

Exemption from liability according to the art. 79 of the Convention on International Sale of Goods (CISG)

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Abstract

Unlike other international documents with regards to international sale of goods, impediments providing an exemption from liability to the promisor are regulated broadly in Art. 79 of the CISG in order to ensure uniformity, which is the main objective of the Convention. Within this framework, this paper first deals with the sphere of application of Art. 79 CISG followed by the prerequisites for exemption of liability under Art. 79. Evaluating the impediment in this context, it is discussed whether cases of hardship would benefit from the protection provided by the Art. 79 along with cases of force majeure. Subsequently, liability for third persons, temporary impediments, and consequences of exemption are analyzed.

Keywords: *exemption from liability, Art. 79 CISG, force majeure, hardship, exemption under CISG.*

JEL Classification: K22, K33

1. Introduction

Art. 79 CISG regulates under which circumstances the party that does not perform its obligations can be exempt from which liabilities. In this regard, in Art. 79 (1), the characteristics of the impediment that the parties experience; in Art. 79 (2) exemption from liability in the case of the party's failure is due to the failure by a third person; in Art. 79 (3), the duration of the effectiveness of this Article; in Art. 79 (4), the burden of giving notice and in Art. 79 (5), the effects of exoneration from liability is regulated.

As the other international conventions, since it was aimed to create a uniform regulation, the “impediment” in Art. 79, is totally different from the nations’ law systems. Besides, differently from the other international regulations, the effect of the exemption from liability was determined as the exoneration from liability for compensation.

2. Sphere of application of art. 79 CISG

The application of Art. 79 CISG depends on some occasions between the parties. With the materialization of these occasions, the exemption can be possible due to Art. 79 CISG only if the other conditions become fact.

Firstly, the party can be exempt from liability under Art. 79, if it has not fulfilled or not properly performed its contractual obligations. Since the CISG has a

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unitive character², there is no distinction between the different types of non-performance. This is a direct consequence of the comprehensive concept of non-performance in the CISG³. According to the comprehensive concept of the CISG, the term “non-performance” is used as a general term covering all types of failure to perform⁴. In other words, the application of Art. 79 is possible in the cases of failure to perform due to impossibility, delay, or defective performance⁵.

Secondly, the delivery of non-conforming goods falls also within the scope of Art. 79 CISG⁶. Although especially Anglo-American authors comment that it is impossible for the party delivering non-conforming goods to exempt from liability under Art. 79 CISG, the prevailing view, and the court decisions⁷ are in the opposite direction. However, it should be emphasized that it is hard to exempt from liability under Art. 79 CISG for the seller in the cases of non-conformity, as the seller is strictly liable for the conformity of the goods⁸.

Thirdly, the parties' failure to observe a mere non-actionable duty to act is the other situation where Art. 79 CISG is applicable⁹. The parties have a duty to act under Art. 74 CISG. If the parties fail to fulfill their duties in consequence of an impediment described in Art. 79 (1) CISG, they can be exempt from liability. However, it should be strictly stressed that an exemption from the obligation to compensate for damages is not possible in such cases under Art. 79 CISG. This article only covers the avoidance of other disadvantages and therefore the application of Art. 79 CISG can only be possible *mutatis mutandis*¹⁰.

² Soergel, Hans Theodor/Lüderitz, Alexander/Dettmeier, Michael, *Bürgerliches Gesetzbuch, Schuldrechtliche Nebengesetze 2, CISG*, Kohlhammer, Stuttgart 2000, Art. 79 No. 3; Witz, Wolfgang/Salger, Hanns-Christian/Lorenz, Manuel, *Internationales Einheitliches Kaufrecht: Praktiker Kommentar und Vertragsgestaltung zum CISG*, Heidelberg, 2000, Art. 79 No. 2; Brunner, Christoph, *UN-Kaufrecht - CISG*, Bern, 2004, Art. 79 No. 3.

³ Schlechtriem, Peter/Schwenzer, Ingeborg/Schwenzer, *Commentary on the UN- Convention on the International Sale of Goods*, 2. Ed., Oxford, 2005, Art. 79 No. 5 (Schlechtriem/Schwenzer/Author, Commentary).

⁴ Brunner, Christoph, *Force Majeure and Hardship Under General Contract Principles - Exemption from Non-Performance in International Arbitration*, The Netherlands, 2009, p. 57 (Brunner, Force Majeure).

⁵ Schlechtriem/Schwenzer/Schwenzer, Art. 79 Nr. 5.

⁶ Staudinger, Julius/Magnus, Ulrich, *Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen, Wiener UN-Kaufrecht (CISG)*, Neuarbeitete Auflage, Berlin, 1999, Art. 79 Nr. 12; Herber, Rolf/Czerwenka, Beate, *Internationales Kaufrecht, Kommentar zu dem Übereinkommen der Vereinten Nationen vom 11. April 1980 über Verträge über den internationalen Warenkauf*, München 1991, Art. 79 Nr. 8; Bianca, Cesare Massimo/ Bonell, Michael Joachim/Tallon, Denis, *Commentary on the International Sales Law*, Giuffrè, Mailand 1987, Art. 79 Nr. 2.4.1. <http://www.cisg.law.pace.edu/cisg/biblio/tallon-bb79.html> (last accessed: 23.08.2019); Soergel/Lüderitz/Dettmeier, Art. 79 Nr. 15; Schlechtriem/Schwenzer/Schwenzer, Art. 79 Nr. 6; Brunner, Force Majeure, p. 189.

⁷ BGH, 24.03.1999, CISG-Online Nr. 396; OLG Zweibrücken, 31.03.1998, CISG-Online Nr. 481.

