
COVID-19 and *force majeure* clauses: an examination of arbitral tribunal's awards

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Abstract

The coronavirus (COVID-19) pandemic has taken a toll on people all across the world in various aspects. The severe consequences of this pandemic can be seen in international trade and commercial contracts. The underlying principle of contract law is that the parties are bound by the promises given under an agreement; however, events such as COVID-19 affect the parties' performance of contractual duties. The harsh measures, such as prohibition on importation and exportation of goods or travel bans, have seriously affected the parties' performances. In such situations, *force majeure* clauses, which serve as an exemption from non-performance, come into play. This article aims to reveal how COVID-19 will be assessed in terms of *force majeure* and the possible attitudes of arbitral tribunals towards these cases. This assessment is undertaken in light of *force majeure* clauses laid under the Convention on Contracts for the International Sales of Goods, the UNIDROIT Principles of International Commercial Contracts, and the International Chamber of Commerce's 2020 *Force Majeure* Clause.

I. Introduction

Since the first quarter of this year, the whole world has been suffering from the spread of a coronavirus, which is also known as COVID-19.¹ The World Health Organization has announced it as a pandemic, which has become an international concern as it affects all countries around the world.² In order to prevent the spread of the virus, a series of measures have been introduced by

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¹ The World Health Organization (WHO) official website <<https://www.who.int/emergencies/diseases/novel-coronavirus-2019>> accessed 8 September 2020.

² Ibid. <<http://www.euro.who.int/en/health-topics/health-emergencies/coronavirus-covid-19/news/news/2020/3/who-announces-covid-19-outbreak-a-pandemic>> accessed 8 September 2020. (COVID-19 was declared as a pandemic by the Director-General of the WHO, Dr. Tedros

governments such as closing borders, imposing prohibitions on exports, and closing workplaces.³ The impact of these COVID-19 measures on businesses, especially international trade, appears as another pandemic-related problem that needs to be sorted out because these measures have been severely affecting commercial contracts and hampering the contractual obligations of the parties.⁴ Thus, *force majeure* clauses that enable exclusion of non-performance due to reasons beyond the control of the parties have attracted attention.

Since the COVID-19 breakout, it is to be expected that an increasing number of *force majeure* claims will be brought before arbitral tribunals. These *force majeure* disputes will probably be complex since COVID-19 is a threatening disease that causes a change of conditions in the business world. Whether COVID-19 results in triggering the *force majeure* excuse in international commercial contracts is a current question that will soon be answered. *Force majeure* is not a concept defined in an identical way under every jurisdiction; therefore, each party's *force majeure* clause within its contracts is of importance when dealing with these particular claims. While considering the *force majeure* claims, the interpretation of the contractual terms might be more significant than before due to extensions on the delivery of goods, the responsibility of mitigating the breakout's impacts, and, of course, costs. As discussed, this pandemic may last longer, so it could reduce labour productivity.⁵ Furthermore, the responsibilities of parties will be hard to define along with the mitigation of costs. *Force majeure* claims for COVID-19 cases have not been brought before the arbitral tribunals yet, but they will soon start to show up. Therefore, it is essential for parties and lawyers to consider how the arbitral tribunals will approach the issue of *force majeure* in pandemic or natural disaster cases.

This article aims to present an examination of *force majeure* clauses under different international legal instruments—namely, the United Nations Convention on Contracts for the International Sales of Goods (CISG), the UNIDROIT Principles of International Commercial Contracts (PICC), and the International Chamber of Commerce's (ICC) 2020 *Force Majeure* Clause (FMC)—and the decisions given by the different arbitral tribunals in order to provide an answer

Adhanom Ghebreyesus, on 11 March 2020 due to the rapid increase in the number of cases outside China since the end of February 2020 that affected a growing number of countries).

³ See European Commission Directorate General Economic and Financial Affairs, 'Policy measures taken against the spread and impact of the coronavirus-14 April 2020' available at <https://ec.europa.eu/info/sites/info/files/policy_measures_taken_against_the_spread_and_impact_of_the_coronavirus_14042020.pdf> accessed 6 September 2020. See also 'Note of the UNIDROIT Secretariat on the UNIDROIT Principles of International Commercial Contracts and the COVID-19 Health Crisis' Note 15 and footnote 12.

