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Legal Implications of COVID-19: *Force Majeure* and Contractual Obligations in International Sale of Goods

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Abstract - The year 2020 has been challenging for businesses worldwide with COVID-19 leading to the disruption of the global economy. The unprecedented circumstances led by this pandemic, inter alia, raise concerns pertinent to the liability for failure to fulfil contractual obligations in international commercial contracts due to COVID-19. United Nations Convention on Contracts for the International Sale of Goods (CISG or Vienna Convention) performs a significant role in the spectrum of international sales. Article 79 of the CISG reflects the legal concept of force majeure, which provides a defence for non-performance of contractual obligations in certain enumerated circumstances beyond the parties' control. In this respect, the current research, through the doctrinal research methodology, reviews the application of force majeure to grant relief for non-performance of contractual obligations due to COVID-19 where a contract is governed by the CISG. The study concludes that COVID-19 is likely to be considered an impediment beyond the control of the parties under Article 79 of the CISG even though the likelihood of successful invocation of the article will vary depending on the circumstances of each case.

***Keywords*— COVID-19, International Trade, , Sale of Goods, Contractual Obligations, *Force Majeure*.**

I. INTRODUCTION

The novel Coronavirus disease 2019, commonly known as COVID-19, was initially identified in December 2019 in Wuhan, China. Thenceforth, this outbreak significantly grew across international borders, leading the World Health Organisation to characterise COVID-19 as a pandemic on 11 March 2020. Hence, to contain the virus, countries have resorted to various measures to restrict movement, nationally and internationally through national lockdowns, nationwide curfews, closure of the international borders and suspension of international travel. The unfavourable impact of COVID-19 on the wide-spectrum of daily activities, particularly on national and cross-border trade is tremendous. It has constrained the supply chains. While only certain goods, such as grocery items, are in high demand, the demand for other types such as white goods has decreased (PricewaterhouseCoopers, 2020).

These unprecedented circumstances, *inter alia*, raise questions about the liability of parties to international commercial contracts for failure to meet their contractual obligations due to COVID-19. As the dilemma unfolds, the *force majeure* clauses in contracts and the relevant laws could be useful to protect the parties. If a *force majeure* clause is absent in a certain contract, the parties will have to have recourse to the relevant laws. If the contract relates to international trade of goods, the CISG may apply. In view of this, the current paper intends to examine the application of *force majeure* to grant relief for non-performance of contractual obligations due to COVID-19, in instances where the CISG governs a contract.

II. METHODOLOGY

This doctrinal research involved a close analysis of primary sources such as international Conventions and secondary sources such as books, journal articles along with online sources to offer a reasoned and coherent account of the relevant law. The researchers conducted an in-depth analysis of

the provisions of the CISG to address the research question regarding how *force majeure* operates to grant relief for non-performance of contractual obligations due to COVID-19, where the CISG governs a contract. The sole aim of this doctrinal research is to describe the relevant body of law and how it applies (Dobinson and Johns, 2007). In that sense, this research is purely theoretical.

Since the area under scrutiny; contractual obligations in light of the crisis created by COVID-19 is a novel issue, the absence of judicial decisions on the particular matter to date, has been a limitation to the research. The research scope is restricted to the contractual obligations of the contracts that are governed under the CISG.

III. DISCUSSION AND ANALYSIS

A. Force Majeure Clauses

It is an internationally recognised principle that contracts must be entirely performed by both parties (*pacta sunt servanda*). However, if parties to a contract are unable to duly fulfil the contractual obligations due to the occurrence of an event beyond their reasonable control, would the obligor be liable for the non-performance or can that party claim exoneration? In such events, the law provides relief through the operation of *force majeure*. The term *force majeure* refers to a superior force event such as acts of God or acts of war. In the law of contract, a *force majeure* clause is a type of clause which warrants a party to a contract to suspend or terminate the contract upon the development of a situation that prevents, impedes or delays the performance of the contract (McKendrick, 2018). The objective of a *force majeure* clause is two-fold; allocating risk and putting the parties on notice of events that may suspend or excuse service (Dalmia, 2020). Typically, *force majeure* events may include fire, flood, civil unrest, or terrorist attack.

The concept of *force majeure* which originates from Roman law and is found in civil law countries (in French, German, Italian and even Chinese law), is not typically recognised in common law countries (Balestra, 2020). A *force majeure* is a civil law concept that has no settled meaning in the common law. It must be expressly referred to and defined in a contract (Dalmia, 2020). When a contract has no *force majeure* clause, there still may be protection for the parties under doctrines of frustration, impracticality and impossibility, but the exceptions may be narrower than those offered by more specific *force majeure* clauses (Sircar, 2020). Generally, most international commercial contracts include a *force majeure* clause (Balestra, 2020).

The wording of a *force majeure* clause is crucial. The exact scope of the clause will depend upon the wording used to construct the clause. *Force Majeure* clauses come in many shapes and sizes., ranging from the simple clause providing for cancellation of the contract if the performance is interrupted by circumstances embraced within the term force majeure, to clauses of immense complexity, including, *inter alia*, a list of excusing events, provisions for notices to be issued to the promisee and detailing the consequences of the *force majeure* event (McKendrick, 1995).