⁸ Honsell, Heinrich/Magnus, Ulrich, *Kommentar zum UN-Kaufrecht, Übereinkommen der Vereinten Nationen über Verträge über den Internationalen Warenkauf*, 2. Aufl., Springer, Heidelberg, 2010, Art. 79 Nr. 4; Schlechtriem/Schwenzer/Schwenzer, Commentary, Art. 79 Nr. 6.

⁹ Brunner, Art. 79 Nr. 3; Schlechtriem/Schwenzer/Schwenzer, Commentary, Art. 79 Nr. 7; Staudinger/Magnus, Art. 79 Nr. 14.

¹⁰ Schlechtriem/Schwenzer/Schwenzer, Commentary, Art. 79 Nr. 7.

3. Prerequisites for exemption under art. 79 (1) CISG

According to Art. 79 (1) CISG, “A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.”

The conditions of exemption under Art. 79 (1) CISG are (A) an impediment beyond control, (B) unforeseeability and (C) unavailability in a sense that the breaching party cannot reasonably be expected to avoid or overcome the impediment or its consequences. Besides, the breaching party has to (D) fulfill its duty to inform and there should be (E) causality between all mentioned requirements.

3.1 Impediment beyond control

The application of Art. 79 CISG depends on the existence of an impediment. In order to lead the exemption due to Art. 79 CISG, this impediment has to be an objective circumstance, in other words, lie outside of the promisor's sphere of control¹¹. The promisor is liable from its sphere of control¹² and if it does not fulfill its obligations due to an internal circumstance, it will be liable to pay in kind¹³. In this regard, while specifying the promisor's sphere of control, distribution of liabilities in the contract¹⁴, international customary law and the practices between the parties have to be taken into consideration¹⁵. The promisor has to take all precautions for the circumstances falling into its sphere of control in order to perform all

¹¹ Schlechtriem, Peter/Schwenzer, Ingeborg, *Kommentar zum Einheitlichen UN-Kaufrecht*, München 2004, Art. 79 Nr. 12; Piltz, Burghard, *Internationales Kaufrecht, Das UN-Kaufrecht (Wiener Übereinkommen von 1980) in praxis-orientierter Darstellung*, München 1993, Art. 4 Nr. 234; Flambouras, Dionysios, “*The Doctrines of Impossibility of Performance and Clausula Rebus Sic Stantibus in the 1980 Vienna Convention on the Contracts for the International Sale of Goods and the Principles of the European Contract Law: A Comparative Analysis*”, *Pace International Law Review*, Vol. 13, Fall 2001, p. 266 <http://www.cisg.law.pace.edu/cisg/biblio/flambouras1.html> (last accessed: 23.09.2019); Staudinger/Magnus, Art. 79 Nr. 16; Schlechtriem/Schwenzer/Schwenzer, *Commentary*, Art. 79 Nr. 11; Herber/Czerwenka, Art. 79 Nr. 8; OLG München, 05.03.2008, CISG-Online Nr. 1686.

¹² Karollus, Martin, *UN-Kaufrecht, eine systematische Darstellung für Studium und Praxis*, Vienna/New York, 1991, p. 207 ff.; Enderlein, Fritz/Maskow, Dietrich/Strohbach, Heinz, *Internationales UN-Kaufrecht, Kaufrechtskonvention, Verjährungskonvention, Vertretungskonvention, Rechtsanwendungskonvention*, Berlin 1991, Art. 79 Nr. 4.1; Schlechtriem/Schwenzer, Art. 79 Nr. 14; Piltz, Art. 4 Nr. 228 ff.

¹³ High Court of Munich decided that the seller cannot be exempt from liability, as it fall into its sphere of liability, in a case that the seller cannot transfer the goods to the buyer, since its car was stolen. (OLG München, 05.03.2008, CISG-Online Nr. 1686).

¹⁴ Huber/Mullis, p. 259; Staudinger/Magnus, Art. 79 Nr. 16; Brunner, Art. 79 Nr. 6.

¹⁵ Staudinger/Magnus, Art. 79 Nr. 16; Schlechtriem/Schwenzer/Schwenzer, *Commentary*, Art. 79 Nr. 11; Huber/Mullis, p. 259.

obligations foreseen in the contract¹⁶. Illness or death of a key employer, a strike in the operation, difficulties with payment, difficulties with providing required energy, are the examples for the impediments in the sphere of organization¹⁷; a delay during the supply process of raw material¹⁸ or difficulties during the transfer of the goods¹⁹ are the instances for the impediments outside of the organization. Both of these circumstances are falling into the sphere of control, and therefore, it is impossible for the promisor to exempt from liability under Art. 79 CISG, by leaning these impediments.

In the doctrine and practice, there is a dispute on the time of existence of the impediment. According to the first view²⁰, the impediment shall exist after the time of the conclusion of the contract. If the impediment exists before the time of the conclusion of the contract and it is unknown by the promisor, this situation will be an issue about the validity of the contract; as the existence of the subject-matter is a condition of validity. Since the validity is not governed by the CISG according to Art. 4 (a) CISG, there will be no place of application of Art. 79 CISG in such a situation. However, according to the prevailing view, and the view I agree²¹, there will be no difference between the application conditions of Art. 79 CISG for the impediments existing before or after the conclusion of the contract. The approach about the impediment taken by the CISG is influenced by the general concept of Anglo-American law system, which also influenced German and Dutch civil law systems. Therefore, exemption under Art. 79 CISG is possible for the impediments arisen before the conclusion of the contract, if this impediment is not known to the promisor. For instance, if a product is chosen by the buyer with its serial number and