⁴ See European Commission Directorate General Economic and Financial Affairs (n 3). See UK Cabinet Office, 'Guidance on responsible contractual behaviour in the performance and enforcement of contracts impacted by the Covid-19 emergency' (7 May 2020) at para 10 available at <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/899175/___Update_-_Covid-19_and_Responsible_Contractual_Behaviour_-_30_June___final_for_web_.pdf> accessed 17 September 2020.

⁵ 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* 51.

for the problems arising from the current COVID-19 pandemic. The reactions of the tribunals to *force majeure* claims are important for ascertaining if COVID-19 can be acknowledged as a *force majeure* excuse according to the requirements of the general concept.

II. The concept of *force majeure*

The basic principle of contract law is that the parties are bound by their promises under a contract, which is known as *pacta sunt servanda*. However, it was seen as unreasonable to expect parties to perform their duties when the changed circumstances had occurred. Therefore, the doctrine of *rebus sic stantibus* was developed to initiate the possibility of releasing the obligations that become onerous by changed circumstances.⁶ In terms of the exemption of non-performance, it should be noted that *force majeure* is not a principle applied or acknowledged by all legal systems. The exemption doctrine is referred to in different concepts under civil and common law systems that do not recognize *force majeure*.⁷ In England, frustration is employed, and under US law, impossibility is the doctrine applied to changed circumstances.⁸

Force majeure, which originates from Roman law, gives rise to the exemption from the liability for non-performance in the case of an unforeseen or unexpected event beyond the control of the parties.⁹ The term *force majeure* is presented and described in French law as the event that prevents the party from the performance and is irresistible and unforeseeable.¹⁰ In terms of the consequences of *force majeure*, there is a distinction drawn between temporary and permanent impediments. If there is a temporary impediment, suspension of obligations is followed, whereas, in the case of a permanent impediment, the exclusion of the liabilities appears.¹¹

Common law systems do not recognize *force majeure*; however, they have similar concepts for the exemption of liability due to changed circumstances. In

⁶ Igneborg Schwenzer, 'Force Majeure and Hardship in International Sales Contract' (2008–09) 39 VUWLR 709.

⁷ Marel Katsivela, 'Contracts: Force Majeure Concept or Force Majeure Clauses?' (2007) 12 Unif. L. Rev. 101, 108.

⁸ A.H. Puelinckx, 'Frustration, Hardship, Force Majeure, imprévision, Wegfall der Geschäftsgrundlage, Unmöglichkeit, Changed Circumstances: A Comparative Study in English, French and Japanese Law' (1986) J. Int'l Arb. 47, Sukhnam Digwa-Singh, 'The Application of Commercial Impracticability under Article 2-615 of the Uniform Commercial Code' in Ewan McKendrick, (eds), *Force Majeure and Frustration of Contract*, (London: Lloyd's of London Press, 1995) 305.

⁹ Peter Mazzacano, 'Force Majeure, Impossibility, Frustration & the Like: Excuses for Non-Performance; the Historical Origins and Development of an Autonomous Commercial Norm in the CISG' (2011) 2 NJCL 1, Schwenzer (n 6) 709.

¹⁰ William Swadling, 'The Judicial Construction of Force Majeure Clauses' in Ewan McKendrick, *Force Majeure and Frustration of Contract*, (2nd Ed, Informa Law, 1995) p 5, Barry Nicholas, 'Force Majeure in French Law' in Ewan McKendrick, *Force Majeure and Frustration of Contract*, (2nd Ed, Informa Law, 1995) 24, Puelinckx, (n 8) 55–6.

¹¹ Nicholas (n 10) 26. Klaus Peter Berger and Daniel Behn, 'Force Majeure and Hardship in the Age of Corona: A Historical and Comparative Study' (2020) 6 McGill Journal of Dispute Resolution 4, 79.

