevant to the ongoing escalation of the crisis.[24]

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[22] Akhileshwar Pathak, "Carriage and Delivery: Incoterms BT - Contract Terms in International Business: Principles and Applications," in *Contract Terms in International Business*, ed. Akhileshwar Pathak (Singapore: Springer Nature Singapore, 2025), 133–42, https://doi.org/10.1007/978-981-96-8146-4_13.

[23] Hüseyin Can Aksoy, "Elephant in the Room: CISG, Hardship, and Uniform Application," *European Business Law Review*, 2023, 463–80, https://doi.org/https://doi.org/10.54648/eulr2023027.

[24] Vernon Valentine Palmer, "Excused Performances: Force Majeure, Impracticability, and Frustration of Contracts," *The American Journal of Comparative Law* 70, no. Supplement_1 (October 1, 2022): i70–88, https://doi.org/10.1093/ajcl/avac017.

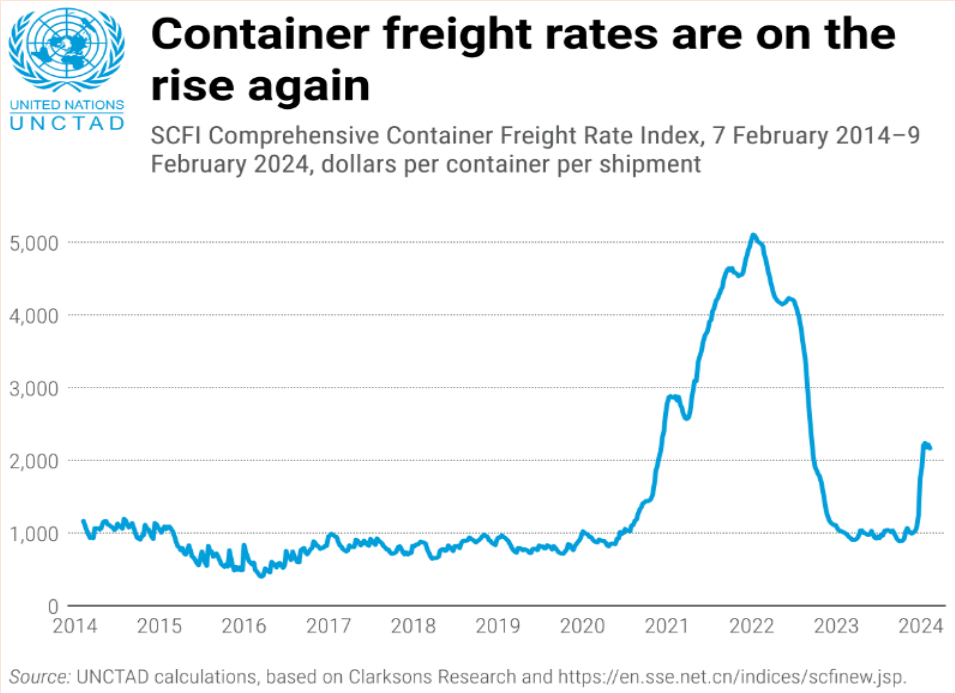
The implications of the unforeseeability element in the Red Sea Crisis case 2023-2024 can be reviewed based on the period during which international shipping takes place. For example, contracts agreed upon before October 2023 have a strong claim for "force majeure," as the risks were largely unforeseen. Then, contracts agreed upon between October and December 2023 fall into a gray area, requiring a specific factual assessment regarding the parties' knowledge and the reasonably available information at the time the contract was made. In this type of contract, the parties usually provide strong evidence to determine their inability, so it can be considered "force majeure" based on facts and evidence showing that it was beyond their control, including the inability to reroute, thus increasing tariffs, and so on. Meanwhile, contracts made after January 2024 have weak force majeure claims, as the disruptions have become widely known and can be said to be foreseeable by a reasonable commercial party. During this period, the parties entering into the agreement can create a comprehensive agreement regarding the rerouting and the costs associated with it. It is recorded that five international companies suspended their operations in the Red Sea in December 2023, such as OOCL based in Hong Kong, CMA CGM from France, Maersk from Denmark, Hapag-Lloyd from Germany, and Mediterranean Shipping Co owned by Italy-Switzerland.[25]

Therefore, to support the qualification of the crisis as unforeseeable, it is required for contracts agreed upon before the Red Sea Crisis 2023-2024 occurred or by early October 2023. Historically, there is no precedent for systematic Houthi attacks on international commercial vessels before the Red Sea crisis occurred. Although the Yemen conflict has been ongoing since 2015, the attacks on commercial shipping represent a qualitatively different escalation, resulting in losses during shipping operations. Random attacks on ships from various countries and carrying different types of cargo (not just Israeli-affiliated vessels) could not have been anticipated by reasonable business operators. These attacks not only create direct losses for shipping operators but also result in prolonged shipping time dilemmas.[26] Regarding the response of the international community, such as the establishment of Operation Prosperity Guardian and the UN's insistence, it shows that even state actors did not anticipate this escalation, let alone shipping operators.

Regarding this matter, international arbitration law distinguishes between general risk inherent in international trade and specific risk in international trade. Article 79 of the CISG is not intended to protect parties from general trade risks, but only from obstacles that are truly beyond the reasonable calculation of a business operator. The Red Sea Crisis 2023–2024 has successfully surpassed the threshold from general risk to extraordinary specific risk. This is evidenced by the fact that freight costs have increased by 300-400% within weeks, several of the world's largest shipping companies have massively rerouted their routes, and the

[25] BBC, "More Big Shipping Firms Stop Red Sea Routes after Attacks," *BBC*, December 17, 2023, https://www.bbc.com/news/world-middle-east-67738792.
[26] Emilio Rodriguez-Diaz, J. I. Alcaide, and R. Garcia-Llave, "Challenges and Security Risks in the Red Sea: Impact of Houthi Attacks on Maritime Traffic," *Journal of Marine Science and Engineering* 12, no. 11 (2024), https://doi.org/10.3390/jmse12111900.

insurance market has imposed a war risk surcharge that has never been seen before on that route.[27]



Picture 3. The trend of rising global container shipping rates (container freight rates).

