

**THE INVOCATION OF FORCE MAJEURE BY SELLERS DUE
TO CORONAVIRUS IN INTERNATIONAL SALES
CONTRACTS UNDER CISG**

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ABSTRACT

By entering into a contract, parties agree to be legally bound by the provisions contained therein and perform their contractual duties in accordance. Pursuant to a sales agreement, a seller primarily undertakes the obligations to produce, sell and deliver the goods to the possession of buyer whereas a buyer primarily undertakes the obligations to make a payment in return and take the delivery of the goods. These obligations may vary due to the provisions contained in a contract but they are more or less similar also under an international sales contract. Even though the parties are bound with their legal obligations, there might be some unforeseeable incidents that happen beyond their control and eventually bar them from honoring their contract. These incidents are called force majeure and this legal concept has a very significant consequence of exempting the party at default from liability due to this alleged impediment.

A very well acquainted example of this legal concept of force majeure is this novel contagious outbreak of Covid-19. This virus and the government-enacted measures in order to halt the spread of it have a very strong impact as to create an impediment for a seller to perform the undertaken contractual obligations, thus a seller might avail under the protection of this legal concept and be exempt from liability. Pursuant to Article 79 of United Nations Convention on Contracts for the Sale of Goods (CISG), there are three main requirements to be satisfied which are: beyond control, unforeseeability and being unable to avoid or overcome. The chance of invocation of this article with success is dependent on these requirements.

For the purpose of this thesis, it shall be attempted to find an answer to the research question of “To what extent are the sellers in an international sales contract entitled to rely on the legislative principles of force majeure set in CISG as a consequence of coronavirus?” by discussing and evaluating potential circumstances the sellers might find themselves in. Despite the judges’ and arbitrators’ tendency to interpret this legal concept in a narrow manner, readers will be presented a broader interpretation of this legal concept in a way to allow sellers to avail under its protection, given the unprecedented and extraordinary nature of this virus.

INTRODUCTION

It would not be wrong to claim that the force majeure provisions, irrespective of the type of the contract or the legal transaction they are located in, are the least invoked provisions. Indeed, extraordinary events do not take place very often. Even if it is invoked, its chance of resulting in success is relatively low. As it will be elaborately discussed further in this thesis, force majeure provisions, which provide a relief from liability due to extraordinary circumstances that bar a party from performing its contractual obligations require a case-by-case analysis and a very high threshold to meet. Hence their invocation does not take place very often and illustratively speaking, they remain under dust through the validity period of numerous contracts.

The basic knowledge of this legal concept showed itself to be insufficient following the emergence of a novel contagious outbreak when the governments announced lockdown and many restrictive measures to halt the spread of this virus. I recall the day when the official announcements were made, the law office I had been working back then have received several phone calls from the clients asking whether they can avail under the protection of force majeure provision or not. It would have been relatively easy if the answer were, “Yes, you definitely can”. However, in order to come up with an answer, all aspects of the situation the clients have found themselves in have to be evaluated and then the clients should be informed about whether their invocation would be successful and they would be relieved from liability or not.

Under the light of this introduction, this thesis is dedicated to the consequences of this novel pandemic on the international sales contract concluded under United Nations Convention on

Contracts for the Sale of Goods (hereinafter referred as “CISG”). The main task would be to find an answer to what extent the parties, more specifically sellers, to an international sales contract are entitled to invoke force majeure provision due to consequences of coronavirus under CISG. The principal reason behind choosing CISG as a basis was due to the fact that the majority of the jurisdictions share similar force majeure provisions under their domestic legislations. Hence, the provision contained in CISG shall be considered as a reflection of general legislative principles of force majeure existing in most of these legislations. Choosing a convention, which has a wide scope of application throughout the world with ninety-four signatory states as of September 24, 2020¹ would also allow this thesis to be a contribution to doctrine.

Besides this, it is also worth mentioning that not only (international) sales contracts got affected adversely whereas this contagious outbreak had negative consequences in almost every kind of legal transactions, including lease agreements, employment agreements and many more. The underlying reason behind choosing international sales contracts is that the alleged impediment of coronavirus and government-enacted measures has very visibly and severely distorted demand and supply chain and logistics within the context of international commerce. Hence, it is believed that there is going to be a significant increase in disputes brought before courts and arbitral tribunals with regards to this issue.

For the purpose of this thesis, the first chapter is going to begin by illustrating the emergence of this contagious outbreak and the measures taken all around the world to halt the spread of the virus. This would allow the readers to see the impact of these measures on the demand and supply chain and logistics all around the world. It is going to be proceeded with the

¹ 'CISG: Table Of Contracting States' (*Institute of International Commercial Law*, 2021) <<https://iicl.law.pace.edu/cisg/page/cisg-table-contracting-states>> accessed 20 March 2021

explanation of *pacta sunt servanda* principle to highlight the binding force of contracts and the definition of force majeure that allows a departure from this principle. The readers are also going to be provided with a critical analysis of the force majeure certificates. In the second chapter, readers are going to be introduced to Article 79 of CISG that stipulates the exemption from liability. From this point, this thesis is going to focus on the three main requirements to be met for a successful invocation of force majeure under Article 79/1 of CISG which are impediment beyond the control of the seller, unforeseeability at the conclusion of the contract and being unable to avoid or overcome the impediment. The explanations under these sub-headings are going to include both supporting and dissenting opinions with regards to these requirements by evaluating possible circumstances the sellers might have faced. Based on these explanations, the third chapter is going to proceed with Article 79/2 of CISG, which stipulates default due to a third party's failure with a specific focus on default due to supplier. Then, Chapter 4 is going to duly cover the duration of the exemption from liability and requirement of giving timely notice to the counter party about the non-performance. Finally, the thesis is going to be concluded and readers are going to be presented to the extent the sellers are entitled to invoke this provision.

CHAPTER 1: THE EMERGENCE OF CORONAVIRUS & THE PRINCIPLE OF PACTA SUNT SERVANDA

This chapter is going to explain the emergence of coronavirus and the government-enacted measures taken in order to halt the spread of the virus and then proceed with the pacta sunt servanda principle and definition of the force majeure.

A. The Outbreak of Coronavirus and Distortions in Supply Chain and Logistics

Throughout 2020, and in 2021, this unprecedented virus called coronavirus (hereinafter referred as “Covid-19” or “virus”) has become the first priority in the World’s agenda. The consequences of this contagious lethal outbreak are felt throughout the world resulting in mass death and disruption to every single industry. The World Health Organization (hereinafter referred as “WHO”), through its announcement on March 11, 2020 characterized coronavirus as pandemic. The severity of this virus has forced governments to enact extraordinary measures such as lockdowns, curfews and border closures. These measures and restrictions have resulted in distortions in demand and supply chain and in logistics, thus the parties to international business transactions often became unable to perform their contractual duties. Hence, along with the health and social lives of the people, this virus has also impacted the international commerce especially international sales contracts negatively.

To illustrate the big picture, all the measures including lockdowns, shutdowns of factories and border closures have cut down the production and movement of goods. China has followed a very strict lockdown program and many cities such as Wuhan and Hubei were kept under

lockdown for a long period of time. Factories were kept under shutdown in the beginning of the year and the outbreak has forced many companies for example Apple and Ikea to shutdown their factories and stores for a long time.² Production was kept at minimum, even reduced to zero, thus harmed the supply chain from the very earliest stage. Prior to WHO's announcement, on January 30, 2020 China Council for the Promotion of International Trade had released a statement informing the local companies who are unable to perform their contractual obligations due to this virus outbreak to be entitled to get a force majeure certificate.³ According to the report of Reuters dated 11.03.2020, China has issued 5.637 force majeure certificates, which corresponds to a total contract value of 503.5 billion Yuan (\$72.47 billion).⁴

Turning back to Europe, in Italy, where the virus went seriously beyond control and resulted the mass death of people, the government has imposed a national lockdown in the entirety of the country that only allowed people to resume their daily routines for necessity work and health-care. On March 17, 2020 the Italian government enacted a decree, called *Cura Italia Decree*, stating that any kind of rules, which are adopted for the purpose of protection of the health in the times of pandemic, must always to be considered as a reason of exemption from liability in case of delay or failure to fulfill contractual obligations.⁵ Pursuant to Circular No:0088612 dated 25.03.2020, the Ministry of Economic Development has authorized the Chambers of Commerce to issue force majeure certificates. Pursuant to this above-mentioned

² Rob Garver, 'China Coronavirus Lockdown Crippling Global Supply Chain' (*Voice of America*, 2021) <<https://www.voanews.com/science-health/coronavirus-outbreak/china-coronavirus-lockdown-crippling-global-supply-chain>> accessed 24 May 2021