¹⁶ Reinhart, Gert, *UN-Kaufrecht, Kommentar zum Übereinkommen der Vereinten Nationen vom 11 April 1980 über Verträge über den internationalen Warenkauf*, Heidelberg, 1991, p. 90; Schwimann, Michael/Posch, Willibald, *ABGB Praxiskommentar, Bd. 5, §§ 859-1059 ABGB, WucherG, UN-Kaufrecht*, 3. Auflage, Wien 2006, Art. 79 Nr. 7; Achilles, Wilhelm Albrecht, *Kommentar zum UN-Kaufrechtsübereinkommen (CISG)*, Neuwied 2000, Art. 79 Nr. 5; Münchener KommBGB/Huber, *Münchener Kommentar zum BGB, Bd. 3 CISG*, 5. Aufl., München, 2007, Art. 79 Nr. 12; Münchener KommHGB/Mankowski, *Münchener Kommentar zum HGB, Bd. 6 CISG*, 2. Aufl. 2007, Art. 79 Nr. 24 ff.; Brunner, Art. 79 Nr. 7 ff.; Honsell/Magnus, Art. 79 Nr. 13; Staudinger/Magnus, Art. 27 Nr. 18; Karollus, p. 208.

¹⁷ Bianca/Bonell/Tallon, Art. 79 Nr. 2.6.5; Schlechtriem/Schwenzer, Art. 79 Nr. 18 ff.; Piltz, Art. 4 Nr. 238; Münchener KommBGB/Huber, Art. 79 Nr. 16; Münchener KommHGB/Mankowski, Art. 79 Nr. 27; Honsell/Magnus, Art. 79 Nr. 13 ff.; Enderlein/Maskow/Strohbach, Art. 79 Nr. 7.2; Brunner, Art. 79 Nr. 7 ff.; Staudinger/Magnus, Art. 79 Nr. 19 ff.

¹⁸ Soergel/Lüderitz/Dettmeier, Art. 79 Nr. 16; Schlechtriem/Schwenzer, Art. 79 Nr. 18; Honsell/Magnus, Art. 79 Nr. 14; Achilles, Art. 79 Nr. 5; Brunner, Art. 79 Nr. 11; Staudinger/Magnus, Art. 79 Nr. 22.

¹⁹ Schlechtriem/Schwenzer, Art. 79 Nr. 20. Not being able to buy the goods due to bad conjuncture can be given as an exemple to this situation (Cour d'appel de Colmar, 12.06.2001, CISG-Online Nr. 694).

²⁰ Lee, Wanki, "Exemptions of Contract Liability Under the 1980 United Nations Convention", *Dickinson Journal of International Law*, Vol. 8, Spring 1990, pp. 375-376 <http://www.cisg.law.pace.edu/cisg/biblio/lee.html>. (last accessed: 23.09.2019).

²¹ Honnold, Art. 79 Nr. 432.3; Secretariat Commentary, *Commentary on the Draft Convention on Contracts for the International Sale of Goods prepared by the Secretariat ("Secretariat Commentary") /UN DOC. A/CONF. 97/5*; Brunner, *Force Majeure*, p. 228.

disappears by a meteor hit before the conclusion of the contract and if the contract was signed without any knowledge of the seller, the seller cannot perform its obligations due to an impediment beyond its control. It cannot be logically explained the distinction between the situations of the meteor hit before or after the conclusion of the contract. However, if it is accepted that the Art. 79 CISG can be only applied for the impediments arising after the conclusion of the contract, there will be a huge burden on the shoulders of the seller facing an impediment existing before the conclusion of the contract²². Or if the parties are agreed upon the sale of a particular painting, there should be no difference between the liabilities of the seller should be interpreted by giving no respect whether the burning of the painting materializes before or after the conclusion of the contract.

Coming to the impediments under the Art. 79 CISG, acts of God like earthquakes, streak of lightning, flood, avalanche; political and social incidents like wars, revolutions, coups, civil wars; legal impediments like embargos, import and export prohibitions, restrictions on foreign currency deals and other impediments such as theft of goods during transportation or sabotage can be regarded as impediment²³. These impediments are divided as *force majeure* and hardship by the doctrine²⁴. Hardship means unforeseeable circumstances that unbalance the parties' positions fundamentally, in other words, when the performance has become *excessively onerous*²⁵. Since there is no direct provision contained in the CISG referring to the hardship, the application of Art. 79 CISG is disputable for these situations. According to the first view, it is impossible to consider hardship in the frame of Art. 79 CISG, and therefore, the gap in the CISG should be filled through domestic law²⁶. Yet, the view to resort to domestic laws as a guide can be subject to criticism as such an interpretation would harm the unification of the Convention,

²² Honnold, Art. 79 Nr. 432.3.

²³ Bamberger, Heinz Georg/Roth, Herbert/Saenger, Ingo, *Kommentar zum Bürgerlichen Gesetzbuch, Band 3, §§ 1297-2385, EGBGB, CISG*, München 2003, Art. 79 Nr. 4; Flambouras, p. 267; Achilles, Art. 79 Nr. 6; Art. 4 Nr. 229; MünchKommBGB/Huber, Art. 79 Nr. 10 ff.; Schlechtriem/Schwenzer, Art. 79 Nr. 14; Soergel/Lüderitz/Dettmeier, Art. 79 Nr. 8; MünchKommHGB/Mankowski, Art. 79 Nr. 34; Bianca/Bonell/Tallon, Art. 79 Nr. 2.6.7; Reinhart, Art. 79 Nr. 4; Piltz, *Internationales Kaufrecht*, Art. 4 Nr. 229; Staudinger/Magnus, Art. 79 Nr. 27 ff.; Brunner, Art. 79 Nr. 17 ff. It was decided that the promisor may be exempt from liability due to abrupt price increases, if it is stuck in a difficult situation. (OLG Hamburg, 28.02.1997, CISG-Online Nr. 261); In an arbitral award, there is a Yugoslavian seller and a Magyar buyer. Arbitration Court attached to the Hungarian Chamber of Commerce and Industry decided that there is an impediment beyond buyer's control, where the buyer was unable to pay the contractual price to the seller as there was a United Nations embargo imposed to Yugoslavia, and therefore the buyer is able to be exempt from liability. (Arbitration Court attached to the Hungarian Chamber of Commerce and Industry, 10.12.1996, CISG-Online Nr. 774).