England, the doctrine of frustration excuses the party from non-performance when the performance is radically different from the one that was undertaken at the beginning owing to changed circumstances.¹² As a result of the frustrating event, the performance becomes onerous, and the contract is automatically terminated.¹³ The frustrating event does not always trigger the excuse of the non-performing party because whether or not the contract has been frustrated depends on the court.¹⁴

Even though national laws have their concepts for exempting the parties due to the events that are beyond the control of the parties, unforeseeable at the time of the conclusion of the contract, and unavoidable, it does not mean that the same event creates the same results under all legal systems. In other words, one event may result in the exemption of liability in a given country, whereas the other may not acknowledge the same event as a basis for exemption. Moreover, different exemption concepts provide different solutions for the unforeseen event.¹⁵

Force majeure is not only the concern of national law systems, but it is also dealt with in international areas. In particular, the CISG, and the PICC have exemption clauses due to changed circumstances. In addition to these, the ICC also offers a *force majeure* clause in both short and long forms. The CISG provides a *force majeure* rule for exemption due to changed circumstances under Article 79, which states that:

[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.

Article 7.1.7(1) of the PICC reads:

Non-performance by a party is excused if that party proves that the non-performance was due to an impediment beyond its control and that it 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 ICC released a long and short form of *force majeure* and hardship clauses in March 2020 in response to the COVID-19 outbreak before the ICC's 2003 FMC had been offered. The ICC's 2020 FMC illustrates 'simpler presentation and expanded options to suit various companies' needs'.¹⁶ Along with the definition of *force majeure*, the 2020 FMC also provides a definition for the affected

¹² Swadling (n 10) 5.

¹³ Ewan McKendrick, 'Frustration and Force Majeure' in Ewan McKendrick, *Force Majeure and Frustration of Contract*, (2nd Ed, Informa Law, 1995) 44, Berger and Behn (n 11) 101, Nicholas (n 10) 231.

¹⁴ Ibid 42. It stated that 'The second proposition of Bingham L.J. is worthy of note because it makes the point that it is no easy task to persuade a court that a contract has been frustrated.'

¹⁵ Mazzacano (n 9), McKendrick (n 13).

¹⁶ ICC Force Majeure and Hardship Clauses available at <<https://iccwbo.org/publication/icc-force-majeure-and-hardship-clauses/>> accessed 4 May 2020.

party who is ‘the party affected by the impediment’. Although the wording of the 2020 clause is slightly different from the clause released in 2003, the overall requirements for *force majeure* are still the same. However, a change in the listed events referring to the ones generally accepted as a *force majeure* event was introduced by the 2020 FMC. In the ICC’s 2020 FMC revision, the definition of a *force majeure* is stated as:

1. Definition. ‘*Force majeure*’ means the occurrence of an event or circumstance (‘*Force majeure* Event’) that prevents or impedes a party from performing one or more of its contractual obligations under the contract, if and to the extent that the party affected by the impediment (‘the Affected Party’) proves:
 - a. that such impediment is beyond its reasonable control; and
 - b. that it could not reasonably have been foreseen at the time of the conclusion of the contract; and
 - c. that the effects of the impediment could not reasonably have been avoided or overcome by the Affected Party.

The CISG and the PICC are identical in wording for the requirements of *force majeure*. The ICC follows a different structure for *force majeure* clause, and it also provides a list of events that are presumed to be *force majeure* events. When the wording of the articles/clauses provided under these different legal instruments is examined, invoking *force majeure* provisions requires that there should be ‘an impediment beyond control’, ‘unforeseeability of the impediment at the time of the conclusion of the contract’, and ‘impossibility of avoidance and overcoming it and its consequences’. Whether COVID-19 can be accepted as an impediment that calls forth *force majeure* is examined in the light of these requirements. Therefore, under the headings below, all of these preconditions of *force majeure* are analysed according to these international instruments and in light of different approaches adopted by various arbitral tribunals.