³ China Council for the Promotion of International Trade, 'CCPIT Issues The Force Majeure Certificates Of Novel Coronavirus Disease (COVID-19) For Enterprises' (*En.ccpit.org*, 2021) <http://en.ccpit.org/info/info_40288117668b3d9b017080e1f9b5072f.html> accessed 4 January 2021

⁴ Reuters Staff, 'China Force Majeure Certificate Issuance Pass 5,600 Amid Virus Outbreak - Trade Body' (*U.S.*, 2021) <<https://www.reuters.com/article/health-coronavirus-china-force majeure/china-force-majeure-certificate-issuance-pass-5600-amid-virus-outbreak-trade-body-idUSL4N2B43CK>> accessed 4 January 2021

⁵ Pietro Cavasola and Federica Turetta, 'Chamber Of Commerce Declarations About The Existence Of Force Majeure' (*Cms.law*, 2021) <<https://cms.law/en/ita/publication/chamber-of-commerce-declarations-about-the-existence-of-force-majeure>> accessed 14 May 2021

circular, The Chamber of Commerce declared that upon the request of Italian companies they may issue statements on the state of emergency in Italy and on the restrictions imposed by law, together with a declaration of the company concerned on the impossibility to fulfill its contractual obligations.⁶ Meanwhile, Germany has also taken strict measures with the same purpose and imposed serious lockdown in the country. Germany's biggest car manufacturer, Volkswagen announced a shutdown of its production for a five-week period of time and started in a reduced pace of production in early April, 2020 due to current circumstances.⁷ Other German companies such as BMW have also taken the same path and (had to) slowed down their production. This has been reported as the biggest lockdown since the Second World War in the history.

Some states opted for border-closures in order to track the entry to the state and make sure that outbreak is not brought within the movement of good and people. This had evidently affected the cross-border trade by causing delays and problems. Despite the free market and removal of internal borders within EU, several countries have closed their borders. For example, it has been reported that trucks formed approximately 37-mile-long lines on the A4 highway after Poland closed its borders with Germany in mid-March.⁸ France has also attempted to close its borders to UK travellers and truck drivers but such restriction was protested by other countries, due to it was noted France's border closure, that lasted for 48 hours, put up to 85% of all UK imports from EU at risk and cuts off the supply chain from EU

⁶ Marta Cenini, Giulio Maroncelli and Roberta Padulo, 'International Supply Chain: Italian Chambers Of Commerce May Issue The "Force Majeure Certificates"' (*Ipsoa*, 2020) <[https://www.ipsoa.it/documents/impresa/contratti-dimpresa/quotidiano/2020/04/14/international-supply-chain-italian-chambers-of-commerce-may-issue-the-force-majeure-certificates#:~:text=In%20order%20to%20meet%20the,emergency%20and%20force%20majeure%20\(so%2D](https://www.ipsoa.it/documents/impresa/contratti-dimpresa/quotidiano/2020/04/14/international-supply-chain-italian-chambers-of-commerce-may-issue-the-force-majeure-certificates#:~:text=In%20order%20to%20meet%20the,emergency%20and%20force%20majeure%20(so%2D)> accessed 6 January 2021

⁷ Charles Riley, 'The World's Biggest Car Factory Just Reopened. Here's What Volkswagen Had To Do' (*CNN*, 2021) <<https://edition.cnn.com/2020/04/27/business/volkswagen-restart-production-wolfsburg/index.html>> accessed 24 May 2021

⁸ Ian Twinn and Navaid Qureshi, 'The Impact Of Covid-19 On Logistics' (*Ifc.org*, 2021) <https://www.ifc.org/wps/wcm/connect/2d6ec419-41df-46c9-8b7b-96384cd36ab3/IFC-Covid19-Logistics-final_web.pdf?MOD=AJPERES&CVID=naqOED5> accessed 14 May 2021 p.2

to Ireland.⁹ Speaking of logistics, on the other side of the world, in India, the lockdown has created in a shortage of truck drivers, which has resulted in over 50,000 containers piling up in the ports of Chennai, Kamajar and Kattupalli.¹⁰ In addition to road and seaway transportation, airway transportation has also stopped due to cancellation of flights by the airline companies. The virus had remarkably slowed down, even paused the logistics to a great extent.

These are only a few examples of the restrictions, which serve to the purpose of illustrating the situation due to Covid-19 around the world. Looking at the big picture and given the important role of China in the international commerce, especially by being the main producer and supplier of indefinite various goods, the distortion in the supply chain and logistics was inevitable. As a matter of fact, according to the DHL Report dated November 30, 2020 the volume of total containers handled at Chinese ports incurred a drop of %10.1 in the first months of 2020. It has been further reported that this weak demand will continue to affect routes between Asia, Europe and United States.¹¹ Given the long journey the goods take in international sales transactions, all of these measures eventually and inevitably restricted the movement of goods. Hypothetically speaking, in an international sales contract involving multiple countries from the production until reaching its final consumers, a Chinese manufacturer or German car producer, Italian retailer, Polish distributor with a voyage planned for the goods through Europe, India or Chinese ports, there would be at least one party being unable to perform their contractual duties because of failures in the supply chain due to Covid-19 and government-enacted measures. Thus, many contracts were jeopardized

⁹ Victor Mallet and Domitille Alain, 'France Reopens Border With UK After Virus Closure' (*Ft.com*, 2021) <<https://www.ft.com/content/e2d2e680-752a-44a5-b014-60cd837532e7>> accessed 24 May 2021

¹⁰ Ian Twinn and Navaid Qureshi, 'The Impact Of Covid-19 On Logistics' (*Ifc.org*, 2021) <https://www.ifc.org/wps/wcm/connect/2d6ec419-41df-46c9-8b7b-96384cd36ab3/IFC-Covid19-Logistics-final_web.pdf?MOD=AJPERES&CVID=naqOED5> accessed 14 May 2021 p.2

¹¹ *Ibid* p.3

and parties became unable to perform their obligations, especially the sellers because of being unable to either produce the goods or deliver them.

B. Departure from the Principle of Pacta Sunt Servanda

The most significant consequence of freedom to contract is that by exercising this freedom, parties legally bind themselves in accordance with the terms and conditions they agree upon and acknowledge to bear the consequences in an act of non-performance. Thus, such contract becomes binding as if it is legislation between the parties, so the parties are expected to fulfill their obligations. This is called as *pacta sunt servanda*, a universally recognized principle that has permeated in the contract law. It is simply translated, as “agreements must be kept”. Such principle plays a significant role within the commercial relationships because “The pacta principle reflects not only natural justice, but also an economic necessity: commerce would not be possible without reliable promises.”¹² Indeed, stability and commitment are very essential in commercial life whereas in a system in which such principle is undermined and not given due consideration properly, it would not be possible to speak of a well functioning international supply chain.

Given the reality of the above-mentioned situation and distortions in the demand and supply chain and logistics, even if a party wants to perform the undertaken contractual obligations, it may not be possible. This non-performance would create consequences for the party at breach but “a party may be excused from the pacta sunt servanda principle in some exceptional

¹² Peter J. Mazzacano, ‘Force Majeure, Impossibility, Frustration & Like: Excuses for Non-Performance; the Historical Origins and Development of an Autonomous Commercial Norm in CISG’ (2011) Nordic Journal of Commercial Law p.6

grounds.”¹³. In order to be relieved from the *pacta sunt servanda* principle one has to prove that the alleged situation suffices to be exceptional whereas the outbreak of Covid-19 and the government-enacted measures constitute an appropriate example for these kinds of exceptional situations. At this moment, the concept of force majeure is highlighted the most whereas it is a concept that under certain circumstances the parties are exempted from liability even if they do not perform their contractual obligations.

If one asks the question, so what is meant by the term “force majeure” or how it is defined, the most precise definition would be “Force majeure occurs when the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which the performance is called for would render it impossible. I promised to do this but I cannot due to some irresistible unforeseeable and uncontrollable event.”¹⁴ Basically, it is an act of breaking a promise without legal consequences attached to it. In order to invoke this legal concept a party shall prove that the alleged circumstances meet the relevant requirements established under the relevant provision that provides the exemption from liability, in our case it is going to be Article 79 of CISG. This is a compromise that parties make for the sake of freedom of contract and the law is trying to strike a balance between these above-mentioned legal principles. The invocation of this legal concept takes place very rare because binding force of a contract is respected at its most by the parties and especially by the courts. The courts tend to interpret the term force majeure in a very narrow manner. As a matter of fact, according to Opinion No: 7 of CISG Advisory Council, “Article 79 has been invoked in litigation and arbitration by sellers and

¹³ Yohannes Hailu Tessema, 'Force Majeure And The Doctrine Of Frustration Under The UNIDROIT Principle, CISG, PECL And The Ethiopian Law Of Sales: Comparative Analysis' (2017) 58 Journal of Law, Policy and Globalization p. 33

¹⁴ All Answers ltd, 'Force majeure and hardship' (UKEssays.com, May 2021) <<https://www.ukessays.com/essays/law/force-majeure-and-hardship.php?vref=1>> accessed 14 May 2021

buyers with limited success.”¹⁵ This situation has also been confirmed by the German Courts, a CISG signatory state, “even though Germany has reported more Article 79 cases than any other CISG signatory state, this amounts to only 18 cases from that country that are considered in this article. An overview of Article 79 demonstrates that parties may frequently resort to this provision as a defense, but they are rarely successful.”¹⁶ This turns us back to the explanations given in the introduction part of this thesis; the existence of a force majeure provision does not directly avail a party under its protection. Indeed, *pacta sunt servanda* remains, as the main principle whereas this legal concept called force majeure stand as exception, but it is undeniable that exceptions with regards to coronavirus have slowly becoming the “new” normal in our lives.