Furthermore, the element of unavoidability in Article 79 of the CISG requires that the party claiming force majeure must not have "avoided or overcome (the impediment) or its consequences." This phrase contains two different aspects in determining unavoidability, namely avoiding the impediment itself, and overcoming its consequences. It is important to note that what is required is not absolute impossibility, but rather reasonable impracticability from a commercial perspective. This is in line with the approach in UNIDROIT Principles Article 7.1.7, which uses the standard "cannot reasonably be required."[28]

In CISG practice and jurisprudence, the availability of alternative routes is consistently used as the basis for rejecting force majeure claims, relying on the principle that obstacles can be overcome thru available commercial instruments, albeit at a higher cost, and do not meet the impossibility standard required by Article 79.[29] The existence of the Cape of Good route as a substitute path, which is technically operational, becomes the strongest argument for the party rejecting the exemption claim, because it demonstrates that the physical execution of the contract is still possible. Therefore, the claim that execution has become "impossible" is doctrinally difficult to uphold if it is solely based on the fact of the closure of the primary route. Basically, Article 79 is not designed to protect a party from every form of commercial difficulty,

[27] UNCTAD, "Navigating Troubled Waters Impact to Global Trade of Disruption of Shipping Routes in the Red Sea, Black Sea and Panama Canal."
[28] Sergio García Long, "Hardship under the Unidroit Principles of International Commercial Contracts: A Reassessment from Uniform Law," *Uniform Law Review* 30, no. 4 (December 1, 2025): 504–17, https://doi.org/10.1093/ulr/unaf046.
[29] Peter J. Mazzacano, "CISG Article 79 a t 40: 'Impediments' to Uniform Interpretation?," *SSRN*, 2022, 1–21, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4360421.

and that increases in costs, delays, or logistical inconveniences, no matter how significant, do not automatically transform a more expensive performance into an impossible performance in the legal sense here. However, an analysis that stops at this point will yield an incomplete conclusion, because Article 79 does not merely require absolute impossibility but also the commercial impracticality of the available alternatives, and it is precisely here that a sharper legal argument must be constructed. The party claiming the exception must be able to concretely and proportionally demonstrate that the Cape of Good route is not a commercially reasonable alternative in the context of the relevant contract. For example, by demonstrating that the cumulative burden produced, such as a freight cost surge of 300-400%, an extension of travel time by 10-14 days, an escalation in maritime insurance premiums, and ongoing schedule uncertainties. This collectively results in execution conditions that exceed the level of risk that can reasonably be expected to be borne by the parties at the time the contract was made, particularly if the contract's profit margin, the agreed pricing structure, and the financial capacity of the affected party make the use of alternative routes a burden that substantially alters the economic balance of the contract far beyond the implicit risk distribution assumed by the parties when the contract was signed. Therefore, what must be proven is not merely that the alternative is more expensive, but that it is fundamentally not to be expected from the concerned party based on the factual, commercial, and contractual context surrounding the agreement.

Table 2. Brief table of the Unavoidability factor regarding the Red Sea crisis 2023-2024.

Factor	Argument of Unavoidability	Note
Route of Cape of Good Hope is available.	It doesn't mean that obstacles can be avoided; delays still occur due to the rerouting that detours to the south of the African continent.	Critical if the contract has a delivery deadline.
Freight costs have increased by 300-400%.	Regarding to commercial impracticability, it can meet unavoidability. The increase in costs is caused by restricted access and the diversion of routes that are farther away, resulting in higher costs and longer time.	Need evidence that the cost increase is disproportionate.
Scarcity of alternative route capacity.	If no ships are available, then the element of unavoidability is fulfilled.	Documentation of alternative search efforts is needed.
Force majeure is only a delay, not non-delivery.	Unavoidability is easier to prove for shipping delays than for total failure.	This actually supports the suspension of obligation scheme.

Article 77 of the CISG requires the party suffering a loss to take reasonable steps to mitigate its loss. In the context of force majeure, this obligation also applies to the party claiming the occurrence of the impediment. They are obliged to take all reasonably expected steps to minimize the impact of the obstruction. Relevant mitigation measures in the context of the Red Sea Crisis may include:

a. Diverting the route thru Tanjung Harapan (which is indeed done by the majority of industry players).
b. Provide immediate notification to the counterparty in accordance with Article 79(4) CISG.
c. Negotiating for voluntary adjustments to the delivery schedule.
d. Seeking war risk insurance to cover additional risks.
e. Documenting all efforts made to demonstrate good faith in mitigation.

Article 79 Paragraph (4) of the CISG requires the party experiencing the impediment to notify the other party within a reasonable time after it becomes aware or should have become aware of the impediment. Failure to provide notification may result in that party remaining liable for losses that could have been avoided if the notification had been made in a timely manner. In the context of the Red Sea Crisis, notification should be made immediately after the decision to reroute is taken. Therefore, if all three elements of Article 79 CISG are met, the consequence is an exemption from the obligation to pay damages. However, it is not an exemption from the obligation to perform itself. This is a fundamental difference that is often misunderstood. The legal consequences can include:

a. The seller remains obligated to deliver the goods after the obstacle ends (suspension, not extinction of obligation).
b. The seller is exempt from the obligation to pay damages for delays caused by the obstacle.
c. The buyer remains obligated to accept the goods and make payment according to the agreed price.
d. If the obstacle is permanent or prolonged beyond a reasonable limit, the parties may terminate the contract without penalty (Article 79(5) CISG in conjunction with Article 49 and Article 64 CISG).

Although force majeure is fulfilled, several forms of liability do not lapse for the parties under the CISG:

Type of Accountability	**Status in Force Majeure**	**Legal Basis**
Compensation for late delivery (late delivery damages)	Void if force majeure is proven.	Article 79(1) CISG
Delivery obligation (substantive delivery obligation)	Still there, just postponed.	Article 79(3) CISG
Obligation to pay the price	Still there.	Article 53 CISG
Reasonable mitigation costs	It can be a burden on the parties proportionally.	Article 77 CISG
Losses due to notification failure	Still there if the notification is late.	Article 79(4) CISG
Restitution if the	There is still, the payment that has	Article 81(2) CISG

contract is terminated	been made must be refunded.