²⁴ Böckstiegel, Karl Heinz, "*Hardship, Force Majeure and Special Risk Clauses in International Contracts*", in *Adaptation and Renegotiation of Contracts in International Trade and Finance* (Ed. HORN, Norbert), Kluwer, 1985, p. 159 ff.; Flambouras, p. 283.

²⁵ Flambouras, p. 283; Brunner, *Force Majeure*, p. 213.

²⁶ Schlechtriem, Peter/Stoll, *Commentary on the UN Convention on the International Sale of Goods*, 2nd Edition, 1998, Art. 79 Nr. 39 (Schlechtriem/Author).

which is the basic aim of it²⁷. According to the second view, although through a broad interpretation it is possible to put the hardship into the frame of Art. 79 CISG, such an interpretation would contradict with both the logic and the wording of the article²⁸. Only Art. 79 CISG is not sufficient to apply in the cases of hardship; therefore, the application of general principles of law is needed. Under Art. 7 CISG, the principle of *clausula rebus sic stantibus*, which acts as a general principle of law can be practiced. As a result, in case of a hardship, the parties should renegotiate in order to keep the contract alive, which is one of the basic aims of the CISG or cope with this situation through the other instruments of the international sale of goods (ie. PECL or UNIDROIT principles)²⁹. According to the third view, in the cases of hardship, not only the contract provisions and contractual practices, but also model contracts, clauses, and the like shall be regarded³⁰. However, according to the prevailing view in the recent years and according to my opinion, as it is impossible to draw the line between the *force majeure* and the hardship, contrary to the other international regulations, such as PECL, PICC or DCFR, both situations fall into the scope of Art. 79 CISG³¹. As *force majeure* and hardship were not distinguished in the CISG, both situations have to be interpreted with the guidance of Art. 79 CISG.

3.2 Unforeseeability

For the exemption from liability under Art. 79 CISG, the foreseeability of the impediment shall be objectively impossible at the time of the conclusion of the contract for the promisor³². In this sense, the criterion to be regarded is that this impediment has to be unforeseeable not only for the promisor but also for a reasonable person of the same kind³³. However, at this point, it has to be underlined that all circumstances that can be interpreted as *force majeure* or unordinary will not

²⁷ Rimke, Joern, “*Force majeure and hardship: Application in international trade practice with specific regard to the CISG and the UNIDROIT Principles of International Commercial Contracts*”, Pace Review of the Convention on Contracts for the International Sale of Goods, Kluwer (1999-2000), p. 219 <https://www.cisg.law.pace.edu/cisg/biblio/rimke.html> (last accessed: 23.09.2019).

²⁸ Flambouras, p. 279-280.

²⁹ Flambouras, p. 280.

³⁰ Honnold, P. 432.3

³¹ Schwenger, Ingeborg, “*Force Majeure and Hardship in International Sales Contracts*”, VUWLR (2008) 39, p. 725 <https://core.ac.uk/download/pdf/18243147.pdf> (last accessed: 23.09.2019); Magnus, Ulrich, “*Force Majeure and the CISG*”, in *The International Sale of Goods Revisited* (Edp. Sarcevic/Volken), The Hague, 2001, p. 10; Staudinger/Magnus, Art. 79 Nr. 24; Herber/Czerwenka, Art. 79 Nr. 8; Enderlein/Maskow/Strohbach, Art. 79 Para. 6.3; Honnold, Para. 432.2; Brunner, Art. 79 Nr. 23 ff.; Brunner, Force Majeure, p. 213; Rimke, p. 223.

³² Schlechtriem/Schwenger, Commentary, Art. 79 Nr. 13; MünchKommBGB/Huber, Art. 79 Nr. 8; Schlechtriem/Schwenger, Art. 79 Nr. 22; MünchKommHGB/Mankowski, Art. 79 Nr. 39; Staudinger/Magnus, Art. 79 Nr. 32; Honsell/Magnus, Art. 79 Nr. 15; Brunner, Art. 79 Nr. 28; Karollus, p. 207; ICC Case No. 7197; Malaysia Dairy Industries Pte. Ltd. v. Dairex Holland BV, 02.10.1998, <http://cisgw3.law.pace.edu/cases/981002n1.html> (last accessed: 23.08.2019).

³³ Witz, Wolfgang/Salger, Hanns-Christian/Lorenz, Manuel, *Internationales Einheitliches Kaufrecht: Praktiker Kommentar und Vertragsgestaltung zum CISG*, Heidelberg, 2000, Art. 79 Nr. 5; Bianca/Bonell/Tallon, Art. 79 Nr. 2.6.3; Schlechtriem/Schwenger, Art. 79 Nr. 22; Staudinger/Magnus, Art. 79 Nr. 32; Soergel/Lüderitz/Dettmeier, Art. 79 Nr. 3-4; Flambouras, p. 271.

constitute an unforeseeable impediment. If these occurrences are recurring, they will not be unforeseeable³⁴.

For instance, in an arbitration, the tribunal dismissed the demand of exemption according to the Art. 79 CISG, where the promisor was unable to fulfill its contractual obligations due to an avalanche, which occurred in a place that is usually snowy in Decembers³⁵. On the contrary, in a case between a Spanish buyer and an Iraqi seller, after the war began in Iraq, the court accepted the exemption of the seller, who made the last delivery to another harbor than determined due to the war, which constitutes an unforeseeable impediment at the time of the conclusion of the contract³⁶. In another case, the court decided that freezing of the port in December is unforeseeable in St. Petersburg³⁷. However this decision was commented as the worst decision of 25 years, between the cases where the CISG was applied³⁸.