Given the unprecedented and extraordinary circumstances of such outbreak, the exceptional situation needs to be evaluated in detail. As the world has passed the first year anniversary of this unprecedented virus, it seems like this situation will likely remain as the major topic of discussions for a long time among legal scholars. Despite of the fact that some countries have opted to issue force majeure certificates, there is still an uncertainty towards their effect in an international trade. Such certificates may possess a strong evidence to the recognition of a force majeure event and may suffice to exempt a party from liability to some extent, but it should also be recognized by a competent court or tribunal in a given dispute when it is relied on against another party from a different country. “They may not, however, prejudge a domestic court’s or international arbitral tribunal’s factual evaluation of the COVID-19 situation in a given case, if that court or tribunal sits outside China.”¹⁷ The same explanation

¹⁵ Rapporteur: Professor Alejandro M. Garro, ‘CISG-AC Opinion No. 7, Exemption of Liability for Damages under Article 79 of the CISG’ (2007) p.2

¹⁶ Peter Mazzacano, ‘The Treatment of CISG Article 79 in German Courts: Halting the Homeward Trend’ (2012) *Nordic Journal of Commercial Law* p.3

¹⁷ Klaus Peter Berger and Daniel Behn, ‘Force Majeure And Hardship In The Age Of Corona’ (2020) 6 *SSRN Electronic Journal* p.92

would also be applicable for disputes in which an Italian seller is party to it, as Italy also has a similar practice. The competent court shall conduct a case-specific assessment in accordance with the facts of the case brought before it and the certificate would only possess a significant evidentiary role in this assessment, not a final and conclusive proof. The explanation with regards to such certificates would not continue any further whereas the legal assessment of these falls beyond the scope of this thesis.

Overall, it has been seen that the virus and government enacted measures have severely affected the international demand and supply chain and logistics. Thus many parties have become unable to honor their contractual commitments. Despite of the *pacta sunt servanda* principle, the legal concept of force majeure allows the party at breach to be exempt from liability to a certain extent. As of this moment, it will be shifted to Article 79 of CISG titled; “Exemption” and evaluated in depth with regards to Covid-19 and its consequences from the perspective of the seller.

CHAPTER 2: FORCE MAJEURE UNDER CISG

In this chapter, readers are going to be introduced to the Article 79 of CISG, the legal provision that stipulates the legal concept of force majeure. Then, it is going to be proceeded with three main requirements to be met for the invocation of this provision with success: impediment beyond the control of the seller, unforeseeability at the conclusion of the contract, being unable to overcome or avoid the consequences of the alleged impediment.

A. Force Majeure Under The Scope Of CISG Article 79

The relevant provision is the Article 79 of CISG in which force majeure is stipulated by referring the alleged situation as an “impediment”. CISG has apparently refrained from using the term *force majeure* but this article is generally referred as force majeure provision in practice.

Article 79 Exemption¹⁸

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

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

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

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

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

(4) The party who fails to perform must give notice to the other party of the impediment and its effect on his ability to perform. If the notice is not received by the other party within a

¹⁸ United Nations Convention on Contracts for the International Sale Of Goods (1980) Article 79

reasonable time after the party who fails to perform knew or ought to have known of the impediment, he is liable for damages resulting from such non-receipt.

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

Pursuant to Art.79/1 of CISG, a party to a sales contract is exempt from liability as long as the alleging party proves that such non-performance was caused by an impediment beyond their control and they could not have been reasonably expected to take such impediment into account at the conclusion of the contract. The alleging party shall also prove that the impediment and its consequences could not have been avoided or overcome. It is seen that the threshold is set to a high point and a successful invocation of this provision depends on satisfying all of these requirements.

The Opinion No: 7 of CISG Advisory Council further explains that the invocation of force majeure provision has resulted in a very limited success and “Overall, sellers made only slightly more claims of exemption than buyers”.¹⁹ Given the unprecedented and extraordinary nature of the coronavirus outbreak and remarkable distortions in the supply chain due to Covid-19 measures, it seems like the sellers will invoke this provision more frequently and the claim would presumably result in success. However, as explained, the party alleging the existence of a force majeure event shall meet the requirements set forth in the relevant provision cumulatively to be exempt from liability. This thesis is going to continue with the evaluation of these requirements found in the Article 79/1 of CISG from the seller’s perspective.

¹⁹ Rapporteur: Professor Alejandro M. Garro, ‘CISG-AC Opinion No. 7, ‘Exemption of Liability for Damages under Article 79 of the CISG’ (2007) p.2

a. Impediment Beyond the Control of the Seller

The term force majeure is most of the time referred to an *unforeseeable irresistible compulsion* or a *superior strength* that ultimately prevents a party to a contract fulfilling his obligations. In the words of CISG, it corresponds to an “impediment”. The most common types of impediments are the natural disasters, military coups, blockades, and epidemics, shut down of transport routes due to for instance a volcano eruption. The notion that lies behind all these examples is the notion of being “beyond control”. It is important to prevent a party to avoid liability due to a known and controllable occurrence; otherwise this legal concept would be open to abuses, “the force majeure clause must not be an avenue for a party to escape liability due to a known event, or an event which might have been prevented by taking adequate precautions.”²⁰ For the purpose of this thesis, the pandemic of coronavirus and the government-enacted measures show themselves to be an irresistible and a superior strength. The nature of this virus together the restrictions and the duties of seller as being an employer show that such impediment is manifestly beyond control of the sellers.

When it comes to force majeure regarding epidemics or pandemics, one might come up with an assertion that such outbreak is not the first one that humankind went through and claim that such outbreak were actually in control, not beyond. Indeed, the world has gone through contagious outbreaks such as the recent Severe Acute Respiratory Syndrome (hereinafter referred as “SARS”) outbreak, which has ended in June 2003. It has been reported to result in 8098 infected people and 774 deaths.²¹ Another outbreak called Middle East respiratory syndrome (hereinafter referred as “MERS”), emerged in 2012, was contained but caused 2494

²⁰ Bodhisattwa Majumder and Devashish Giri, 'Coronavirus & Force Majeure: A Critical Study (Liability Of A Party Affected By The Coronavirus Outbreak In A Commercial Transaction)' (2020) 51 Journal of Maritime Law & Commerce p. 54

²¹ History.com Editors, 'Pandemics That Changed History' (*HISTORY*, 2021) <<https://www.history.com/topics/middle-ages/pandemics-timeline>> accessed 24 May 2021

infected people and 858 deaths. SARS outbreak was reported to have 9.7%, and MERS to have %34 of fatality rate.²² None of these outbreaks caused the same effects as this novel coronavirus pandemic. Despite of being less fatal than these two previous outbreaks, Covid-19 appears to be more contagious whereas “the global count is rapidly approaching 10 million known cases and has passed 500.000 deaths” as in the end of first six months period of time.²³ As of May 25, 2021, as the World has already gone by the first anniversary of WHO’s announcement declaring this outbreak as pandemic, the reported cases are 167 million people and the number of casualty is 3.48 million. WHO is still conducting operations in Wuhan to reach a conclusion about the emergence of this virus and its actual source. As the time goes by, the virus has also mutated into new variations that ultimately made the process more uncontrollable. Given the reality, all of these lead us to the conclusion that the alleged impediment of Covid-19 is “far beyond the control of not only the parties of international trade but also governments, scientists, and doctors”.²⁴ Thus, at the end of the day all of these show that the situation was beyond the control of the seller due to the nature of the virus.