The ICC 2020 Force Majeure Clause is a contractual instrument specifically designed to address the limitations of default regimes such as Article 79 of the CISG in accommodating the complexities of contemporary commercial disruptions. Unlike Article 79, which does not enumeratively define events that can be classified as obstacles, the ICC 2020 Clause adopts a two-tier structure approach consisting of a general definition based on three cumulative elements: beyond reasonable control, could not reasonably have been foreseen, and could not reasonably have been avoided or overcome, which is then supplemented by a list of hardcoded events that presumptively meet these criteria.[30] The most relevant aspect in the context of the Red Sea Crisis is that the ICC 2020 Clause explicitly includes acts of war, hostilities or warlike operations (whether war be declared or not), armed conflict, and acts of terrorism as events that presumptively meet the force majeure standard, a category that can arguably encompass the Houthi attacks on commercial shipping routes, considering that these attacks involve the use of military weapons against civilian ships in the context of an internationally recognized armed conflict. The relevance of this clause in international shipping contracts becomes very significant precisely because it offers a force majeure presumption that reverses the burden of proof: if the event falls into the category of hardcoded events, the party claiming the exception no longer needs to independently prove the elements of foreseeability and unavoidability, but only needs to show that the event causally obstructs the performance of the contract, thereby dramatically lowering the burden of proof compared to the pure regime of Article 79 CISG.

The application of the ICC 2020 Force Majeure Clause to the Red Sea Crisis can be qualified as an event that precisely falls into the category of hardcoded events as intended. Such a situation is explicitly stated in a strict interpretation based on international humanitarian law, which indicates that "armed conflict" does not have to involve sovereign states as parties, but also includes non-international armed conflicts involving organized armed groups with a certain level of intensity, as recognized in the jurisprudence of the International Criminal Court, which can meet that threshold.[31] The ICC 2020 clause requires that a force majeure event directly hinders the performance of contractual obligations, not merely makes it more difficult or expensive. In the context of the Red Sea Crisis, where the Cape of Good Hope route remains available as an alternative, the argument that the Houthi attacks directly prevent the performance of the contract, as opposed to merely complicating its execution, faces the same challenge as encountered under Article 79, namely that the availability of commercial alternatives weakens the claim of direct causality between the external event and the failure to perform the contract. Thus, although the ICC 2020 Clause offers a more accommodating framework than Article 79, it does not completely eliminate the

[30] Line Engbo Gissel, "The Standardisation of Transitional Justice," *European Journal of International Relations* 28, no. 4 (2022): 859–84, https://doi.org/https://doi.org/10.1177/13540661221120980.
[31] Stephan Wilske and Matthew T Adams, "INTERNATIONAL ARBITRATION IN TIMES OF — OR : AN INVITATION FOR ' DANCING IN THE DARK ,'" *Contemporary Asia Arbitration Journal*, 1984, 1–41, https://ssrn.com/abstract=6825299.

complexity of proof inherent in cases of geopolitical disruption that do not result in absolute impossibility.

The interaction between the ICC 2020 Force Majeure Clause and Article 79 CISG in the context of the Red Sea Crisis significantly influences each other. Hierarchically, if the parties have explicitly agreed to the ICC 2020 Force Majeure Clause in their contract, that clause, as an expression of the parties' autonomy protected by Article 6 CISG, will replace and take precedence over the default provisions of Article 79. Thus, the exclusion analysis must be conducted based on the parameters of the ICC 2020 Clause, not based on the standards of Article 79 independently. However, if the contract does not contain an explicit force majeure clause, a condition not uncommon in short-term shipping contracts or contracts negotiated quickly, then Article 79 applies as the default provision with all its analytical rigor. If the ICC 2020 clause is incorporated into the contract but the parties dispute whether the Houthi attack falls within the scope of the clause: in this scenario, the arbitration tribunal or court will likely refer to the interpretative standards of Article 79 and CISG jurisprudence as background law to fill the interpretative gap of the ICC 2020 clause, creating a normative synergy where both instruments complement each other.

The practical implication of this analysis is that international trade actors, particularly in the shipping sector, who are inherently exposed to maritime geopolitical risks, should not only incorporate the ICC 2020 Force Majeure Clause into their contracts but also design the clause with more detailed specifications explicitly covering categories of disruptions caused by non-state actors, mandatory route diversions, and burden-sharing mechanisms for the additional costs incurred. Thus, the interaction between contractual clauses and the regime of Article 79 CISG can produce optimal legal certainty for all parties involved in international trade transactions in an era of increasingly intense geopolitical instability

3.2. Can Incoterms 2020 Ensure Legal Certainty During Geopolitical Disruptions? Lessons from the Red Sea Crisis (2023–2024)

International trade is inherently a high-risk activity because every cross-border transaction contains dimensions of uncertainty not found in domestic trade processes, differences in legal jurisdictions, exchange rate fluctuations, long-distance shipping risks, differences in customs regulation regimes, and geopolitical volatility that can suddenly and fundamentally alter the logistics landscape. In this context, Incoterms (International Commercial Terms) emerge as one of the most vital instruments in the architecture of modern international trade law.[32]

Incoterms, codified and published by the International Chamber of Commerce (ICC), are a set of standard rules that precisely define how risks, costs, and delivery responsibilities are distributed between the seller and the buyer in sales contracts in international trade. Since its first appearance in 1936, Incoterms has undergone eight revisions, with the latest version being Incoterms 2020, which reflects the evolution in global trade and logistics practices.[33] Currently,

[32] Mohammad Ekram Yawar and Anwarulhaq Amani, "Incoterms in International Trade Law ," *EuroGlobal Journal of Linguistics and Language Education* 2, no. 1 SE-Articles (February 26, 2025): 109–22, https://doi.org/10.69760/egjlle.2500014.

[33] Ademuni Odeke, "The Role and Importance of the International Chamber of Commerce and Incoterms in International Trade and Sales BT - Insurance of International Sales' Contracts under

Incoterms are used in millions of international trade contracts every day and are considered part of *lex mercatoria* (the law of international trade customs) that applies universally.[34]

In this case, legal certainty must be ensured, legal certainty in this context is understood as a condition where the parties can predict with adequate accuracy where the risk shifts from one party to another, who bears the cost of a particular event, and what legal consequences follow the occurrence of an event that disrupts the performance of the contract. The Incoterms scheme itself is a scheme for the distribution of responsibility. Incoterms 2020 operates the distribution of responsibilities between the seller and the buyer thru three interrelated yet conceptually distinct dimensions. In geopolitical cases such as the Red Sea Crisis 2023-2024, this Incoterms scheme is often used to determine the responsibility transfer scheme when circumstances beyond the parties' control prevent them from fully meeting their responsibilities in international trade.