3.3 Unavoidability of the impediment

If the impediment is unforeseeable at the time of the conclusion of the contract, but become foreseeable afterwards; the promisor will not be able to exempt from liability under Art. 79 CISG, if it does not take all precautions in order to avoid the impediment or the negative consequences of that unavoidable impediment³⁹. In other words, the promisor will not be exempt from liability unless it proves that it made maximum effort in order to hinder the impediment or the consequences of the unavoids impediment.

In the case of an accident on the route of the ship used for transportation, change of the route of it, or if not possible, the delivery of the substantial goods⁴⁰; if

³⁴ Bianca/Bonell/Tallon, Art. 79 Nr. 2.6.3; Honsell/Magnus, Art. 79 Nr. 15; Herber/Czerwenka, Art. 79 Nr. 11; Staudinger/Magnus, Art. 79 Nr. 32; Achilles, Art. 79 Nr. 7; Brunner, Art. 79 Nr. 33; Schlechtriem/Schwenzer, Art. 79 Nr. 22.

³⁵ China International Economic & Trade Arbitration Commission, 02.05.1996, CISG-Online Nr. 1067.

³⁶ Hilaturas Miel, S.L. v. Republic of Iraq, U.S. District Court, Southern District of New York, 20.08.2008, CISG-Online Nr. 1777 = <http://www.unilex.info/case.cfm?pid=1&do=case&id=1465&step=Abstract> (last accessed: 23.09.2019).

³⁷ Raw Materials Inc. v. Manfred Forberich GmbH & Co., KG, U.S. District Court, Northern District of Illinois, East. Div., 06.07.2004, CISG-Online Nr. 925 = <http://www.unilex.info/case.cfm?pid=1&do=case&id=987&step=Full Text> (last accessed: 23.09.2019).

³⁸ Lookofsky, Joseph/Flechtner, Harry, "Nominating Manfred Forberich: The Worst CISG Decision in 25 Years", *Vindobona Journal of International Commercial Law and Arbitration*, Vol. 9, Y. 2005/1, pp. 199-208, http://www.cisg.law.pace.edu/cisg/biblio/lookofsky_13.html (last accessed: 23.09.2019).

³⁹ Herber/Czerwenka, Art. 79 Nr. 12-13; Staudinger/Magnus, Art. 79 Nr. 34; Honsell/Magnus, Art. 79 Nr. 16; Schlechtriem/Schwenzer, Art. 79 Nr. 23; Schlechtriem/Schwenzer/Schwenzer, Commentary, Art. 79 Nr. 14; Secretariat Commentary, Art.65 Nr.7; Flambouras, p. 272. The seller cannot be exempt from liability under Art. 79 (1) CISG, who did not take all due precautions in order to hinder the stealing of the car. (LG Freiburg, 22.08.2002, CISG-Online Nr. 711).

⁴⁰ Weber, Rolf, "Vertragsverletzungsfolgen: Schadensersatz, Rückabwicklung, vertragliche Gestaltungsmöglichkeiten" in, Bucher Eugen(Hrsg.), *WienerKaufrecht, Berner Tage für die juristische Praxis*, Bern, 1991, p. 174; Schlechtriem/Schwenzer/Schwenzer, Commentary, Art. 79 Nr. 14; Art. 79 Nr. Honsell/Magnus, Art. 79 Nr. 16; Secretariat Commentary Art. 65 N.7-9; Enderlein/Maskow/Strohbach, Art.79 N.13.6.; Staudinger/Magnus, Art.79 N. 34; Karollus, p. 209; Bianca/Bonell/Tallon, Art.79 Nr. 2.6.5.

the transactions are postponed in the country of the obligor, making the payment from the accounts in the other countries can be given as examples for the efforts in order to hinder the consequences of an unavowed impediment⁴¹. The promisor has to bear all financial burdens in order to take these measures⁴².

3.4 Duty to inform

According to Art. 79 (4) CISG, *“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 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.”*

The promisor relying on Art. 79 CISG has to notify the promisee of the unavowed impediment and its consequences. This duty can be interpreted into the scope of general duty to co-operate under the CISG. The notification shall contain the nature, severity and the duration of the impediment⁴³. Namely, it has to describe whether this impediment is temporary or permanent, and if it is temporary, in how many days the promisor is able to overcome the consequences of that impediment.

The notification shall include so detailed information that, after receiving this notification, the promisee should be able to decide whether it avoid the contract or keep the contract alive and wait for the performance or insist on the performance with substantial goods etc.⁴⁴.

The duty to inform shall be fulfilled within a reasonable time after the promisor knew or ought to have known of the impediment⁴⁵. In the contrary case, the promisor not fulfilling this duty has to bear all damages⁴⁶.

3.5 Causation of non-performance

The last condition of exemption under Art. 79 CISG is the causation of non-performance. In other words, the promisor's failure to perform shall be solely requiring from an unforeseeable and unavoidable impediment⁴⁷. In this regard, the promisor will not be exempt from liability, if the goods get harmed due to defective packaging⁴⁸, or if the contract was breached due to an avoidable impediment or if it

⁴¹ ICC Case No. 7197.

⁴² Brunner, Art. 79 Nr. 34; Reinhart, Art. 79 Nr. 6; Honsell/Magnus, Art. 79 Nr 16; Staudinger/Magnus, Art. 79 Nr 34; Schlechtriem/Schwenzer, Art. 79 Nr. 23.

⁴³ Bianca/Bonell/Tallon, Art. 79 Nr. 2.8; Flambouras, p. 272; Schlechtriem/Schwenzer, Art. 79 Nr. 49; Piltz, Art. 4 Nr. 237; Staudinger/Magnus, Art. 79 Nr. 46.