The rapid pace in transmission and the unpredictable effects to human health made such outbreak even more dangerous. It has been observed that a young person may suffer deeply and be intubated whereas an elderly person goes through it without showing any symptoms or vice versa. The unknown and indefinite nature of this outbreak is the biggest concern for the seller whereas a seller also owes duty of protection to its personnel as well. It should not be forgotten that there might be more than one person on the seller’s side of the contract. Seller recruit employees and the term “seller” refers to all of them, depending on the size of the company and the sector it is conducting business in, the number of employees can be up to

²² Eskild Petersen, Morion Koopmans and others ‘Comparing SARS-COV-2 with SARS-COV and Influenza Pandemics’ (2020) 20 Lancet Personal View p.238

²³ Ibid p.238

²⁴ Şeyma Esra Kiraz and Esra Yıldız Üstün, 'COVID-19 And Force Majeure Clauses: An Examination Of Arbitral Tribunal’s Awards' (2020) Uniform Law Review p.11

hundreds, even thousands. Under majority of the jurisdictions, pursuant to labour laws, the employer has the duty to protect the rights of its employees; starting with the right to health of employees and the right to work in a safe environment. They are expected to show the utmost care and to take all the necessary precautions to minimize the risks the employees are exposed to in their work. This duty does not arise only when there is an extraordinary situation but rather exists all the time in accordance with the necessities of the work. This duty carries a more significant importance when it is a matter of life or death.

There is no doubt that the virus imposes threat to health of the employees especially in work places where people remain together and stay in contact for a long time during their shift. This eventually raises the possibility of the spread of virus. Hence, it is expected from an employer, the seller in our case, to take necessary precautions and not to summon its workers and demand the operation of business in the usual course of actions for the sake of its contractual obligations under these circumstances. Indeed this is considered as a valid excuse for a seller in which, “an impediment to performance exists if for other than economic reasons, the obligor cannot reasonably be expected to affect performance because its personnel or third parties which it has engaged to perform the whole or part of the contract would be exposed to hazards to their life or health.... This is provided that such exposure exceeds the risk which is customary in the particular trade or under the circumstances.”²⁵ This excerpt from an ICC award is in conformity with the situation the seller finds itself into due to coronavirus. The seller cannot reasonably be expected to affect performance because the employees would be directly exposed to hazards to their life and health. At the end of the day, the hands of the seller are tied due to this situation because coronavirus constitutes an imminent hazard to life and health as well as exceeds the risk and tolerance.

²⁵ Christoph Brunner, *Force Majeure And Hardship Under General Contract Principles Exemption For Non-Performance In International Arbitration* (Kluwer Law International 2009) p.210

This situation has been explained in another ICC award by the arbitral tribunal expressing that “but events which go beyond merely increasing the financial burden on the party performing and which reach a point where they render performance unacceptably hazardous to the lives and safety of those performing, are in a different category altogether. If such events supervene, and if the risk, which they create, is unlikely to be removed within a reasonable time, under many legal systems further performance will be excused. Whether it is will usually depend upon such matters as the foreseeability, character and expected duration of the risk, as they would have appeared to an objective, informed observer”.²⁶ This award also highlights the notion of excess of tolerable risk inherited in the supervening events, which under the relevant circumstances require an objective case-specific assessment on grounds of foreseeability, character and expected duration of the risk. Especially, the criterion of character is what makes this virus manifestly beyond control from seller’s perspective. Furthermore, the risk it creates also shows itself to be unlikely to be removed. All of these notions are relevantly applicable in the context of coronavirus.

Moreover, given that the governments have regulated many restrictions such as lockdown, curfew and social distance practice, the mobility of the seller and of his employees are minimized, almost reduced to zero for a long period of time. It is certain that government-enacted restrictive measures are beyond the control of the seller whereas seller has no power to violate them unless government gives competence to do so. As of present moment, the world has already passed through the first anniversary of this novel contagious outbreak and it is somehow learnt to cope and to live with this reality. In case of acknowledging that such impediment is actually under control to some extent instead of being totally beyond, the

²⁶ Ibid p.210

chance of invocation of this legal concept with success will be frankly lower. Hypothetically speaking a seller may not claim as of today that it is unable to perform its contractual obligations due to coronavirus and the government-enacted measures when the home country of seller, the state where the goods are destined to or the states the goods are routed to stop by have eased down the restrictive measures and the work actually seems to be conducted. This would also fail to meet the unforeseeability requirement, which will elaborately be discussed in the following part of this thesis. It might also be subject to a counter argument, which suggests that the seller could overcome and avoid failure to perform by adjusting to this new normal. However, this situation will also require a case-specific analysis, one should refrain from jumping to a conclusion without making the necessary evaluations. Under the scope of this thesis, it is focused whereby the alleged impediment of coronavirus and government-enacted measures has caused the non-performance by being beyond the control sellers.

There is one last thing to mention with regards to the sphere of control of the sellers before moving to the next requirement. In the context of the alleged impediment, besides the concerns with employees, the default of seller to perform might be due to failure of suppliers. Indeed, it is very likely for suppliers to suffer under similar circumstances and be unable to provide raw materials to be used for manufacturing of the goods to the seller. Sellers are held responsible for the procurement of raw materials and it is accepted to fall under the scope of control and risk of the sellers. However, as hinted in the above-mentioned ICC case, sellers might be exempt from liability if their personnel or third parties whom the seller has engaged with would be exposed to hazards to health. At this moment, we are presented to Article 79/2, whereby default due to third person's failure whom the seller has engaged to perform the whole or a part of the contract is stipulated. The scope of "third person" is controversial, whereas according to legal scholars and jurisprudence suppliers are not accepted to be third

person. However, for the purpose of this thesis, in connection with the extraordinary nature of the impediment, it is deemed to include suppliers and sellers would be given a chance to avail under the protection of this legal concept pursuant to Art.79/2 with a view that the situation exceeds the control of the seller. As of now, it will be refrained from proceeding whereas Chapter 4 will be dedicated to this issue. Indeed, it is believed that following the detailed explanation of Art.79/1; it would be easier to grasp the application of Art.79/2.

For the purpose of this first requirement, it is acknowledged that the contagious outbreak and government-enacted measures have shown themselves sufficient to be beyond control of the seller. Following this affirmation, the thesis will now proceed with the second requirement established under Art.79/1, which is “unforeseeability at the conclusion of the contract” and discuss specific scenarios in which the date of the conclusion of the contract possesses significance.

b. Unforeseeability at the Conclusion of the Contract

In order to invoke the force majeure provision with success, the seller has to prove that such contagious coronavirus outbreak and all the measures taken by the governments to halt this spread were unforeseeable at the conclusion of the contract. This requirement shows itself to be closely linked with the objective to prevent a party to avail under the protection of this provision and be exempt from liability in case of a foreseeable situation. There to say, it has already been explained that departure from *pacta sunt servanda* principle requires a high threshold to meet. This statement finds its roots especially in this requirement. Regardless of how uncontrollable the situation is, if it was predictable, reasonably be taken into account or fell under the sphere of risk assumed by the party alleging the existence of force majeure

event, it turns into a foreseeable occurrence; and the chance to invoke this legal principle with success sharply reduces to zero. In the previous requirement the focus was merely on the character of the alleged situation whereas it is now moved on to a time-based assessment together with predictability and a risk assumption in connection with the nature of such virus. Keeping this general introduction in mind, the seller is required to show that coronavirus and all the government-enacted measures that bar him from fulfilling his contractual duties were neither foreseeable nor under the sphere of the assumed risks at the conclusion of the contract.

To begin with, it would not be wrong to claim that at the end of the day the fate of the invocation of this principle is at the hands of the judge of a competent court or of the appointed arbitrators. Their decisions will either exempt the seller on grounds of force majeure or the seller would bare the consequences of his non-performance. In order to make this decision, the alleged event shall be duly assessed from the perspectives of both the seller and a reasonable third person in terms of whether the alleged circumstances were unforeseeable or not. This requires an objective assessment that shows that neither the seller nor a reasonable third party was able to foresee the upcoming events.²⁷ The term “reasonable person” is defined within the context of CISG under Article 8/2 as “...statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.”²⁸ Given the tendency to make a narrow interpretation and a high threshold to meet, this assessment plays a significant role in the final decision so as not to allow a party to avail under the protection of this legal concept while such alleged impediment is foreseeable by any reasonable third person.

²⁷ Tuğçe Oral, 'Exemption From Liability According To The Art. 79 Of The Convention On International Sale Of Goods (CISG)' (2021) 9 Juridical Tribune p.649

²⁸ United Nations Convention on Contracts for the International Sale of Goods (1980) Article 8/2

The extraordinary nature of this outbreak was elaborately explained under the beyond control requirement. Despite of how reasonable people are, the virus and the consequences of this spread together with the measures enacted by the governments have proven themselves to be unprecedented. Indeed, “the consequences of the outbreak of coronavirus and the measures taken by the states to prevent it have been far more severe when compared to earlier epidemics. This degree of severity makes the epidemic unforeseeable such that the affected party could not have taken any reasonable steps to prevent its effect.”²⁹ This unprecedented and unforeseeable nature of the alleged situation will lead decision makers to interpret this legal concept broadly. The objective assessment also seems in favor of the sellers to show that the situation was beyond foreseeable context of anyone at the conclusion of the contract because it would be undeniably odd to expect or predict a global catastrophe that results in mass deaths like this virus did. Therefore, this would be a dominant factor on the decision whereas “...it is likely that Courts would allow the claim of the parties, who are failing to honour the terms of the contract, that the consequences of Coronavirus were so unforeseeable that it was not in their control to prevent its consequences”³⁰ Given that, the alleged impediment is commonly described as unprecedented, extreme, extraordinary the unforeseeability requirement is likely to be met.