The normative structure of Incoterms 2020 organizes eleven trade terms into two main categories based on the mode of transportation used. The first category includes seven terms applicable to all modes of transport, namely EXW (Ex Works), FCA (Free Carrier), CPT (Carriage Paid To), CIP (Carriage and Insurance Paid To), DAP (Delivered at Place), DPU (Delivered at Place Unloaded), and DDP (Delivered Duty Paid). The second category includes four terms specifically designed for sea and inland waterway transport, namely FAS (Free Alongside Ship), FOB (Free on Board), CFR (Cost and Freight), and CIF (Cost, Insurance and Freight).[35] [36] Each term precisely defines the point at which the risk transfers from the seller to the buyer, as well as the division of responsibilities for transportation costs, insurance, and documentation. In the context of the Red Sea crisis 2023-2024, the most suitable scheme is the Rules for Sea and Inland Waterway Transport (Sea Specific). This scheme provides extensive coverage for shipping companies in distributing liability when situations beyond their control occur during shipping. Some of the schemes used include:

a. Free Alongside Ship (FAS), a risk transfer scheme is carried out alongside the ship at the export port, this scheme is rarely used in modern container trade.
b. Free On Board (FOB), a scheme where the transfer of risk occurs when the goods are on board the ship at the export port, is the most popular scheme used in international trade.
c. Cost and Freight (CFR), when the goods are on board the ship (risk), but the seller pays the freight, resulting in a split between the point of risk transfer and the cost burden in the shipping process.
d. Cost, Insurance & Freight (CIF), the same as CFR plus the seller is required to have insurance under the Institute Cargo Clauses (C) (ICC (C)), the most common scheme in commodity trading with minimum ICC (C) insurance.

Incoterms," in *Insurance of International Sales' Contracts under Incoterms*, ed. Professor Ademuni-Odeke, 1st ed. (Cham: Springer Nature Switzerland, 2025), 3–53, https://doi.org/10.1007/978-3-031-75136-3_1.

[34] Andrew Hutchison and Franziska Myburgh, *Research Handbook on International Commercial Contracts* (Cheltenham, UK: Edward Elgar Publishing, 2020), https://doi.org/10.4337/9781788971065.

[35] Hutchison and Myburgh.

[36] Juana Coetzee, "Chapter 8: CISG and Incoterms: Reviving the Traditions of the Lex Mercatoria" (Cheltenham, UK: Edward Elgar Publishing, 2020), https://doi.org/10.4337/9781788971065.00014.

According to Bergami & Tichá, the main function of Incoterms in the context of risk allocation can be categorized into three interrelated dimensions. The first dimension is the physical dimension, which is the determination of the point at which the risk of damage or loss of goods transfers from the seller to the buyer. The second dimension is the financial dimension, which is the determination of the party responsible for bearing the costs incurred in the shipping process, including freight, insurance, customs duties, and port fees. The third dimension is the documentary dimension, which is the determination of the obligations of the parties related to the procurement, delivery, and financing of the documents required in the transaction.[37] These three dimensions work synergistically to create a theoretically comprehensive and predictable risk allocation framework, as in Incoterms 2020. Several significant changes in Incoterms 2020 have direct implications for legal certainty in the context of the geopolitical disruption of the Red Sea crisis 2023-2024:

a. Increase in CIP insurance standards. Incoterms 2020 raised the minimum insurance requirements for the CIP term from ICC (C) to ICC (A), which provides broader all-risk coverage, including war risk (with the addition of the war risk clause). This is directly relevant to geopolitical disruptions.
b. Free Carrier (FCA) with on-board Bill of Lading. Thru this change, Incoterms 2020 accommodates the needs of Letter of Credit-based transactions where the bank requires on-board, but the goods are delivered before loading. This provides additional flexibility in the documentation chain.
c. Strengthening security obligations. Incoterms 2020 also clarifies security obligations for both sellers and buyers, including the obligation to provide the information needed to meet security requirements. This is relevant in the context of sanctions and export restrictions hindered by geopolitics.

The Red Sea crisis of 2023-2024 has become a relevant geopolitical disruption for the Incoterms mechanism. In this case, the most affected incoterms are FOB, CFR, CIF, CPT, and CIP. This crisis creates a dilemma of uncertainty regarding route diversion costs, and also the availability of ships .[38] One of the most fundamental sources of legal uncertainty in the context of geopolitical disruption is the ambiguity that arises when the shipping route that forms the basis of the contract agreement must be replaced with an alternative route. This issue is particularly acute in terms that link the point of risk transfer to specific geographical locations or the moment of delivery to the carrier. The terms CFR and CIF create a doctrinally unique construction. The risk transfers to the buyer when the goods are on board the ship at the port of export, but the seller still bears the freight and insurance costs for CIF until the destination port. In normal conditions, this split works well, but in situations where route changes increase freight costs by 300-400%, this split creates uncertainty where the seller is obligated to bear the additional route diversion costs, or this is a consequence of costs that can be transferred. This

[37] Roberto Bergami and Lucie Tichá, "Managing Incoterms® 2020 Export Risks," *International Journal of Economics and Business Research* 23, no. 2 (January 1, 2022): 255–73, https://doi.org/10.1504/IJEBR.2022.120651.
[38] Alka Rai, "Turbulent Waters in the Red Sea: Understanding Maritime Shipping Business Impacts and Implications," *Journal of Transportation Security* 18, no. 1 (2025): 17, https://doi.org/10.1007/s12198-025-00299-7.

is not explicitly regulated in Incoterms and must be sought again in the applicable law on the transportation contract.