Generally, an elaborated *force majeure* clause may have three fundamental components (McKendrick, 2018). The first component is the description of the events that invoke the clause. The description of the *force majeure* events is commonly divided into two parts. The first part consists of a list of certain events whereas the second part includes a general provision that seeks to embrace events that are absent in the specific list. The second component of a clause includes obligations of the parties concerning the reporting of the occurrence of the *force majeure* event. This will cover the matters such as the person to whom the report is to be made, the time at which the report is to be made, the form of the report and the consequences of failing to report in a specified manner. Yet, it is to note that all *force majeure* clauses do not

have this component. The third component consists of the remedial consequences of the occurrence of a *force majeure* event. A clause can grant an extension of time, suspension or variation or the termination of the contract.

In the absence of a definition of *force majeure* in statute or common law, the parties to a contract are free to agree what will amount to a *force majeure* for the purpose of their contract, reporting obligations and what the consequences will be if such an event happens (Longworth and Jones, 2020). The burden of proof lies with the party that seeks to invoke the *force majeure* clause.

B. The Effect of Force Majeure in Contracts under the CISG during COVID-19 Crisis.

With the closure of international borders and the implementation of different social distancing methods, the pandemic has led to a financial slowdown across countries in many sectors and has created obstructions of business. Given the situation, an inevitable concern arises concerning the inability to perform the contractual obligations in cross-border trade. Obligations such as provisions of goods or services are largely affected in the current circumstances. In view of this, this section of the research paper critically analyses the function of *force majeure* during COVID-19 crisis to relieve those who are parties to contracts that come within the purview of the CISG.

1) The Sphere of Application of the CISG: The CISG seeks to overcome the disparities between the different legal systems around the world, particularly between the civil law (French and German sub-traditions) and the common law (English and American sub-traditions), through building a uniform law for the international sale of goods (Henseler, 2007). Prior to analysing *force majeure* under CISG, it is necessary to examine briefly, the sphere of application of the Convention. Articles 1-6 of the CISG details the scope of the application. The CISG applies to contracts in two ways.

It applies to the sale of goods when both parties to the contract of sale have their places of business in different States that are both Contracting States unless the parties have excluded its application under Article 6 of the CISG. However, even if one or both parties do not have their place of business in a contracting State, the CISG may apply, "when the rules of private international law lead to the application of the law of a Contracting State", subject to the limitation in Article 95 in the Convention. For instance, if two parties in France and Sri Lanka have chosen French law as the law of the contract, the CISG would normally apply since France is a contracting State although Sri Lanka is not. Further, when deciding the application of the CISG, the nationality of the parties or the civil or commercial character of the parties or of the contract (for instance, the place where the buyer takes delivery and whether the goods are to move from one country to another country) remains irrelevant.

However, if the fact that the parties have their places of business in different States does not appear either from the contract or from any dealings between, or from information disclosed by the parties at any time before or at the conclusion of the contract, that fact is to be disregarded. There are further limitations to the application of the CISG. The Convention does not apply to certain types of sales, *viz*. sales of goods bought for personal, family or household use, sales by auction, sales on execution or otherwise by authority of law, sales of stocks, shares, investment securities, negotiable instruments or money, sales of ships, vessels, hovercraft or aircraft and sales of electricity. Unless a contract expressly excludes the application of the CISG or the parties otherwise so indicate, the CISG can automatically apply to transactions of a party with foreign buyers or suppliers of raw materials, commodities and manufactured goods (McMahon, 2017).

2) Force Majeure under the CISG: The term *force majeure* is not explicitly used in the CISG. However, it is widely acknowledged that

archetypal instances of *force majeure* qualify as a common cause for exemption from liability under Article 79 of the CISG. Article 79(1) specifies as follows:

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

Accordingly, an impediment beyond a party's control is considered the basis for *force majeure* (Alper, 2020). Scrutiny of Article 79(1) depicts that there are four requirements to satisfy for successful invocation of the defence.

a) Presence of an impediment that is beyond the party's control.

Whether circumstances amount to an impediment in terms of Article 79 of the CISG is determined based on the contractual allocation of risk, trade usages and the typical sphere of control of the party in breach (Linklaters, 2020).

b) The impediment is unforeseeable.

This means that the impediment was not foreseen at the time the contract was concluded. Whether the requirement of unforeseeability is satisfied will be decided by applying the objective standard of a reasonable person in the position of the party in breach at the time, the relevant contract was concluded (Linklaters, 2020).

c) The impediment and its consequences could not have been reasonably overcome or avoided.

For instance, it would be considered whether the parties sought an alternative source of goods or attempted to arrange an alternative means of transport. This will also be ascertained with reference to the contractual allocation of risk.

d) The non-performing party must show that the non- performance is due to the impediment.

Also, pursuant to Article 79(4) of the CISG, if the party in breach does not comply with the requirement of giving a notice to the innocent party regarding the impediment and its effect on the inability to perform within a reasonable time after the non-performing party knew or ought to have known of the impediment, that party will be liable to pay damages resulting from the non-receipt of such notice.