In relation with the explanations provided until now, it is worth clarifying the concepts of “not reasonably to take into account” and “fall under the scope of the risk assumed by the party”. All of these terms: predictability, to take into account or falling under the sphere of assumed risk are similar means to a same end, which is the unforeseeability. When it comes

²⁹ Bodhisattwa Majumder and Devashish Giri, 'Coronavirus & Force Majeure: A Critical Study (Liability Of A Party Affected By The Coronavirus Outbreak In A Commercial Transaction)' (2020) 51 Journal of Maritime Law & Commerce p. 59

³⁰ Ibid p.59

to a sales transaction, which takes place in an international context involving a cross border trade and a relatively long journey destined for goods, there are relatively more things to take into account compared to domestic sales transactions. The unforeseeable events also impose greater problems in this sense, as explained by Prof. Ingeborg Schwenzer in these following words: “Unforeseeable changed circumstances are probably one of the major problems parties - especially those who are party to a long or longer term complex contract - may face in international trade. Indeed, with globalization these problems are increased as the involvement of more and more countries in production and procurement entails even greater imponderables.”³¹ Especially when such alleged force majeure event is due to this novel contagious outbreak, the extent of imponderables the transactions are encountered with is unquestionable. In the international context, these explanations shall also extend to a greater scope and include the voyage the goods are destined to and all other operational issues that are related to the international sales transaction involving cross border trade.

At this moment, if the occurrence of the alleged impediment were taken into account at the conclusion of the contract, the party would miss its chance to be exempt from liability under this provision because it would be presumed that such risk fell under the sphere of risk assumed by that party.³² In the usual flow of life, the sellers, as being prudent merchants, are expected to weigh all possible situations that might have adverse effects on their performance and adjust their operations in accordance with them. So that mere struggles such as sharp fluctuations in currencies, bad air conditions, a long-lasting electric outage, or common commercial risks such as bankruptcy or inability to get a loan from a bank are out of the scope of excuses a seller can put forward. In addition to these, the seller may also not claim that his

³¹ Ingeborg Schwenzer, 'Force Majeure And Hardship In International Sales Contracts' (2008) 39 Victoria University of Wellington Law Review p.709

³² Christoph Brunner, *Force Majeure And Hardship Under General Contract Principles Exemption For Non-Performance In International Arbitration* (Kluwer Law International 2009) p.156

failure to perform the contractual duties is due to failures caused by his employees whereas he is expected to make necessary adjustments, manage its operations in a way to suspend any kind of lack and failure of employees. All of these belong to the risk of sphere of the seller that he is reasonably expected to take into account at the time of the conclusion of the contract. However recalling the duty of sellers, as being an employer to protect the health of employees, it is accepted that if the illnesses, deaths or vacancies of employees are due to extraordinary external events like an epidemic or a pandemic, which have substantial effects on the entirety of the employees, the seller may very well be excused due to its non-fulfillment of contractual duties.³³ It would be unrealistic to expect from a seller to foresee this kind of failure due to a pandemic like coronavirus while such situation exceeds both the control and foreseeability. In the same sense, it also significantly exceeds the assumption of the risks. Therefore, given the reality, the seller cannot reasonably be expected to take into account and assume this kind of risk at the conclusion of the contract. Any contrary arguments to it will be addressed further in the upcoming paragraphs and the readers will be presented a case in which a force majeure claim was denied to non-fulfillment of unforeseeability criteria.

As hinted above, all of the explanations with regards to the unforeseeability of the alleged force majeure event are open to rebuttals and there comes a time when the alleged force majeure event is deemed to be foreseeable despite of its uncontrollable nature and extent of inherited risks. These counter arguments find their roots especially on a time-based assessment and the time of the conclusion of the contract is taken as a basis in this assessment. If there is evidence that shows that by the time the contract is being concluded such alleged impediment has already existed or highly likely to exist, then this impediment

³³ Ibid p.168

loses its notion of unforeseeability. The seller is expected to take these kinds of situations into account and then enter into a contract with free will. It is worth mentioning a sample case in which the force majeure claim based on Art.79 of CISG was denied by arbitrators due to failure to meet unforeseeability requirement in the times of SARS outbreak. In the dispute brought before China International Economic and Trade Commission (hereinafter referred as “CIETAC”), the dispute involved an international sales contract entered between a Chinese seller and a Dutch buyer, which sets forth the agreement between parties on sale of *L-lysine*. Apparently, the parties have concluded the contract two months after the emergence of SARS outbreak.³⁴ Following the seller’s failure to deliver the total of agreed amount of *l-lysine*, the buyer had decided to dismiss the remaining delivery and demanded the price difference between the contract price and market price, together with an interest. As a defense, the seller invoked Art.79 of CISG and claimed that the failure in delivery was due to SARS outbreak and argued that he shall be exempted from liability with regards to the price difference and the interest the buyer has initiated the arbitration for. The determinant factor in CIETAC tribunal’s decision was the time of the conclusion of the contract, which corresponds to a date two months after the emergence of SARS. It is seen that the alleged force majeure event was an occurrence, which could have been reasonably taken into account by the seller at the time of the conclusion of the contract. With this idea in mind, the tribunal has rejected seller’s Art.79 claim and found that the issue did not fall under the scope of Art.79 of CISG.³⁵ The tribunal has decided that “SARS happened two months before parties signing the contract, so SARS was not unexpected. Beside, SARS was under control by June 2003. At the time of the conclusion of the contract, the Seller should have had enough opportunities to consider the influence of SARS in China and it shall not become an impediment as stipulated in Article 79

³⁴ Şeyma Esra Kiraz and Esra Yıldız Üstün, 'COVID-19 And Force Majeure Clauses: An Examination Of Arbitral Tribunal’s Awards' (2020) Uniform Law Review p.22

³⁵ Lok Kan So, Poomintr Sooksripaisarnkit and Sai Ramani Garimella, 'COVID-19 In The Context Of The CISG: Reconsidering The Concept Of Hardship And Force Majeure' (2021) Balkan Yearbook of European and International Law Springer p.8

of the CISG.”³⁶ It is clearly seen that the emphasis lays on the fact the alleged event being expected and also controllable in connection with the time of the conclusion of the contract. This decision shows itself to be in conformity with all of the explanations provided so far in this thesis.

Under the light of this decision, it is expected that courts and arbitral tribunals are going to follow a similar approach with regards to disputes due to coronavirus especially for the contracts, which have been entered into after the emergence of virus. If the contract has been entered in a post-corona period, the buyer would be considered right to expect that the seller has taken into account the current circumstances, has foreseen and “has taken the risk that the impediment evolves”.³⁷ In addition to this, the above-mentioned force majeure certificates shall be issued in accordance with these explanations, so that a certificate issued for a contract, which has been entered into in post-corona period, would be contrary to the legislative principles of Art.79 of CISG. The freedom to contract means that the parties are free to stipulate the terms and conditions they want to oblige themselves into, thus a seller who wants to enter into a contract post corona period shall reserve its rights in accordance with the reality. Unless provided otherwise in the contract, the parties have to comply with these general legislative principles of force majeure in order to avail under its protection. A contrary application of such certificates would allow abuses of this legal concept and provide exemption from liability due to known and foreseeable events.

³⁶ China 5 March 2005 CIETAC Arbitral Award (L-Lysine Case) <<http://cisgw3.law.pace.edu/cases/050305cl.html> > accessed 05 April 2021

³⁷ Yohannes Hailu Tessema, 'Force Majeure And The Doctrine Of Frustration Under The UNIDROIT Principle, CISG, PECL And The Ethiopian Law Of Sales: Comparative Analysis' (2017) 58 Journal of Law, Policy and Globalization p.36

For the purpose of a fair outcome that serves for the sake of an efficient international commerce, the determination shall be made with regards to the WHO's official announcement declaring the pandemic, which took place in March 11, 2020. The majority of the government-enacted measures have been announced consecutively following this announcement. There is a time difference between the first reported cases in Wuhan and the WHO's announcement whereas the life with coronavirus remained unknown by then. Things could have been remarkably different if the virus were contained in China but by the time its severity was noticed, the virus had already and substantially spread all over Italy and then to the rest of the World. Thus, it would be unfair to expect seller to take into account of such situation if the contract was entered before WHO's announcement, not before the reports of first cases. However it should not be forgotten that the assessment to be conducted with regards to invocation of force majeure is a case-specific assessment, which is closely dependent on the facts of the case. Keeping this in mind, the date to be taken as a determinant factor in this assessment shall be different, if there is a Chinese party to an international sales contract, because the virus and the consequences of it happened earlier than anywhere else in the World in China thus the parties were able to be aware of it.³⁸ In this case taking WHO's announcement date would create unfair outcomes and lead to invocation of force majeure provision when it should not be invoked at all. It can be contended that the explanations with regards to taking WHO's announcement as a basis are applicable in an assessment involving non-Chinese parties to a sales contracts.