The risk transfer mechanism in Incoterms 2020 operates within a normative framework that implicitly assumes the normality of logistics infrastructure and the predictability of shipping routes. An assumption that was fundamentally exposed to its weaknesses by the Red Sea Crisis 2023-2024. In delivery-based terms such as FOB, CFR, and CIF, the transfer of risk that occurs at the loading point at the port of origin doctrinally frees the seller from responsibility for any incidents affecting the goods in transit. However, this normative construction is not designed to anticipate scenarios where the delivery route assumed by the parties when the contract was made becomes unoperational due to active military threats.[39] The Red Sea crisis exposes a fundamental distinction, namely the difference between risk transfer as a legal concept and risk management as an operational capacity. Although the FOB clause legally and effectively transfers the risk to the buyer at the time the goods are loaded onto the ship, this transfer of risk does not automatically equip the buyer with the capacity to manage the practical consequences of geopolitical disruptions that occur after that transfer point, including a 300-400% increase in freight costs, unanticipated route changes, systemic delays that disrupt the downstream supply chain, and an escalation of maritime insurance premiums not reflected in the original contract price structure. In the context of CIF in particular, the paradox that arises is even sharper. The seller remains obligated to provide minimum insurance (Institute Cargo Clauses C) which, in practice, is not designed to cover the risk of geopolitical disruptions. As a result, the buyer, who has formally assumed the risk since loading, finds themselves exposed to commercial losses not covered by the provided insurance mechanism, creating a protection gap that cannot be resolved thru contractual allocation alone.

The deeper implication of the above analysis is that the existing framework of international trade contracts, whether Incoterms 2020 or the default regime of Article 79 CISG, is structurally inadequate to address the practical realities of contemporary geopolitical disruptions that are systemic, prolonged, and multidimensional. The formal allocation of legal risk thru the choice of Incoterms provides normative certainty regarding who bears the risk, but it does not answer the far more commercially critical question of how that risk is managed, mitigated, and its burden distributed when the disruption exceeds the operational adaptation capacity of the party who formally bears it. The Red Sea crisis demonstrates that in conditions of prolonged geopolitical disruption, the party contractually bearing the risk. For example, buyers in an FOB scheme may face commercial consequences that substantially exceed what can be managed thru the instruments available in the standard contractual ecosystem, creating a situation where a legally perfect allocation of risk results in substantive commercial injustice because there is no burden-sharing mechanism that can be activated when the allocated burden exceeds the absorptive capacity of the party bearing it. This underscores the need for a paradigmatic reform in the design of international trade contracts. From an approach that solely focuses on the allocation of static risk at a specific point in time, toward an approach that integrates dynamic risk adaptation mechanisms. Including price adjustment clauses,

[39] Notteboom, Haralambides, and Cullinane, "The Red Sea Crisis: Ramifications for Vessel Operations, Shipping Networks, and Maritime Supply Chains."

mandatory hardship-based renegotiation procedures, force majeure specifically defined to encompass maritime geopolitical disruptions, as well as proportional burden-sharing mechanisms that can be activated when the conditions of contract performance materially deviate from the assumptions underlying the initial agreement. Thus, commercial certainty does not only depend on the firmness of normative risk allocation but also on adaptive flexibility that allows the contract to continue functioning as an effective trade facilitation instrument even in the face of geopolitical turbulence, which is increasingly becoming a permanent characteristic of the contemporary international trade environment.

Then, incoterms generally do not regulate the route that must be taken by the carrier. The selection of the route is the domain of the transportation contract (bill of lading or charter party), not the sales contract, which creates a significant legal gap. When the seller uses the CFR or CIF term (where the seller contracts the carrier), the seller has a certain degree of control over the carrier's route choice. However, when the seller uses the FOB or FCA term (where the buyer contracts the carrier), the seller has no control over the route diversion decision. If the carrier contracted by the buyer chooses a longer route, the goods, which are already at the buyer's risk but still in the process of delivery, experience delays that cannot be controlled by anyone in the sales contract chain.

CIF is the most commonly used term in commodity trading and Letter of Credit-based trading. Its unique construction with a split between the point of risk transfer and cost obligation creates its own challenges in geopolitical disruptions. In CIF, the seller is required to insure the goods with minimum coverage, namely ICC (C).[40] The ICC (C) clause does not cover war risk by default; a separate war risk endorsement is required. In the context of the Red Sea Crisis, the war risk premium for that route increased to 0.5-1% of the cargo value per voyage from previously being close to zero.[41] Incoterms 2020 also requires conditional "against the risks" insurance, but does not explicitly define whether war risk is part of the risks that must be covered.

Therefore, to understand the legal certainty provided by Incoterms, it is necessary to first understand its normative position. Incoterms is not a positive law that binds directly like the CISG. Incoterms is a codification of trade usages that gains binding force thru incorporation in international trade contracts. Incoterms become non-governmental rules (ICC) that are binding due to contractual incorporation, thus becoming the primary instrument for the distribution of risk and cost. Incoterms apply as *lex specialis* within their scope.[42] One of the most common misunderstandings in international trade practice is the assumption that Incoterms are a comprehensive instrument capable of regulating all aspects of international sales contracts. In reality, as explicitly stated in the Introduction to Incoterms 2020, Incoterms

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[40] Michael Bridge, "Chapter 9: CIF and FOB Contracts in English Law: Current Issues and Problems," in *Research Handbook on International and Comparative Sale of Goods Law* (Cheltenham, UK: Edward Elgar Publishing, 2019), https://doi.org/10.4337/9781786436153.00019.

[41] Ryan Harmon, "Red Sea Disruption Sends War Risk Premiums to 1% of Vessel Value," *Logistics Middle East*, July 11, 2025, https://www.logisticsmiddleeast.com/transport/maritime/red-sea-disruption-sends-war-risk-premiums-to-1-of-vessel-value.

[42] Margarida Lima Rego, "Chapter 12: Insurance Requirements in Incoterms® 2020," in *Research Handbook on Marine Insurance Law* (Cheltenham, UK: Edward Elgar Publishing, 2024), 245–59, https://doi.org/10.4337/9781803926681.00022.

do not regulate ownership or property rights over goods, contract termination and its consequences, force majeure or hardship, payment obligations, as well as the consequences of contract breaches and the available remedies. These limitations are highly relevant in the context of geopolitical disruptions, as almost all legal issues arising from such disruptions are related to aspects not covered by Incoterms.

Incoterms is an instrument that provides legal certainty in a narrow slice of specific conditions of the entire international trade contract, namely only on the aspects of allocation of physical risk and shipping costs under normal conditions. Beyond that, legal certainty must be sought from other normative legal instruments, whether conventional ones like the CISG and UNIDROIT principles, or contractual ones like force majeure clauses, hardship clauses, and governing law clauses.[43] Understanding these limitations is crucial to avoid the trap of assuming that the use of certain Incoterms is sufficient to allocate all risks that may arise in international trade transactions, including risks stemming from geopolitical disruptions.