1. Applicable law to a *force majeure* clause

According to the freedom of the contract, the parties can agree on the *force majeure* clause in their commercial agreements. They can widen the *force majeure* events and specify their concepts. Thus, if an event impedes the performance one of the parties after entering into the contract, this party can use the *force majeure* clause to excuse the non-performance under the contract. It is rare, but if the parties do not have a *force majeure* clause in their contract, the applicable law fills in the contractual gaps to settle the dispute.¹⁷ International commercial contracts generally cover the choice-of-law clause. The parties do

¹⁷ Emre Esen, ‘Uluslararası Ticarî Sözleşmelerden Covid-19 Pandemisi Sebebiyle Doğabilecek Uyuşmazlıkların Çözümüne İlişkin Genel Bir Değerlendirme’ (*LexperaBlog*, 17 March 2020) available at <<https://blog.lexpera.com.tr/uluslararasi-ticari-sozlesmelerden-covid-19-pandemisi-sebebiyle-dogabilecek-uyusmazliklarin-cozumune-iliskin-genel-bir-degerlendirme/>> accessed 23 March 2020.

not have to choose the national law only by the clause; they can refer to non-State rules in their contract as well. The term ‘non-State rules’ is used for transnational commercial law instruments that are developed by international institutions or the trade associations such as the PICC or general principles of commercial law and the *lex mercatoria*.¹⁸

If the parties do not have a *force majeure* clause in their contract, the *force majeure* is defined according to the rules of this applicable law, and the dispute over whether the event paves the way for a *force majeure* excuse, and what sort of consequences its application could bring, is solved according to the particular *force majeure* principle laid out under the applicable law.¹⁹ The CISG is also regularly used by courts/tribunals as a transnational commercial law instrument in practice. The CISG is assumed as a reflection of the *lex mercatoria*.²⁰ According to Article 1 of the CISG, the CISG governs commercial contracts for the sale of goods between parties in different countries that are the contracting States unless the parties have expressly waived their applicability in their contract or when the rules of private international law require the application of the law of the CISG’s contracting States. It is also possible that the parties of a sales contract can choose the CISG to govern their contracts. In this case, Article 79 of the CISG can be used, claiming *force majeure*.

The application of the PICC to the contracts is available if ‘the parties have agreed that their contract be governed by the [PICC], general principles of law, the *lex mercatoria* or the like’ or ‘when the parties have not chosen any law to govern their contract’.²¹ The PICC serves ‘to interpret or supplement international uniform law instruments’.²² If the parties specifically refer to the PICC or another soft law, the results of the dispute may be predictable, but it must be highlighted that these types of rules do not cover all aspects of a commercial dispute.

Finally, this might be rare, but if the contract does not cover the appropriate *force majeure* clause that covers pandemic and government-announced shut-downs and applicable law, businesses should explore whether the doctrine of frustration could offer any resolution. Although, in most common law doctrines, frustration is too narrowly interpreted, and courts tend to lean towards principles as enunciated in the case of *Paradine v Jane* (1647),²³ the obligation of performance is absolute. While the *Taylor v Caldwell* (1873) case brought about a conservative reform that, if an event makes performance impossible,²⁴

¹⁸ Johanna Hoekstra, ‘Regulating International Contracts in a Pandemic: Application of the Lex Mercatoria and Transnational Commercial Law’ (2020) 117–25 <<http://repository.essex.ac.uk/28030/1/016.pdf>> accessed 12 September 2020.

¹⁹ Ibid.

²⁰ Ibid p. 119.

²¹ See UPICC Preamble.

²² Ibid.

²³ *Paradine v Jane*, [1647] EWHC KB J5, 82 ER 897.

²⁴ *Taylor v Caldwell* [1863] EWHC QB J1, 122 E.R. 309.

then parties could be excused from their respective obligations, in the case of *Canary Wharf (BP4) T1 Ltd v European Medicines Agency* (2019),²⁵ the High Court concluded against the company European Medicines Agency, seeking relief from a 25-year lease on account of Brexit being a frustrating event. Hence, it is evident that, whereas frustration is practical in principle, its application will be difficult.²⁶

III. Impediments beyond the control of the parties

1. Is COVID-19 acceptable as an impediment?

An impediment is defined as '[a] change of circumstances that could not reasonably be expected to have been taken into account, rendering performance excessively onerous' by the CISG's Advisory Council.²⁷ The question as to what kind of impediments may lead to exemption is not answered within the scope of the CISG; however, it is suggested that the interpretation of the impediment should be made with reference to international practice.²⁸ Even though the notion of an impediment that triggers *force majeure* clause is not illustrated within the relevant articles under the CISG, a war, terrorist acts, riots, blockades, and acts of God are deemed to be impediments.²⁹