Under the light of this requirement, it is clearly seen that the unforeseeability requirement is very significant and essential in the determination whether such impediment constitutes a force majeure event or not. Despite of the severity and the uncontrollable nature of the alleged

³⁸ Şeyma Esra Kiraz and Esra Yıldız Üstün, 'COVID-19 And Force Majeure Clauses: An Examination Of Arbitral Tribunal's Awards' (2020) Uniform Law Review p.20

impediment, provided that such impediment were foreseeable by the seller at the date of the conclusion of the contract, the seller loses its chance to rely on the provision of force majeure. The analysis depends on the parties and the facts of each case whereas as explained in detail below, if a party to an international sales transaction is from China, the date to be taken as basis would be earlier because people have become familiar to this contagious outbreak before the rest of the world. However, if parties are from another country than China, the date to be taken as a basis would be later, arguably WHO's official announcement declaring the outbreak as a pandemic might serve for the best interest of the sellers. Any evidence that rebuts the unforeseeability shall be taken into consideration by the courts or arbitral tribunals. Following the affirmation that the alleged force majeure event is beyond the control of the seller and it is unforeseeable at the conclusion of the contract, the seller shall also prove that he is unable to avoid or overcome the impediment and its consequences. This thesis will now proceed with third requirement set under the Art.79/1 of CISG.

c. Being Unable to Avoid or Overcome the Impediment and Its Consequences

For the purpose of the invocation of force majeure due to coronavirus with success, the seller has to fulfill this third and final requirement provided under Art.79/1 of CISG, which is being unable to avoid or overcome the impediment and its consequences. In other words, the seller should not be in a position to neither avoid nor overcome the impediment and its consequences of this contagious coronavirus outbreak, which bar him from performing the contract.³⁹ The scope of this requirement has been unintentionally seized within the

³⁹ Yohannes Hailu Tessema, 'Force Majeure And The Doctrine Of Frustration Under The UNIDROIT Principle, CISG, PECL And The Ethiopian Law Of Sales: Comparative Analysis' (2017) 58 Journal of Law, Policy and Globalization p.36

explanations provided for the first and second sub-headings. As a matter of fact, it is not possible to separate these three essential requirements with a sharp knife and treat them independently whereas they are closely related. It has been elaborately explained that the unprecedented and extraordinary nature of this virus has proven itself to be uncontrollable and unforeseeable. Therefore it will be refrained from discussing whether the impediment and its consequences were avoidable beforehand, because this was not possible. Hence, the main focus is going to be on to what extent it is possible to expect a seller to overcome the consequences of virus and government-enacted measures for the sake of fulfilling contractual commitments. Under the light of these explanations, the alleged force majeure event had bared its consequences considerably on two stages: production and delivery of the goods. The production has slowed down, even paused and the transportation routes were shut down for a period of time. The severity of the virus and the measures did not allow sellers to overcome these consequences to a great extent.

With regards to the consequences bared on the production stage, these could be explained two-fold: employment vacancies and shortage in raw materials. This sub-heading will cover the consequences in employment vacancies and leave the issue of procurement of raw materials to the following chapter. The government-enacted measures include mandatory mask usage, social distance, curfew, lockdowns, limiting the number of people in a specified meter squares and several more. The severe nature, incubation period and spread rate of this virus have also given rise to the necessity for people who were in contact with a coronavirus positive person to stay under quarantine for ten to fourteen days. The main objective underlying in all of the measures is to minimize contact between people. Workplaces are the places that people get in contact with others at its most so that people from various districts over the city come and work together during their shift and then leave either by private means

or public transportation. This scheme entails a drastically high risk and multitude contacts within. So, the sellers as being employers carrying the duty to protect the life and health of his employees have to take necessary precautions and implement similar measures to minimize the risk of spread within the workplace and also they have to abide by the government-enacted measures. It is worth repeating that the government-enacted measures, by their nature, are beyond the control of the seller and also neither avoidable nor overcomeable. Any conduct to bypass these measures without competence issued by the government would likely result in liability and create further unpleasant consequences. At the end of the day, all of these above-mentioned measures have shown themselves to be inevitable and these have consequentially affected production remarkably in an adverse manner by causing vacancies of employees within the work place.

For the course of overcoming the above-mentioned consequence, mandating employees to work in the usual order would be a violation of the measures and the employees would directly be exposed to imminent and hazardous threat to their health. This has been explained prior in this thesis under beyond control requirement, to be an excess of risk, which is neither customary nor tolerable. Since there were no available means to overcome a spread between the employees, the decrease in number of employees in a shift or pausing the productions for a period of time were inevitable measures that the seller had to take. Hiring substitute employees fails to be a fair solution as well whereas the substitute workers will also be exposed to same kind of threat. On the other hand, these non-convenient alternative solutions would be against policy considerations because they would result in putting monetary benefits in front of health concerns and constitute an unacceptably dreadful violation of human rights. This is something to be prevented not only in extraordinary circumstances but also in the normal times under usual circumstances.

Overall, the tendency was to minimize contact, which also entailed reducing pace in the work. At the end of the day even if failures due to employees are not considered as a valid excuse from fulfilling the contractual obligations in the usual flow of life, a pandemic that has serious and severe impacts on the employees shall be construed as a valid exemption whereas it is evidently seen that the hands of the sellers, as being employers, are tied. The consequences of this alleged impediment were, as explained, inevitable. This premise also shows itself to be in conformity with the explanations provided under previous requirements and have proven the circumstances to be neither avoidable nor overcome-able for that time being.

Meanwhile, the logistics have also experienced distortions due to this alleged force majeure event and sellers were barred from performing contractual duties in terms of being unable to deliver the goods to buyers. Under the light of the explanations made throughout this thesis and as of the point that has been approached to, one could straightforwardly conclude that the delivery and all risks with respect to this stage fall under the sphere of risk assumed by the seller unless otherwise agreed in the contract. Such consequences may appear in many potential scenarios, for instance by an accident on the route or a mandatory change of route, delays etc. In the sense of this provision, the seller shall show the utmost effort to overcome these consequences and operate in a way to suspend all these unpleasant distortions. The distortions in demand and supply chain and logistics will not be repeated but it should not be proceeded without mentioning that the virus had bared remarkable consequences for the movement of the goods.

The governments were, still are, highly concerned in preventing the spread of virus through the movement of goods and have enacted strict measures to be applied at the borders and customs check. All of these additional procedures have resulted in delays and distortions

within the demand and supply chain. Besides these controls, the movement of goods is also hindered due to spread of virus among the people operating the carriage. One accurate example would be with regards to a livestock carrier called *Al Kuwait* whereby it has been reported that on May 26, 2020, six members of the crew have tested positive for this virus. Following this incident, these six members had to remain at hotel quarantine whereas the rest of the crew was required to stay on board. In the end, the whole process has caused a significant delay for the carriage of approximately 56,000 sheep, which has an estimated value of 12 million dollars.⁴⁰ There were many similar cases whereby the sellers have incurred an unavoidable impediment with regards to delivery part of their contractual obligations either by distortions in the routes or spread among the personnel that conducts the carriage. There is no doubt that along with the distortions in the routes, these instances have made situation even more difficult for the sellers in the times of coronavirus.

Given this reality, about the distortions in the routes, the seller might be expected to find alternative ways for the delivery and change the routes if possible. A case-specific analysis would show whether the seller could avoid the consequences and opt for an alternative route for the delivery of the goods. It has been explained that the virus showed its effects in a global context, not in a certain region. Thus finding an alternative route might not be possible for the seller. It has been observed that the indeterminate nature of this nature has led the governments to frequently take new and various restrictive measures. Even though the seller secures an alternative route, there is not a guarantee that this alternative path will still be available and not be impeded next morning by another government-enacted measure taken with the purpose to halt the spread of this contagious outbreak. This situation has also become tougher when the lives of the people are at stake. Even if there exists alternative routes, if the

⁴⁰ Lok Kan So, Poomintr Sooksripaisarnkit and Sai Ramani Garimella, 'COVID-19 In The Context Of The CISG: Reconsidering The Concept Of Hardship And Force Majeure' (2021) *Balkan Yearbook of European and International Law*. Springer p.3

routes entail a place whereby a very high risk for the spread of virus exists, this shall not be deemed as an alternative. We are once again encountering with policy objectives, in which the financial benefits should not override human rights, especially human health. However, as long as it is proven that there exists an alternative way for seller to perform contractual duties and deliver the goods to the possession of buyer which does not impose a threat to lives of people and not hindered by government-enacted measures, it shall be deemed sufficient to claim that it is possible to overcome the impediment. In this scenario, the seller is also expected to bear additional expenditures because at the end of the day the delivery and risks with regards to it are under seller's responsibility.