⁴⁴ Schlechtriem/Schwenzer, Art. 79 Nr. 49.

⁴⁵ Schlechtriem/Schwenzer, Art. 79 Nr. 44

⁴⁶ Karollus, p. 216.

⁴⁷ Brunner, Art. 79 Nr. 35; Lee, p. 375, 390-391; Bianca/Bonell/Tallon, Art. Art. 79 Nr. 2.6.6.; Schlechtriem/Schwenzer, Art. 79 Nr. 24; Bamberger/Roth/Saenger, Art. 79 Nr. 3; Staudinger/Magnus, Art. 79 Nr. 31; Enderlein/Maskow/Strohbach, Art. 79 Nr. 3.4; Flambouras, p. 273.

⁴⁸ Enderlein/Maskow/Strohbach, Art. 79 Nr. 3.4.

is possible to overcome the consequences of this impediment⁴⁹ or if the efforts for overcoming the impediment or its consequences underwhelm⁵⁰.

4. Liability for third persons

According to Art. 79 (2) CISG, “(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.*”

According to Art. 79 (2) CISG, the promisor is liable for the failure of third persons whom he has engaged to perform the whole or a part of the contract⁵¹. Although the promisor is responsible from the third persons, these persons are acting independently and not within the organizational sphere of the promisor⁵². However, it is not always easy to draw the line between third persons and the persons conducting in the organizational sphere of the promisor.

For instance, in case the obligation of transferring the goods belongs to either party while the transfer of goods is procured by another company, such company would be deemed as a third person and the obligor party would be liable for the actions of the third person⁵³. In an award given by CIETAC, the shipping company hired by the seller did not perform its duty to notify about the delay in the transportation. The Arbitral Tribunal interpreted the shipping company as a third person and discuss whether the seller is able to be exempt from liability under Art. 79 (2)⁵⁴. Likewise, Appellate Court Lugano, described the third persons as “*the carriers that deliver the merchandise to the seller and the subcontractors that are assigned by the seller to carry out the finish work*”⁵⁵. On the contrary, according to

⁴⁹ Schlechtriem/Schwenzer, Art. 79 Nr. 24.

⁵⁰ Arbitration Court attached to the Bulgarian Chamber of Commerce and Industry, 24.4.1996, CISG-Online Nr. 435. (In the case, a Ukrainian seller sells coal to the Bulgarian buyer. Bulgarian buyer tests the quality of the coal, and does not pay the contractual price without sending the report, which proves that the coal is of poor quality. After the Ukrainian seller attempts to resend coal to the Bulgarian buyer, Ukrainian government bans the exportation of coal. However, employees working in the coal mines go on strike, and therefore the contract is breached. The Tribunal decided that the Bulgarian buyer is not able to exempt from liability.)

⁵¹ Schlechtriem/Schwenzer, Art. 79 Nr. 25; Schlechtriem/Schwenzer, Art. 79 Nr. 34; Enderlein/Maskow/Strohbach, Art. 79 Nr. 7.2-4.

⁵² Schlechtriem/Schwenzer, Art. 79 Nr. 25; Brunner, Art. 79 Nr. 14; Bamberger/Roth/Saenger, Art. 79 Nr. 7; Staudinger/Magnus, Art. 79 Nr. 39; Karollus, p. 211-212; Flambouras, p. 274. Partially distinguished: Schlechtriem/Schwenzer/Schwenzer, Commentary, Art. 79 Nr. 34. According to the author, this paragraph only covers the persons acting independently and not within the promisor's organizational sphere but under its responsibility.

⁵³ Karollus, p. 212; Schlechtriem/Schwenzer/Schwenzer, Commentary, Art. 79 Nr. 34.

⁵⁴ CIETAC, 10.03.1995 <http://cisgw3.law.pace.edu/cases/950310c1.html> (last accessed: 29.09.2019).

⁵⁵ Tribunale d'appello Ticino, 29.10.2003 (Translated by: Joseph Gulino), <http://cisgw3.law.pace.edu/cases/031029s1.html> (last accessed: 29.09.2019).

another decision given by *Handelsgericht des Kantons Zürich*, carriers are not third persons in the sense of Art. 79 (2) CISG⁵⁶.

However, according to the prevailing view the suppliers of the promisor should not be deemed as third persons⁵⁷. Reasoning provided for such statement is that suppliers neither partially nor entirely undertake the performance of the contract but rather only fulfill preconditions required for the performance of the contract. Forasmuch as in a verdict given by *Landgericht Frankenthal*, the court decided that differently from subcontractors, promisor is able exempt from liability under Art. 79 (1) CISG for the conducts of the supplier, but not according to Art. 79 (2)⁵⁸. Similarly, commercial representative of the party is not a third person⁵⁹.

It is impossible for the promisor to exempt from liability towards the promisee unless it proves that both the promisor and the third party is able to be exempt from liability under Art 79 (1) CISG. In other words, the prerequisites of Art. 79 (1) shall be materialized for both the promisor and the third party.

5. Temporary impediments

According to the Art. 79 (3) CISG, “*The exemption provided by this article has effect for the period during which the impediment exists.*”

If the impediment having the prerequisites of the Art. 79 CISG is temporary, the promisor has to perform its obligations after the impediment ends⁶⁰. However, as so long as this delay in performance constitutes a fundamental breach under the Art. 25 CISG, the promisee has always the right to avoid the contract by relying on Art. 49 (1) CISG. Yet, this situation will have an effect on the demands of compensation. The promisee will not have right to damages arising from the delay due to that impediment⁶¹.

6. Consequences of the exemption of liability

Due to Art. 79 (5) CISG, “*Nothing in this article prevents either party from exercising any right other than to claim damages under this Convention.*”

According to this provision, promisor is not liable for the compensation of damages arising out of a failure to perform due to an impediment which is

⁵⁶ Handelsgericht des Kantons Zürich, 10.02.1992, HG 970238, CISG-Online Nr. 488.