The effect of Article 79 of the CISG is providing a defence to the non-performing party of a contract a defence against an action for damages and not to terminate the contract (Nicholas, 1989). Hence, if a party is excused from the non-performing, the party is not liable for damages. However, the other party holds the right to avoid the contract in case of a fundamental breach pursuant to other provisions under the title of remedies under the CISG (Bund, 1998).

It is also noteworthy that the CISG imposes liability on the party relying of the breach of contract as well. Article 77 of the CISG dictates that the parties shall take reasonable measures to mitigate damages caused by the other party. In the event of noncompliance, the party in breach will be entitled to claim a reduction in damages. Further, it is notable that under Article 79(3) of the CISG, temporary impediments will only temporarily excuse the obligor for the period for which the impediment exists. The excuse is not permanent.

3) COVID-19 pandemic and Article 79 of the CISG: The kind of unforeseen disruption to lives and businesses that the current world is experiencing due to COVID-19 is what one expects a *force majeure* clause is constructed to respond to (Longworth and Jones, 2020). Alper (2020) and Kuhne (2020) comment that in view of the early case law and Article 79(1) of the CISG, COVID-19 pandemic is likely to be

considered a *force majeure* event. Clearly, the impediment caused by COVID-19 is beyond the reasonable control of parties. It should also be relatively easy in most cases to prove the causal link between non-performance and COVID-19; that non- performance is due to an impediment as a result of COVID-19. Whether the parties could have avoided or overcome the consequences of COVID-19 would have to be decided by ascertaining the circumstances of each case (Alper, 2020).

As for precedent case law concerning a pandemic, there is precedent CISG case decided by the China International Economic and Trade Arbitration Commission [CIETAC] (PRC) in 2005 concerning the Severe Acute Respiratory Syndrome (SARS) outbreak (Arbitration Award 2005, L-Lysine case, [2005]). In this arbitral award, the tribunal decided that the seller could not claim SARS as a *force majeure* event and get excused from performance under Article 79 of the CISG since SARS had happened a few months before the contract was signed. The requirement of foreseeability was not satisfied.

Further, it is worth noting that, generally, under Article 79 of the CISG, economic hardship alone is not perceived as *force majeure* unless the performance becomes unequivocally burdensome for one of the parties. For instance, a case decided in 2009 by the Belgian Supreme Court, *Scafom International BV v. Lorraine Tubes S.A.S.*, where the supplier of steel tubes claimed that steel prices had abruptly risen; the Supreme Court, in connection with Article 79 of the CISG, ruled that:

Changed circumstances that were not reasonably foreseeable at the time of the conclusion of the contract and that are unequivocally of a nature to increase the burden of performance of the contract in a disproportionate manner, can, under circumstances, form an impediment in the sense of this provision of the treaty.

It is also to be observed that the crisis created by COVID-19, similar to that of SARS and Middle East Respiratory Syndrome (MERS) will seemingly remain impermanent. Hence, the relief granted through Article 79 of the CISG for non-performance in international contracts will be in effect only until the crisis subsists. It means if the other party has not avoided the contract; the party in breach will be liable to perform the contractual obligations when the impediment passes (Bund, 1998).

In the event the parties to contracts that are subject to CISG wish to derogate from Article 79 of the Convention, they can choose to include a *force majeure* or hardship clauses in the contract and agree upon more flexible and broader terms and consequence in view of a *force majeure* event. Notably, contractual guarantees also may constrain the degree to which parties can rely on this Article (Linklaters, 2020).

IV. CONCLUSION

In light of the analysis of Article 79 of the CISG and the judicial precedent, *force majeure* can, seemingly, operate to excuse non-performance as a result of COVID-19 provided that the elements of the Article are duly fulfilled. Given the precedent, Article 79, however, is unlikely to provide relief to non-performing parties of contracts that were entered after COVID-19 was officially declared a global pandemic by the WHO. In fact, parties to contracts that were executed after the pandemic went viral will presumably face difficulties in establishing that the impediment was not foreseeable. The element of foreseeability will not be an issue for contracts that were executed before COVID-19 appeared in the globe since the contracting parties could not have possibly foreseen any massive economic interruption that a tiny virus could cause in this ear of technology and science.

One of the main grounds for non-performance in this time of COVID-19 crisis would be due to the economic hardships. Yet, economic hardships are not commonly considered a basis for *force majeure*, to invoke Article 79 of the CISG. Yet, if a party that has highly been affected to the detriment by a hardship that has been

triggered by COVID-19, this should be a ground for *force majeure* to ensure justice and grant due relief that sufferer.

Keeping the above discussion into consideration, the implications of the COVID-19 in international contracts under CISG would have to be decided on the case-by-case basis. To receive relief under the CISG for the impediment created by COVID-19, parties are advised to adhere to the crucial requirements, e.g., tendering reasonable notice of non-performance, take requisite measures to mitigate the resulting losses of the pandemic, e.g., making negotiating to preserve the contract and other steps to that would be necessary to allow establishing the losses, e.g., maintaining proper records and gathering evidence of the losses or delays.

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