Under the light of the explanations provided under the third requirement established in Art.79/1 of CISG, being unable to avoid or overcome the impediment and its consequences, it is seen that it is very case-specific and determinable in accordance with the facts of the each situation. One could argue that for the sake of commercial relationship sellers should honor their contractual obligations, bear all additional expenditures and perform what they have undertaken. On the other hand, one could argue that the alleged impediment of coronavirus outbreak and government-enacted measure constitute a neither avoidable nor a overcomeable impediment thus the sellers should be deemed to satisfy this third requirement and eventually avail under the protection of this legal concept of force majeure. As suggested in the beginning of this thesis, this thesis is lenient towards the sellers in terms of realizing the unprecedented and extraordinary nature of the circumstances they are in and also supports a broader interpretation of this legal concept. Thus, availing a seller under the exemption from liability during the existence of the impediment due to being unable to avoid or overcome it would serve for the fairest outcome whereas, the sacrifices and non-performance were

primarily for the sake of human health and for avoidance of the transmission of this contagious virus. The severity of the alleged force majeure event also supports this view.

For the purpose of this thesis, the explanations under the scope of Article 79/1 of CISG and the requirements established therein have come to an end. It is seen that a seller who wants to invoke force majeure provision with success has to meet all these three requirements, otherwise the exemption from liability due to non-performance will not be granted. This thesis is going to continue with the following chapter whereby Article 79/2 of CISG is explained in detail.

CHAPTER 3: ARTICLE 79/2 OF CISG

This chapter is going to focus on Article 79/2 of CISG, which stipulates default due to third party's failure. For the purpose of this thesis, it is going to evaluate default of seller due to supplier's failure.

A. Default Due to Third Party's Failure

There comes times in which the seller might find himself in a position that his non-performance is due to failure of third party whom he has engaged to perform the contract with. These kinds of situations lead us to Art.79/2 of CISG, which stipulates default due to third parties' failure. Pursuant to Art.79/2, for the invocation of force majeure provision with success, both of the parties have to meet the requirements established under Art.79/1. Thus double satisfaction is required, which sets the threshold to a very high point. Given the scope of this thesis and the nature of alleged force majeure event, it is very likely for all actors in the international demand and supply chain to suffer under same circumstances, so that for instance a supplier may also be unable to perform his duties and provide the raw materials to seller. As it will be explained further in detail, even though supplier does not constitute a third party in the sense of this provision, for the purpose of this thesis and the lenient approach towards sellers it will be suggested otherwise and the readers will be presented that the extraordinary nature of the circumstances should avail a seller under the protection of this provision due to supplier's failure.

To begin with, the determination of scope of “third party” is a complex issue whereas the provision remains silent about this. According to the doctrine and jurisprudence, they are generally accepted to be as independent third parties, distinct and separate from the sellers and out of the scope of control of the seller. However, suppliers are considered as under the sphere of control and risk of the sellers, hence sellers are attributed the responsibility with regards to failures of suppliers in the similar sense of employees’. Pursuant to CISG Advisory Council Opinion No.7, it has been explicitly stated that “There is a consistent line of decisions suggesting that the seller normally bears the risk that third party suppliers or subcontractors may breach their own contract with the seller, so that at least in principle the seller will not be excused when the failure to perform was caused by its supplier's default.”⁴¹ One such example case in conformity with these lines is a dispute involving an international sales contract between a Swiss seller and a German buyer for the sale of *Trieththylenetetramine*. Swiss Supreme Court has denied the invocation of Art.79 of CISG by the seller and concluded “non-delivery by the seller’s supplier is not force majeure, because it clearly belongs to the seller’s contractual risk.”⁴² The decision was given on the grounds that such impediment was not beyond the risk of the obligor. There to say, this constitutes a situation that the seller should have foreseen and have made necessary adjustments to suspend potential adverse situations caused by the supplier.

A seller is responsible for the procurement of raw materials to be used for the manufacture of the goods. Thus, the coordination with the supplier falls under the seller’s responsibility and sphere of risks.⁴³ This premise serves for the sake of commercial relationships between

⁴¹ Rapporteur: Professor Alejandro M. Garro, ‘CISG-AC Opinion No. 7, Exemption of Liability for Damages under Article 79 of the CISG’ (2007) p.6

⁴² Bernardo Cartoni, 'COVID-19 And International Trade Contracts: Is COVID-19 Force Majeure?' (2021) SSRN Electronic Journal. p.3

⁴³ Christoph Brunner, *Force Majeure And Hardship Under General Contract Principles Exemption For Non-Performance In International Arbitration* (Kluwer Law International 2009) p.176

parties, especially in the international sales transactions. However, given the unprecedented and extraordinary nature of the situation and the alleged impediment, it should not be forgotten that sellers are not the only actors in the international demand and supply chain experiencing the consequences of this virus whereas the impacts are deeply felt throughout the actors in the chain. There is no doubt that a failure in one loop in the supply chain evidently results in failures in the rest of the chain and that seller might be unable to overcome the consequences of this specific failure. This situation has been highlighted in the above-mentioned CISG Opinion in a way to allow sellers an exception for very extraordinary cases.⁴⁴ It is believed that there is no doubt in the minds of the readers that coronavirus is nothing but an extremely exceptional and extraordinary cause. So, the Article 79/2 of CISG comes to fore.

Pursuant to Art.79/2 of CISG, “if the party’s failure is due to the failure by a third person whom he has engaged to perform the whole or a part of the contract, that party is exempt from liability only if: he is exempt under the preceding paragraph; and the person whom he has so engaged would be so exempt if the provisions of that paragraph were applied to him.”⁴⁵ Hence, it is seen that the threshold is set to a high point and the requirements provided in Art.79/1 must be established for both of the parties the seller and the supplier in case of when the failure of the seller to perform under current circumstances is due to failure of his supplier. This dual satisfaction is essential for the invocation of force majeure provision with success on grounds of Art.79/2 of CISG. Provided that the supplier, whom the seller has been engaged in for the performing contractual obligations, is also experiencing the consequences of the alleged coronavirus and government-enacted measures that bar him from his own

⁴⁴ Rapporteur: Professor Alejandro M. Garro, ‘CISG-AC Opinion No. 7, Exemption of Liability for Damages under Article 79 of the CISG’ (2007) p.10

⁴⁵ United Nations Convention on Contracts for the International Sale of Goods (1980) Article 79/2

performance, it shall be deemed sufficient to invoke Art.79/2 of CISG. For the purpose of this thesis, it will be assumed that supplier meets the requirements established under Art.79/1.

In these kind of situations, specifically for the third requirement set under Article 79/1, the seller may not be able to overcome supplier's failures for instance by procuring raw materials from another supplier who is also experiencing the same consequences as the first supplier due to coronavirus. This situation has been acknowledged and referred to be as an obstacle; there to say "Most of the parties have failed to produce products that they have promised to sell and deliver, since acquiring and receiving the raw materials from their suppliers has become an obstacle."⁴⁶ As it has been elaborately explained in the above-mentioned CISG Opinion, there has to be exceptions with regards to these exceptional cases "in which the seller has no control over the choice of the supplier or its performance, in which case the supplier's default may be established as a genuine impediment beyond the control of the seller."⁴⁷ In this sense, these exceptional cases may also extend to instances whereby, the supplier whom the seller has engaged to might be the one and only available supplier of the relevant materials or the other suppliers might also be unavailable to deliver the required materials due to this contagious outbreak and government-enacted measures. From this perspective, the unprecedented and extraordinary nature of this alleged force majeure event seems to be sufficient to establish this provision and allow the seller to be exempt from liability despite of the usual assumption of the risks conception and narrow interpretation of this provision. A classic narrow interpretation would lead to unfair decisions and deteriorate the effectiveness of Art.79/2 of CISG especially in the times of coronavirus. The unprecedented and extraordinary nature of the alleged situation justifies this application of

⁴⁶ Şeyma Esra Kiraz and Esra Yıldız Üstün, 'COVID-19 And Force Majeure Clauses: An Examination Of Arbitral Tribunal's Awards' (2020) Uniform Law Review p.28

⁴⁷ Rapporteur: Professor Alejandro M. Garro, 'CISG-AC Opinion No. 7, Exemption of Liability for Damages under Article 79 of the CISG' (2007) p.7

Art.79/2 of CISG under these circumstances with a dual satisfaction of the requirements set in Art.79/1 with regards to both parties.