The normative stance in international trade law, especially regarding this research, still goes thru the CISG. The CISG and Incoterms operate at different levels but complement each other within the framework of international sales contract law.[44] CISG, as a conventional instrument ratified by more than 95 countries by the year 2024, regulates the substantive aspects of international sales contracts, including contract formation, the obligations of the parties, risk transfer, and remedies for breach of contract. Incoterms, on the other hand, only regulate the distribution of costs and risks of delivery. The interoperability of the two occurs in the sense that when the parties use certain Incoterms, that choice becomes part of the contract, which is then governed by the CISG (to the extent that the CISG applies under Article 1 of the CISG), so the interpretation of Incoterms must be done within the context of the legal framework established by the CISG.

One of the most crucial interoperability issues in the context of geopolitical disruption is the relationship between the transfer of risk according to Incoterms and the provisions on the transfer of risk in CISG Part IV (Articles 66-70). Article 66 of the CISG stipulates that after the risk has transferred to the buyer, loss or damage to the goods does not relieve the buyer of the obligation to pay the price, unless the loss is caused by the seller's actions or negligence. This provision is fundamentally consistent with the Incoterms mechanism; however, the CISG provides a broader framework thru Article 79, which regulates the exemption from obligations due to force majeure and which, as analyzed in various international arbitration rulings, can affect the distribution of risk even after the Incoterms risk transfer point has been surpassed.

The specific transfer of risk in Articles 66 to 70, which operate complementarily with Incoterms, is very important in conditions of geopolitical disruption. In the context of geopolitical disruption, the principles in Article 66 of the CISG have significant implications.[45] If the risk has transferred to the buyer (for example, in FOB, when the goods are on board the ship at the port of export), then the buyer is still obliged to pay the price even if the ship

[43] Odeke, "The Role and Importance of the International Chamber of Commerce and Incoterms in International Trade and Sales BT - Insurance of International Sales' Contracts under Incoterms."
[44] Ekram Yawar and Amani, "Incoterms in International Trade Law ."
[45] Celil Durdağ and Gül Esin Delipınar, "The Past, Today and Future of Incoterms in International Delivery: A Review on the Innovations in Logistics," *Journal of Economics Library* 7, no. 4 (2020): 100–110, https://journals.econsciences.com/index.php/JEL/article/view/2166.

subsequently has to change its route and the goods arrive late, or even if the ship is attacked (and insured) during the journey. Then, Article 68 of the CISG regulates situations particularly relevant in commodity trade, the sale of goods already in transit. The risk in this situation transfers to the buyer from the moment of delivery to the carrier who issues the document that constitutes the transport contract. In the context of the Red Sea disruption, if the goods are already in transit when the attack occurs, then the buyer who purchases the goods in transit bears the risk for those goods from the moment the transport document is issued. Therefore, the seller who is aware of any damage or loss at the time the contract is made is obliged to disclose this to the buyer. This clause is particularly relevant for CIF or CFR-based commodity trade where goods are sold multiple times during transit. Therefore, Incoterms do not regulate force majeure. If geopolitical conditions hinder the fulfillment of obligations specified by Incoterms. The applicable regime when the delivery route is impassable is Article 79 CISG and also transportation contract law. Therefore, the seller must prove that the inability to choose the route is an impediment beyond control, even tho there is an argument that an alternative route is available.

The interaction between Articles 66-70 of the CISG and Incoterms creates a layered risk transfer regime. At the first layer, Incoterms determines the timing of the risk transfer, and at the second layer, the CISG determines the legal consequences of that transfer and provides a release mechanism when performance is hindered by events beyond the control of the parties. In the context of geopolitical disruption, this second layer becomes highly relevant, as it provides a legal basis for the affected party to seek relief from obligations that have become impossible or commercially impracticable due to geopolitical obstacles.

As a mechanism for release in conditions of disruption, Article 79 of the CISG is a central provision as an international legal regulation governing the release from obligations due to obstacles beyond the control of the party in default. As previously mentioned, Article 79 Paragraph (1) of the CISG establishes three cumulative elements that must be met to obtain an exemption, such as impediment beyond control, unforeseeability, and unavoidability. It should be emphasized that Article 79 of the CISG does not automatically terminate the contract, but only relieves the affected party from the obligation to pay damages during the period of impediment. In the context of the relationship between Article 79 of the CISG and the Incoterms scheme, the most significant issue is whether Article 79 can shift or modify the risk allocation established by the Incoterms. Analysis of several international arbitration jurisprudences shows that courts and arbitration tribunals generally hold that Article 79 of the CISG operates independently of the Incoterms in the sense that the choice of certain Incoterms does not by itself exclude the applicability of Article 79. Thus, a seller using FOB theoretically bears the risk only until the goods are loaded onto the ship but can still claim exemption under Article 79 if a geopolitical obstacle prevents them from fulfilling the loading obligation, as long as the three elements of Article 79 CISG are met.

Arbitral tribunals tend to interpret Article 79 of the CISG more strictly compared to the concept of force majeure in continental civil law, but more flexibly compared to the doctrine of frustration of contract in common law. In the context of geopolitical disruptions in the form of armed conflicts, military obstacles, or international sanctions, jurisprudence tends to recognize the fulfillment of the impediment beyond control element, while the elements of

unforeseeability and unavoidability become the main battlegrounds of proof, especially when the conflict or tension has been ongoing before the contract was agreed upon.

The corpus of relevant international arbitration jurisprudence regarding force majeure claims in the context of the Red Sea Crisis 2023-2024 can be mapped thru five international arbitration awards that collectively form an analytical framework for evaluating the threshold for exemption under Article 79 CISG in situations of geopolitical disruption. The ruling in Scafom International BV v. Lorraine Tubes (Hof van Beroep Antwerpen, 2007), which was later confirmed by the Hof van Cassatie Belgium (2009), established an important precedent that dramatic and unexpected spikes in raw material prices due to global market conditions under certain circumstances, meet the threshold of hardship that goes beyond mere ordinary commercial fluctuations, although the tribunal ultimately rejected the pure force majeure claim and advocated for renegotiation based on the principle of good faith.[46] The relevance of this ruling to the Red Sea Crisis lies in the precedent that changes in economic conditions that are structural and systemic, rather than mere market volatility, can open the door for legal intervention, although the boundary between compensable hardship and force majeure that absolves liability remains a debated zone. In the context of the Red Sea Crisis, the sustained surge in freight costs by 300-400% triggered by external geopolitical factors has characteristics that are analogously similar to the conditions analyzed in Scafom, namely a fundamental change in the economic parameters underlying the contract. However, with the additional dimension of a physical threat to navigation safety that is not present in the Scafom dispute. Thus, the force majeure argument in the context of the Red Sea is potentially stronger than merely an economic hardship claim.