The PICC, like the CISG, neither explains an impediment within its wording nor illustrates a list of impediments that are deemed as *force majeure* events. The impediment is treated as 'an event which, according to the obligor, is the cause of its non-performance'.³⁰ *Force majeure* events under the PICC are interpreted by a Russian court as such:

[T]he Court referred to Article 7.1.7 of the UNIDROIT Principles which according to the Court makes it clear that to be an exemption or '*force majeure*' the impediment must be

²⁵ *Canary Wharf (BP4) T1 Ltd and ors v European Medicines Agency* [2019] EWHC 335 (Ch).

²⁶ Nabila Rafique, 'Business Focus – Force Majeure and Frustration in the New Normal' (Lexpert, 7 May 2020) <<https://lexpertllp.com/2020/05/07/businesses-focus-force-majeure-and-frustration-in-the-new-normal/>> accessed 9 September 2020.

²⁷ CISG Advisory Council, *Exemption of Liability for Damages under the Article 79 of the CISG* (Cm 07, 2008) note 3.1 available at <<http://www.cisg.law.pace.edu/cisg/CISG-AC-op7.html>> accessed 29 March 2020.

²⁸ See Yesim Atamer, 'Article 79' in Stefan Kröll, Loukas Mistelis, Pilar Perales Viscasillas (eds), *UN Convention on Contracts for the International Sale of Goods (CISG)* (Oxford, 2011) para 46, John Honnold, *Uniform Law for International Sales Under the 1980 United Nations Convention* (4th Edition, Kluwer Law International 2009) para 425.

²⁹ See Fritz Enderlein and Dietrich Maskow, *International Sales Law: United Nations Convention on Contracts for the International Sale of Goods; Convention on the Limitation Period in the International Sale of Goods* (Ocena Publication 1992) 322, Dennis Tallon, 'Article 79' in C.M. Bianca & M.J. Bonell (eds), *Commentary on the International Sales Law- The 1980 Vienna Sales Convention* (Giuffrè 1987) 583. See Ingeborg Schwenzer, 'Article 79 in Schlechtriem & Schwenzer (eds), *Commentary on the UN Convention on the International Sales of Goods (CISG)* (3rd Edition, OUP, 2010), Chengwei Liu, *Remedies for Non-performance: Perspectives from CISG, UNIDROIT Principles & PECL* (Juris Net, 2007) 522.

³⁰ Pascal Pichonnaz, 'Ch 7 Non-performance, s1: Non-performance in General, Art. 7.1.7' in Stefan Vogenauer eds, *Commentary on the UNIDROIT Principles of International Commercial Contracts* (2nd Ed, OUP, 2015) 864, 872.

extraordinary and unavoidable under the given circumstances, such as e.g. floods, earthquakes, snow debris and other similar natural disasters, acts of war, epidemics, etc.³¹

On the other hand, the ICC's 2020 FMC provides a list of presumed *force majeure* events:

The Presumed *Force Majeure* Events commonly qualify as *Force Majeure*. It is therefore presumed that in the presence of one or more of these events the conditions of *Force Majeure* are fulfilled, and the Affected Party need not prove the conditions (a) and (b) of paragraph 1 of this Clause (i.e. that the event was out of its control and unforeseeable), leaving to the other party the burden of proving the contrary. The party invoking *Force Majeure* must in any case prove the existence of condition (c), i.e. that the effects of the impediment could not reasonably have been avoided or overcome.

- a. war (whether declared or not), hostilities, invasion, act of foreign enemies, extensive military mobilisation;
- b. civil war, riot, rebellion and revolution, military or usurped power, insurrection, act of terrorism, sabotage or piracy;
- c. currency and trade restriction, embargo, sanction;
- d. act of authority whether lawful or unlawful, compliance with any law or governmental order, expropriation, seizure of works, requisition, nationalisation;
- e. plague, epidemic, natural disaster or extreme natural event;
- f. explosion, fire, destruction of equipment, prolonged break-down of transport, telecommunication, information system or energy;
- g. general labour disturbance such as boycott, strike and lock-out, go-slow, occupation of factories and premises.