It would not be wrong to claim that the assessment to be carried out by the court or arbitral tribunal to decide whether the seller (also the supplier) was in a position to control, foresee and overcome the consequences of the alleged force majeure event play a crucial role in terms of preventing potential abuses of this legal concept so that it should not be invoked if it is realized that the parties had the chance to overcome their impediments and the consequences. At the end of the day, all these instances require an objective case-specific assessment. For the purpose of this thesis, it is merely focused on the non-performance due to supplier's default but these explanations may extend to various scenarios in which another actor in the demand and supply chain impedes the performance of seller along with the alleged force majeure event. Provided that the seller has shown relevant and adequate effort to overcome the alleged impediment and its consequences but still unable to do so, then the third requirement of the force majeure set forth under Art.79 of CISG would deem to have been met. So that both parties would satisfy the requirements established under Art.79/2, (also Art.79/1) and be allowed to avail under exemption from liability.

CHAPTER 4: FINAL REMARKS FOR INVOCATION OF FORCE MAJEURE PROVISION

Before concluding the thesis, it is worth providing brief explanations about Article 79/3 and Article 79/4 of CISG, which respectively stipulate the duration of the invocation of force majeure provision and the requirement of giving timely notice to the counter party. The former possesses significance in the determination of the duration of exemption from liability whereas the latter in the course of international demand and supply chain.

To begin with the latter, Article 79/4 vests a duty on the party that invokes force majeure provision to give timely notice to the counter-party about the non-performance and its effects. Failure to give such notice does not prevent the party (the seller) from invoking this provision whereas it bears consequences on liability to pay damages due to non-receipt as further stipulated in the article. This issue falls out of the scope of this thesis, thus it will be focused merely on the duty to give timely notification. The purpose of this notification can be explained as to “allow the other party to take appropriate measures”⁴⁸. Indeed for the sake of international demand and supply chain, this carries significance so that the counter-party may for instance obtain the goods from another seller. Failure of giving this notice would deprive the counter-party from this chance to secure him and from the possibility to mitigate adverse potential consequences. This indicates the underlying importance of this duty within the context of international commerce.

⁴⁸ André Janssen and Christian Johannes Wahnschaffe, 'COVID-19 And International Sale Contracts: Unprecedented Grounds For Exemption Or Business As Usual?' (2021) *Uniform Law Review* p.18

In the words of CISG, the notification shall be made in a reasonable time manner. This is obviously dependent on the facts of each case so that the determination of whether the notification was made in a reasonable time requires a case-specific analysis. It is not possible to suggest a date like it has been attempted to under unforeseeability requirement prior in this thesis since in the global context the time that the sellers have become unable to perform or become aware of this fact may show differences. In order to prevent abuses of this provision, the determination shall be made in accordance with the situation of the seller's home country, the government-enacted measures, the reported positive cases, the number of infected employees in the working place and the circumstances of the route scheduled for the goods. These determinants would allow deciding whether the notification is done in a reasonable time manner or not. Among scholars, it has been argued that the alleged impediment of coronavirus outbreak has become a global issue so that the counterparty is expected to guess and infer such non-performance.⁴⁹ The fact that coronavirus has permeated into all parts of our lives and became globally known do not justify such claim. Pursuant to CISG, the seller is expected to notify the counterparty as soon as he knows or ought to know of the impediment. It is infeasible to expect counterparty to predict such non-performance. Thus this duty to give notification shall be honored by the seller pursuant to CISG Article 79/4.

Turning to Article 79/3, the duration for the exemption of liability due to non-performance has been stipulated therein. Pursuant to this article, the exemption from liability is granted only for the period of time, which the impediment exists. In other words, "The aforementioned exemption from liability is legitimate and effective for the entire duration of the impediment"⁵⁰ In case of the termination of the impediment, the party is expected to

⁴⁹ Ibid p.18

⁵⁰ Luca Mastromatteo, Niccola Landi, 'Grounds of Exemption From Liability for Failure to Perform in the United Nations Convention on Contracts for International Sale of Goods (CISG)' (2015) Bocconi Legal Papers p.25

continue honoring the contract by fulfilling the contractual commitments. In this thesis, it is focused on the earliest phase when such contagious outbreak bared its consequences and governments enacted the necessary measures by the time the process mostly remained unknown and unpredictable. Under the current situation majority of the government-enacted restrictions that distorted the demand and supply chain and logistics are removed to a great extent. It would be an unrealistic overstatement to see coronavirus as a permanent impediment while the life has more or less adapted to live with this reality and the businesses have begun to operate in accordance. The termination of the alleged-impediment would be determined in accordance with the circumstances the seller is in. Provided that the seller fulfills the three main requirements explained exhaustively above, he shall be exempted from liability due to non-performance as long as the impediment exists. As underlined prior in this thesis, such exemption is exceptional whereas the usual is the honoring of the contractual commitments. CISG does not open a door to jeopardize contracts on grounds of Article 79 whereas it is primarily focused on striking the right balance in case of an unexpected extraordinary impediment. Hence this temporary exemption is in conformity with the *pacta sunt servanda* principle.

With these final remarks, this thesis has come to an end with respect to the explanations provided for the invocation of force majeure provision by sellers due to coronavirus. In the conclusion part, the readers are going to be provided with the overall conclusion about the research question of this thesis.

CONCLUSION

In retrospect, it has been a long journey determining the extent the sellers to an international sales contracts are entitled to invoke force majeure provision under CISG as a consequence of coronavirus. Given the unprecedented and extraordinary nature of the alleged impediment, this thesis has followed a lenient approach towards sellers and focused on the potential circumstances they might find themselves in. Overall, it is seen that sellers are highly likely to invoke the force majeure provision with success and be exempt from liability due to non-performance caused by coronavirus in the period of time the alleged impediment exists.

The coronavirus and government-enacted measures have shown themselves to be an irresistible superior strength that is manifestly beyond control of the seller. Given the lethal nature of the virus by posing imminent hazard to life and health of the employees and the mandatory force of the restrictive measures that aimed the minimization of the contact among people, the production reduced, even paused for a long period of time. The unprecedented nature of such virus has also proved its unforeseeable nature especially for the contracts that have been entered at a date before WHO's official pandemic announcement on March 11, 2020. Parties that have entered into contract after this date would deem to have foreseen this alleged impediment and assumed the relevant risks. This date might be earlier provided that a party to a contract is from China whereas China has become aware of this virus before anywhere in the World. For the third requirement, it has been focused on potential consequences of this alleged impediment the seller was faced and tried to overcome in production and delivery stage. In the production stage, the employment vacancy problem was dominant whereas the imminent hazard to health of the employees prevented seller to

overcome reduction in production pace. For the delivery stage, along with the spread among personnel conducting the carriage, the government-enacted measures severely distorted the logistics due to shut down of routes and border closures, hence barred the seller to deliver the goods to the possession of buyer. Hence it is seen that sellers are likely invoke the force majeure provision with success provided that they satisfy these above-mentioned requirements. Last but not the least, the sellers may also suffer consequences regarding the procurement of raw materials due to supplier's non-performance who is also potentially suffering due to same alleged impediment. At this moment, on grounds of the exceptional nature of the situation, as a deviation from general practice, suppliers are held out of the scope of control of the seller and held as third party in the sense of Art.79/2 of CISG. Thus sellers are provided exemption from liability under Art.79/2 as long as all the above-mentioned requirements are met twofold for both the seller and the supplier.

It shall never be forgotten that there is not a definite answer to the research question of this thesis whereas all these explanations are rebuttable provided that the seller is in a position to control such impediment or have foreseen it or could avoid or overcome the consequences of such situation. The purpose of this thesis was to provide a framework whereby the force majeure was interpreted broadly from the seller's perspective in the times of coronavirus, which have bared adverse consequences in international sales contracts. The force majeure stands as an exception whereas *pacta sunt servanda* principle always remains as the usual. With the emergence of coronavirus, the legal concept of force majeure has become the most pronounced concept among scholars and it seems like it will remain in the agenda for a long time. Exempting a party from liability due to non-performance of a contractual obligation is possible only in the times of a force majeure event, which coronavirus suffices to be one. To finish the thesis with these final words, provided that sellers meet the three main requirements

established under Art.79/1 of CISG, invocation of force majeure provision due to coronavirus will very likely meet with success and sellers will be exempt from liability due to their non-performance of contractual obligations.

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