The ruling in Tandrin Aviation Holdings Ltd v. Aero Toy Store LLC (High Court of Justice, England, 2010) also provides a different yet equally important analytical contribution, namely the assertion that a global financial crisis, despite being massive, unexpected, and beyond the control of the parties, does not automatically qualify as force majeure if the physical performance of the contract is still possible.[47] The court in this ruling explicitly distinguished between financial impossibility arising from external conditions and physical or legal obstacles that actually prevent the performance of the contract (true legal or physical impossibility), and concluded that the former does not meet the force majeure standard in international contract law. This precedent has direct implications for force majeure claims based solely on the surge in shipping costs due to the Red Sea Crisis: if the only proven impact is the increase in operational costs without any physical obstacles that absolutely prevent performance, the jurisprudence in the Tandrin arbitration ruling suggests that such claims will face rejection. However, the crucial distinction between the Tandrin Arbitration and the context of the Red Sea Crisis lies in the fact that the Red Sea disruption is not merely financial in nature; it involves a real physical threat to the safety of the ship and crew, which in some cases results in conditions where sailing thru the primary route is not only more expensive but

[46] Seema Deshwal and D R Ritu, "Contractual Exemption Theories of Force Majeure and Hardship in International Law," *International Journal of Law Management & Humanities* 5 (2022): 8–20, https://doij.org/10.10000/IJLMH.113795.
[47] M J Denison, "Force Majeure Clauses in LNG Sales and Purchase Agreements: How Do They Stand up during the Covid-19 Pandemic?," *The Journal of World Energy Law & Business* 14, no. 2 (April 1, 2021): 88–96, https://doi.org/10.1093/jwelb/jwab011.

practically impossible without putting lives and assets at commercially or legally unacceptable risk, thereby opening an argumentation gap that is not available in the Tandrin arbitration scenario.

Three ICC arbitration awards also complement this jurisprudential framework, ICC Award No. 6281, ICC Award No. 12112, and Nuova Fucinati S.p.A. v. Fondmetall International, collectively building the doctrine most directly relevant to the analysis of Article 79 CISG in the context of the Red Sea Crisis. ICC Award No. 6281 establishes that embargoes and international sanctions obstructing contract performance can qualify as force majeure if the prohibitions are absolute and leave no reasonable alternative for performance.[48] A precedent that is analogously relevant to the situation where the Houthi military threat effectively renders the Suez Canal route impassable without unacceptable risk. ICC Award No. 12112 further expands the analysis by asserting that the tribunal must evaluate not only the availability of alternatives in the abstract but also the commercial reasonableness of those alternatives in the specific context of the contract in question, including their impact on the overall economic balance of the contract.[49] An approach that directly supports the argument that rerouting to Cape Hope with all its additional burdens may not meet the standard of commercial reasonableness for certain categories of shipping contracts. Meanwhile, Nuova Fucinati S.p.A. v. Fondmetall International (Tribunale di Monza, 1993) is one of the earliest decisions to explicitly apply Article 79 CISG, asserting that market price fluctuations, even if extreme, do not meet the threshold for force majeure because the risk of fluctuations is an inherent part of the commercial risk assumed by the parties when entering into an international contract.[50] The precedent of Nuova Fucinati serves as the strongest counter-argument against force majeure claims based solely on the increase in logistics costs due to the Red Sea Crisis. However, it can be doctrinally distinguished from the Red Sea context on the grounds that the disruption was not merely a fluctuation in market prices but the elimination of accessibility to primary routes due to active military threats. This condition is qualitatively different from the commodity price volatility that was the subject of dispute in Nuova Fucinati, and this qualitative difference argumentatively opens the space for different legal treatment within the framework of Article 79 CISG.

Outside the framework of the CISG, the UNIDROIT Principles of International Commercial Contracts (2016 edition) also provide relevant complementary legal instruments for situations where geopolitical disruptions do not meet the threshold for full exemption under Article 79 of the CISG, yet still impose a highly disproportionate burden on one party. The doctrine of hardship regulated in Articles 6.2.1 to 6.2.3 of the UNIDROIT Principles defines hardship as a situation where there is a fundamental alteration of the equilibrium of

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[48] David Kuster and Camilla Andersen, "Hardly Room for Hardship - A Functional Review of Article 79 of the CISG," *Journal of Law and Commerce* 35 (March 29, 2017), https://doi.org/10.5195/JLC.2016.116.
[49] Markus Burianski and Federico Parise Kuhnle, "Force Majeure in Energy Contracts: Legal Standards and Practical Considerations," *Energy Law Journal* 37, no. 1 (2026): 297, https://globalarbitrationreview.com/guide/the-guide-energy-arbitrations/seventh-edtion/article/force-majeure-in-energy-contracts-legal-standards-and-practical-considerations.
[50] Ljuben Kocev, "The Impact Of Covid-19 On The Performance Of International Commercial Contracts For The Sale Of Goods – Force Majeure And Hardship," in *Conference: Economic and Business Trends Shaping the Future*, 2020, 147–57, https://doi.org/10.47063/EBTSF.2020.0012.

the contract caused by an event beyond the control of the aggrieved party, which could not have been foreseen, and which arises after the contract has been concluded. The difference between force majeure in Article 79 CISG and hardship in the UNIDROIT Principles lies in their legal consequences. Force majeure releases from obligations, while hardship paves the way for contract renegotiation to restore the disrupted balance. Thus, in the context of Incoterms and geopolitical disruptions, the doctrine of hardship is particularly relevant, especially in cases of dramatic freight cost increases in CFR or CIF terms, where the seller can still deliver the goods but only at a cost far exceeding the initial calculations. The renegotiation mechanism provided by the UNIDROIT Principles offers flexibility that is not available in Incoterms or the CISG, and can be the most appropriate instrument to restore legal certainty and contractual fairness in such situations.