In light of the definition of an impediment and the events that trigger a *force majeure* clause under these legal instruments, whether COVID-19 can be accepted as an 'impediment' in terms of *force majeure* should be answered. The ICC's 2020 FMC explicitly acknowledges the epidemic as a presumed *force majeure* event; therefore, a pandemic, which is much broader than an epidemic, can easily be recognized as a *force majeure* event.³² There is no doubt that the COVID-19 pandemic is an impediment in terms of the ICC's 2020 FMC. Also, since the ICC's 2003 FMC has a similar language and treats an epidemic as an impediment, there will be no hesitation for accepting COVID-19 as an impediment under a contract with the ICC's 2003 FMC.

On the other hand, the CISG and the PICC do not illustrate the impediment within their wording. The question as to whether COVID-19 will constitute an

³¹ *Arbitrazh Court of Khanty-Mansi Autonomous District Yugra* available at <<http://www.unilex.info/principles/case/1776>> accessed 28 March 2020. See also Pichonnaz (n 30) 872.

³² See Christian Twigg-Flesner, 'A Comparative Perspective on Commercial Contracts and the Impact of COVID-19: Change of Circumstances, Force Majeure, or What?' in Katharina Pistor (ed), *Law in the Time of COVID-19* (Columbia Law School 2020) available at <<https://scholarship.law.columbia.edu/books/240/>> accessed 17 September 2020.

impediment under these instruments provokes a debate. Diseases like COVID-19 may be deemed akin to an act of God, which is generally used to refer to ‘an event caused by natural forces beyond human control’.³³ Luiz Perez and Alejandro Chevalier claim—with reference to the occurrence of COVID-19 as a result of wild animal markets in China—that COVID-19 may not be seen as an act of God.³⁴ On the other hand, if it is accepted that this virus is not a human-made virus and that it did not emerge as a result of a laboratory process, it can be accepted that COVID-19 is a part of nature (part of biology), so it becomes an impediment in terms of an act of God.

There are different cases being experienced in *force majeure* events regarding an ‘act of God’. In an ICC award,³⁵ the seller temporarily suspended the delivery of the commodity because drought led to a decrease in raw materials. Therefore, the seller received a certificate from the local Chamber of Commerce. The certificate stated that drought is beyond human control and prevents the seller from complying with the contractual obligations. The *force majeure* clause under the contract did not specify drought as a *force majeure* event, but the tribunal concluded that the inclusion of ‘natural catastrophes’ and ‘other circumstances outside control’ within the *force majeure* clause entitled the seller to invoke *force majeure*.

Examining the decision, it might be claimed that, if the current contracts do not cover specific events for *force majeure* claims, the tribunals could accept the suspensions or non-compliance of contractual obligations with regard to a natural disaster that is admitted to be covered under the ‘act of God’ and some other circumstances beyond one’s control. Similarly, it is also possible that, if the contract does not cover a pandemic as a *force majeure* event, COVID-19 can be interpreted as a *force majeure* event lying under the Act-of-God clause.

In terms of the CISG’s sphere of application, even if COVID-19 is rejected as an act of God, the recommendation by commentators to interpret the ‘impediment’ with reference to international practice should result in accepting COVID-19 as an impediment under Article 79. As can be seen above, the ICC’s 2020 FMC, which is another international instrument used in international trade, covers an epidemic as a presumed *force majeure* event, and the aforementioned case noted under the PICC highlighted epidemic as a *force majeure* event; in this case, the CISG would also approach COVID-19 as a *force majeure*.

The mere existence of the COVID-19 pandemic alone does not constitute a *force majeure* event, but the effects of COVID-19 can also give rise to *force majeure* claims. The measures imposed by governments to combat COVID-19

³³ See Oxford Advanced Learner’s Dictionary (6th ed, OUP 2000) p 12.