⁵⁷ Staudinger/Magnus, Art. 79 Nr. 40; Huber/Mulis/Huber, p. 260; Herber/Czerwenka, Art. 79 Nr. 17; Enderlein/Maskow/Strohbach, Art. 79 Nr. 7.2.; MünchKommHGB/Mankowski, Art. 79 Nr. 50; BGH, 24.03.1999, http://www.cisg.law.pace.edu/cases/990324_g1.html (last accessed: 24.09.2019).

⁵⁸ LG Frankenthal, 17.04.1997, 8 O 1995/95 CISG-Online Nr. 479.

⁵⁹ Brunner, Art. 79 Nr. 14.

⁶⁰ Lui, Chengwei, “*Perspectives from the CISG, UNIDROIT Principles, PECL and Case Law [2nd edition: Case annotated update (April 2005)]*”, Nr. 9 <http://www.cisg.law.pace.edu/cisg/biblio/liu6.html#fmix> (last accessed: 26.09.2019); Schlechtriem/Schwenzer/ Schwenzer, Commentary, Art. 79 Nr. 41; Soergel/Lüderitz/Dettmeier, Art. 79 Nr. 27; Enderlein/Maskow/Strohbach, Art. 79 Nr. 10.2.

⁶¹ Staudinger/Magnus, Art. 79 Nr. 44; Honnold, Nr. 435.1; Brunner, Art. 79 Nr. 29; Honsell/Magnus, Art. 79 Nr. 20; MünchKommHGB/Mankowski, Art. 79 Nr. 55; Piltz, Art. 4 Nr. 249.

unforeseeable, unavoidable and does not fall within its sphere of control, in other words the risk shall be borne by the promisee⁶². However, damages that the promisee needs to bear are damages arising only due to the impediment⁶³. Promisor's all other obligations stand.

In the doctrine⁶⁴, Art. 79 (5) CISG is criticized for obligating promisor to specific performance despite the performance cannot be fulfilled as a result of an unforeseeable and unavoidable impediment. It is to be noted that this paragraph provides a different regulation from all other uniform documents and national laws⁶⁵. Although it is explicitly states in Art. 74 of ULIS that in cases where the promisor is not liable, no obligation for specific performance stands in addition to the obligation to compensate damages, Art. 79 CISG contains an entirely different provision from the aforementioned article. This is because of CISG's endeavor to provide uniformity between two legal systems and the fact that it favors the *common law* system in the matter of exemption of liability. Since *common law* system focuses solely on compensation of damages in the event of breach of contract, it is normal for CISG which adopts this system to provide an outcome only for the obligation to compensation damages⁶⁶.

At this point, the effect of parties' decision to regulate punitive or liquidated damages within the contract on cases where the performance is impossible due to an unforeseeable and unavoidable impediment needs to be touched upon. It is my opinion that approach to this topic should be dually divided. Amount to be paid in the event of breach of contract may not be claimed for if the amount provided in the contract is specified instead of the amount to be paid as per the CISG; whereas if an amount is foreseen as an addition to the damages to be determined according to the CISG, then the promisor shall pay such amount⁶⁷. Forasmuch as evaluation of the validity of clauses determined by parties in the contract does not fall under the sphere of application of the CISG as per Art. 4 (a) thereof⁶⁸.

While there is no doubt with regards to the fact that the promisor would be discharged of liability to compensate damages in face of an impediment mentioned under the Art. 79 (1) CISG, other claims of promisee should be discussed. If the performance becomes objectively impossible, specific performance may not be

⁶² MünchKommBGB/Huber, Art. 79 Nr. 26.

⁶³ Atamer, Yeşim, "Borçlunun CISG Madde 79 Uyarınca Tazminat Sorumluluğundan Kurtulması Halinde Alacaklının Diğer Taleplerinin Akıbeti Ne Olur?", p. 489 <http://journal.yasar.edu.tr/wp-content/uploads/2014/01/13-Ye%C5%9Fim-M.-ATAMER.pdf> (last accessed: 01.09.2019); MünchKommBGB/Huber, Art. 79 Nr. 26.

⁶⁴ Brunner, Force Majeure, p. 360-362; Honnold, Nr. 435.5.

⁶⁵ See. PECL (Principles of European Contract Law - http://frontpage.cbs.dk/law/commission_on_european_contract_law/PECL%20engelsk/engelsk_partI_og_II.htm (last accessed: 29.09.2019)) Art. 8:108.; PICC (Principles of International Commercial Contracts - <http://www.cisg.law.pace.edu/cisg/principles.html> (last accessed: 29.04.2019)) Art. 7.1.7. and DCFR (Principles, Definitions and Model Rules of European Private Law Draft Common Frame of Reference - http://ec.europa.eu/justice/policies/civil/docs/dcfr_out_line_edition_en.pdf (last accessed: 29.04.2019)) Art. III-3:104.

⁶⁶ Atamer, Yeşim, *Uluslararası Satım Sözleşmelerine İlişkin Birleşmiş Milletler Antlaşması Uyarınca Satıcının Yükümlülükleri ve Sözleşmeye Aykırılığın Sonuçları*, İstanbul, 2005, p. 477.

⁶⁷ MünchKommBGB/Huber, Art. 79 Nr. 27; Flambouras, pp. 281-282.

⁶⁸ Schlechtriem/Schwenzer/Schwenzer, Commentary, Art. 79 Nr. 51.

asked for since the goods do no longer exist⁶⁹. However, leaving the solution in this situation to national law in the context of Art. 28⁷⁰, in our opinion would not be right as it carries the risk to lead to anomalous outcomes⁷¹. Rights to ask for repairs, replacement or discount on sale price would also be out of the question because of the fact that the goods are not delivered and cannot be delivered in the event of impossibility⁷². Therefore, only right which may be pursued is the avoidance of contract⁷³.