However, the applicability of the UNIDROIT Principles as the governing law of the contract is not automatic. The parties must explicitly choose the UNIDROIT Principles as the governing law of their contract, or at least agree to its application as a supplementary instrument to the chosen national law. This is where the importance of careful and comprehensive contract drafting comes in, anticipating the possibility of geopolitical disruptions and explicitly establishing the legal framework that will apply in such situations.

Despite facing challenges in the context of geopolitical disruption, Incoterms continue to make a significant contribution to legal certainty. For example, Incoterms eliminate the ambiguity that arises from differing interpretations of trade terms in various national legal systems. Then, the clarity of the transfer point in normal conditions, when the geopolitical conditions are stable, Incoterms provide clarity on where the risk transfers, who bears the cost, and what documents need to be fulfilled. Compatibility with Letters of Credit and financial instruments, particularly CIF and CFR, is also designed to be compatible with the Letter of Credit mechanism, which is the backbone of international trade financing.[51] Then the Incoterms revision cycle (every 10 years) allows for adaptation to the developments in international trade practices, as evidenced by the addition of security clauses and the enhancement of CIP insurance standards in the 2020 version.

Legal certainty in the context of international trade law encompasses two interrelated dimensions, namely substantive certainty, which is the ability of the parties to predict the rights and obligations arising in various contract execution scenarios, and procedural certainty, which is the clarity regarding the dispute resolution mechanisms and the law that will be applied when disputes arise. In normal trade conditions, Incoterms significantly contribute to substantive certainty thru the standardization of terminology and risk allocation. However, in conditions of geopolitical disruption, there is a serious deficit of legal certainty stemming from several identifiable factors.

Although Incoterms are not designed as instruments for mitigating geopolitical risks, the selection of the right term can still be an important element in a comprehensive risk management strategy. In unstable geopolitical conditions, the choice between shipment-based terms and arrival-based terms has very different implications for each party's risk exposure.

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[51] Wahidul Sheikh et al., "Optimising International Trade: The Examination of Incoterms Selection by Exporters and Importers," *Review of International Business and Strategy* 34, no. 4 (June 19, 2024): 562–83, https://doi.org/10.1108/RIBS-08-2023-0093.

Arrival-based terms such as DAP, DPU, and DDP place greater risk on the seller because the risk transfers when the goods arrive at the destination. In conditions where shipping routes pass thru areas prone to geopolitical disruptions, the use of these terms provides an incentive for sellers to take more proactive mitigation steps, including choosing safer alternative routes, providing more comprehensive insurance, or using transportation contracts with stronger protection provisions. On the other hand, from the buyer's perspective, arrival-based terms provide better protection because the buyer only bears the risk after the goods arrive safely. However, the consequence is a higher price because the seller will include greater insurance and risk management costs into the selling price.

On the other hand, shipment-based terms such as FCA, FOB, CFR, and CIF place the risk of loading or shipping earlier on the buyer. This option may be more advantageous for buyers with strong risk management capacity, such as multinational companies with sophisticated risk management divisions and access to comprehensive hedging instruments. The selection of the appropriate term in conditions of geopolitical uncertainty should always be based on a careful analysis of each party's risk management capacity, rather than solely on short-term cost considerations. Incoterms, as a standardization instrument, provide significant legal certainty in normal trade conditions, but they inherently contain regulatory gaps that make them inadequate as the sole risk allocation framework when geopolitical disruptions shake the normality conditions on which they are based. The legal certainty expected from the use of certain Incoterms becomes an illusion when the required conditions for the transfer of risk cannot be met due to geopolitical obstacles beyond the control of the parties involved.

4. Conclusions

The Red Sea Crisis 2023-2024, triggered by a series of attacks by the Houthi group on commercial ships in the Bab-el-Mandeb Strait, can substantially be classified as force majeure under Article 79 of the CISG, as long as it meets the three cumulative elements required, namely impediment beyond control, unforeseeability, and unavoidability. The attacks launched by this non-state actor are clearly beyond the sphere of control of the parties involved in international trade contracts, as no commercial business entity has the capacity to control or prevent armed military actions in international waters. The element of unforeseeability is strongly met for contracts agreed upon before October 2023, considering there is no historical precedent of systematic Houthi attacks on international commercial shipping before this crisis occurred. As for the element of unavoidability, it is fulfilled thru evidence of commercial impracticability, where the rerouting via Cape of Good Hope causes an increase in freight costs by 300-400% and an extension of travel time by 10-14 days, which collectively renders the contract commercially unfeasible even tho it is still physically possible. Thus, the legal consequence that arises is not the automatic termination of the contract, but rather a temporary release from the obligation to pay compensation during the period of obstruction, while the obligation to deliver the goods remains in a suspended status in accordance with the suspension of obligation scheme recognized in Article 79 paragraphs (3) and (5) of the CISG.

The mechanism for distributing contractual risks based on the Incoterms 2020 scheme proves to contain a serious deficit of legal certainty when faced with geopolitical disruption conditions such as the Red Sea Crisis 2023-2024. Incoterms only provide legal certainty within a limited scope, namely in the aspects of physical risk allocation and shipping costs under

normal trading conditions, and explicitly do not regulate crucial aspects such as force majeure, contract termination, or remedies for breach. When the shipping route that forms the basis of the contract agreement must be replaced by a much longer and more expensive alternative route, the construction of terms like CFR and CIF creates doctrinal ambiguities regarding who bears the additional costs of rerouting, while the FOB term presents its own complexities because the choice of route is in the hands of the buyer as the party contracting the carrier. The interoperability between Incoterms and Articles 66-70 of the CISG indeed creates a tiered and complementary risk transfer regime, but it still leaves legal gaps that cannot be resolved by merely referring to Incoterms alone. Legal certainty in conditions of geopolitical disruption can only be comprehensively achieved thru a combination of detailed force majeure clauses in contracts, the application of the hardship doctrine based on UNIDROIT Principles, strengthening risk allocation clauses, price adjustment mechanisms in international contracts, and the selection of Incoterms schemes tailored to each party's risk management capacity and the prevailing geopolitical conditions on the chosen shipping route.

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