³⁴ Luiz Perez and Alejandro Chevalier, ‘Tackling Uncertainty in Pandemic Related Int’l Disputes’ (Law 360, 27 March 2020) available at <<https://www.law360.com/articles/1257759/tackling-uncertainty-in-pandemic-related-int-l-disputes>> accessed 28 March 2020. See Andrew A. Schwartz, ‘Contracts and COVID-19’ (2020) 73 *Stan. L. Rev. Online* 48, 58.

³⁵ ICC Case No. 8790/2000, p.155.

can be alleged as a *force majeure* event. The State interventions are accepted as impediments causing *force majeure*.³⁶ Therefore, a general lockdown in a country, the closing of the borders, and restricting exportation or importation of specific goods should be accepted as impediments occurring during COVID-19.³⁷ Within the recent note by the UNIDROIT Secretariat, it is acknowledged that the measures implemented by governments do lead to the implementation of *force majeure* and that the health conditions of employers and employees pose a significant risk to the performance of the contract regarding confinement procedures.³⁸

Although these measures are deemed to be an impediment, whether these give rise to the application of *force majeure* depends on other factors such as delivery dates, the type of goods, the origin of the parties, and other related things. The restrictions and measures implemented due to the virus must affect the contractual obligations. In other words, if COVID-19 does not affect the import-export of goods or the delay in the delivery of goods under a commercial contract, it cannot be claimed that COVID-19 itself is not accepted as a *force majeure* event.

2. Whether COVID-19 was beyond the control of the parties?

To invoke a *force majeure* clause under these instruments, the existence of an impediment is not merely enough; it is also required that the impediment must be 'beyond the control of the party'. Ingeborg Schwenzer explains this criterion: 'Only an impediment which lies outside of the promisor's sphere of control can lead to exemption under Article 79'.³⁹ In order to determine whether the impediment is beyond one's control or not, most commentators have recommended seeking the 'external character' of the impediment, which means the obligor has no intervention in the issue.⁴⁰ The ICC's 2020 FMC requires that 'the impediment is beyond its reasonable control,' which means that the impediment could have been reasonably foreseen by the parties at the time of the conclusion of the contract.⁴¹ As the ICC's 2020 FMC provides a list of the presumed events, the parties do not have to have evidence that the event is 'beyond the control' when the *force majeure* event in the particular situation is the one listed in the presumed event list.

³⁶ Schwenzer 'Article 79' (n 29) 1137.

³⁷ Similarly see Berger and Behn (n 11) 91. Marco Torsello and Matteo M. Winkler, 'Coronavirus-infected International Business Transactions: A Preliminary diagnosis' (2020) 11 European Journal of Risk Regulation 396.

³⁸ Note of the UNIDROIT Secretariat (n 3) note 15 and footnote 12.

³⁹ Ibid.

⁴⁰ See Schwenzer, 'Article 79 (n 29) para 11, Enderlein and Maskow (n 29) 322, Tallon (n 29) 579. Christoph Brunner, 'Rules on Force Majeure as Illustrated in Recent Case Law' in Fabio Bortolotti and Dorothy Ufot (ed), *Hardship and Force Majeure in Commercial Contracts: Dealing with Unforeseen Events in a Changing World* (Kluwer Law International 2019) 82–7, Pichonnaz (n 30) 873 para 22. Pichonnaz explains that the impediment should be an 'exogenous' event.

⁴¹ ICC Force Majeure and Hardship Clauses (n 16).

Regarding COVID-19, not only must it be an impediment in terms of an exemption for non-performance, but it must also be beyond the control of the parties to be able to claim *force majeure*. COVID-19 is acknowledged as a pandemic; thus, it can be alleged that COVID-19 is far beyond the control of not only the parties of international trade but also governments, scientists, and doctors.⁴² However, the point here is if the impediment (COVID-19) is ‘beyond the promisor’s typical sphere of responsibility [it] shall be considered as impediments’.⁴³ For example, non-performance due to a flood that destroys all of an obligor’s goods is seen as a *force majeure* impediment. However, in the case of stocking all of the goods in a warehouse that is located in a flood risk zone, could it be concluded that the impediment was beyond the control of the obligor? Henceforth, before acknowledging COVID-19 as a *force majeure* impediment, there should be a case-by-case analysis to come to the conclusion that it is beyond the control of the parties.