Claim for specific performance stands still in case of performance being late or delivery of goods are not in conformity with the contract as a result of subjective impossibility or other impediments⁷⁴. If late performance or delivery of goods which are not in conformity with the contract also constitute a fundamental breach, there is no obstacle for promisee to avoid the contract or ask for discount on sale price⁷⁵. Another remedy for the promisee in the event of goods which are non-conforming to the contract is repair of goods or replacement with new one⁷⁶.

Last item which the promisee may claim in the context of the CISG is interest as per article 78. The doctrine is unanimous on interest being different from the damages stipulated in the Art. 79 (5) CISG⁷⁷.

7. Conclusion

The main aim of the CISG is to establish a uniform system in the field of international sales law, and therefore many terms belonging to civil law or common law systems was not implicated in intentionally. One of the best instances of the

⁶⁹ Brunner, Art. 79 Nr. 42; Staudinger/Magnus, Art. 79 Nr. 58; Münch KommBGB/Huber, Art. 79 Nr. 29; MünchKommHGB/Mankowski, Art. 79 Nr. 8-9; Piltz, Art. 4 Nr. 251; Schlechtriem/Schwenzer/Schwenzer, Commentary, Art. 79 Nr. 53; Honsell/Magnus, Art. 79 Nr. 26; Witz/Salger/Lorenz, Art. 79 Nr. 12; Bianca/Bonell/Tallon, Art. 79 Nr. 2.10.2; Karollus, p. 141; Honnold, Art. 79 Nr. 435.5.

⁷⁰ Staudinger/Magnus, Art. 79 Nr. 59.

⁷¹ Schlechtriem/Schwenzer/Schwenzer, Commentary, Art. 79 Nr. 53.

⁷² Atamer, p. 478.

⁷³ MünchKommBGB/Huber, Art. 79 Nr. 28.

⁷⁴ Bamberger/Roth/Saenger, Art. 79 Nr. 10; Honsell/Magnus, Art. 79 Nr. 27; Flambouras, p. 275-276; Karollus, p. 141; Staudinger/Magnus, Art. 79 Nr. 60; Piltz, Art. 4 Nr. 251, BGH, 27.11.2007, CISG-Online Nr. 1617.

⁷⁵ Bamberger/Roth/Saenger, Art. 79 Nr. 10; Brunner, Force Majeure, p. 366 ff.; Schlechtriem/Schwenzer/Schwenzer, Commentary, Art. 79 Nr. 55; Bianca/Bonell/Tallon, Art. 79 Nr. 2.10.; MünchKommBGB/Huber, Art. 79 Nr. 28; Herber/Czerwenka, Art. 79 Nr. 22; MünchKommHGB/Mankowski, Art. 79 Nr. 12; Staudinger/Magnus, Art. 79 Nr. 55-56; Soergel/Lüdetirtz/Dettmeier, Art. 79 Nr. 25; Atamer, p. 478; Honnold, Art. 79 Nr. 425.6; Piltz, Art. 4 Nr. 253.

⁷⁶ Enderlein/Maskow/Strohbach, Art. 79 Nr. 13.6; Staudinger/Magnus, Art. 79 Nr. 57; Atamer, p. 478; Piltz, Art. 4 Nr. 243.

⁷⁷ Staudinger/Magnus, Art. 79 Nr.61; Schlechtriem/Schwenzer/Schwenzer, Commentary, Art. 79 Nr. 56; Herber/Czerwenka, Art. 79 Nr. 22; Honnold, Art. 79 Nr. 435.6; Enderlein/Maskow/Strohbach, Art. 79 Nr. 13.1; Bamberger/Roth/Saenger, Art. 79 Nr. 10; Piltz, Art. 4 Nr. 245; Bianca/Bonell/Tallon, Art. 79 Nr. 2.10; MünchKommBGB/Huber, Art. 79 Nr. 28; MünchKommhgb/Mankowski, Art. 79 Nr. 13; Flambouras, p. 282; Soergel/Lüderitz/Dettmeier, Art. 79 Nr. 25.

CISG's this characteristic is the formulation of the Art. 79 CISG. The law of non-performance system of the Convention has neither civil law nor common law effect.

In order to be exempt from liability under the CISG, the impediment that hinders the promisor's performance has to be either unforeseeable at the time of the conclusion of the contract or if it is foreseeable, it shall be impossible to avoid that impediment or the consequences of it. Moreover, after the existence of this impediment, the promisor shall notify the reasons of its non-performance in detail. If there is a subcontractor for fulfilling the obligations foreseen in the contract, for the exemption, the promisor has to prove that all stated prerequisites are materialized for both the promisor and the subcontractor.

If the impediment having the prerequisites of the Art. 79 CISG is temporary, the promisor has to perform its obligations after the impediment ends, when the delay of the performance does not constitute a fundamental breach. However, as so long as this delay in performance constitutes a fundamental breach under the Art. 25 CISG, the promisee has always the right to avoid the contract by relying on Art. 49 (1) CISG. The only disadvantage of the promisee here is that it will be unable to claim damages for non-performance.

It has been criticized that according to the CISG the promisor will not be totally exempt from liability when it faces with an unforeseeable and unavoidable impediment, it will only be exonerated from the liability of paying compensation. Exemption will not have any effect on the other obligations of the promisor. If the performance becomes objectively impossible, the promisee will only have the opportunity to avoid the contract. On the contrary, if the performance becomes subjectively impossible or if the obligations cannot be fulfilled in compliance with the contract due to another reason, the promisee has a right to request one of those measures: specific performance, reparation of the goods, price reduction or avoidance of the contract.

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