As a result of the spread of COVID-19, governments have taken serious measures, such as travel bans, restricting and prohibiting road and rail transportation, prohibiting the exportation of certain goods and raw materials, and allocating certain goods or raw materials for the production of specific goods. All of these measures have led to a failure to produce goods or to hamper the delivery obligation of the parties. In the case of travel bans due to COVID-19, whether this will be acknowledged as an impediment beyond control requires an answer. In an ICC case, the respondent was contracted to deliver trucks and maintain them in an Arab country.⁴⁴ However, the respondent cited *force majeure* as a basis for the default, claiming that his employees’ origins were from Israel, so they could not obtain visas. The tribunal refused the *force majeure* claim because there was insufficient proof of *force majeure*, especially highlighting that the delay in obtaining visas⁴⁵ could not account for default over 26 months and that the defaulting party could have hired employees from different nationalities.⁴⁶

The impediments occurring as a result of ‘intra-firm’ or production processes are treated as an internal issue that can be controlled by the parties.⁴⁷ Under the CISG, the operation of a business such as providing personnel is within the

⁴² Berger and Behn (n 11).

⁴³ Dionysios P. Flambouras, ‘The Doctrines of Impossibility of Performance and *clausula rebus sic stantibus* in the 1980 Vienna Convention on Contracts for the International Sale of Goods and the Principles of European Contract Law: A Comparative Analysis’ (2001) 13 *Pace International Law Review* 261, p. 267 available at <<http://www.cisg.law.pace.edu/cisg/biblio/flambouras1.html>> accessed 13 March 2020, Brunner (n 40) 82.

⁴⁴ ICC Case No. 1782/1973.

⁴⁵ Pichonnaz (n 30) para 22.

⁴⁶ See also *National Oil Corp. v. Libyan Sun Oil Co. Case* ICC Award No. 4462. The tribunal rejected the *force majeure* defense, asserting that the defendant could have found non-U.S. personnel to perform the contract, so the ban entering the U.S. passports holders to Libya did not constitute *force majeure*.

⁴⁷ Brunner, ‘Rules on Force Majeure’ (n 40) 82, Pichonnaz (n 30) 873 para 22.

obligor's sphere of risk;⁴⁸ therefore, if a party suffers from a shortage in staff due to travel restrictions imposed as a measure against COVID-19 and so fails to produce the goods that he or she contracted for sale, this may not be deemed as an impediment beyond control.

The UNIDROIT Secretariat's Note addresses the 'subjective situation of the obligor' and states that, in cases of bad faith, the obligors' illness would not be accepted as a *force majeure*.⁴⁹ On a similar account, Pascal Pichonnaz does not accept 'death or severe illness of the obligor or a central person of the firm' as an impediment beyond control. These views could not be easily acceptable for COVID-19 situations. Since the current death toll from COVID-19 is approaching one million people worldwide,⁵⁰ business will be adversely affected by the loss of these people, whether or not they are key personnel.⁵¹ Christoph Brunner holds the view that 'the obligor may be excused if illnesses, deaths or vacancies of employees are caused by extraordinary external events as in the case of an epidemic affecting the obligors entire personnel'.⁵² Rather than questioning if the pandemic is affecting all employers, we believe that the death or illness of either the contract parties or their employers should be examined on a case-by-case basis. If the deaths and illnesses severely hamper the performance of the contract, it should be regarded as being 'beyond control'.

During the COVID-19 crisis, it is also observed that governments either have restricted the exportation of some goods due to high demand within the country itself or have employed these goods to produce devices, equipment, or products that have been used for combatting the spread of COVID-19. In this situation, whether a party can rely on this event as an impediment beyond its control raises a question. In the ICC's Case 3740 (unpublished), an interesting case on *force majeure* that is about the defendant government's exportation restriction, the Indian defendant refused to deliver a certain quantity of the commodity. His reason was that the home country was aiming to meet domestic demands first rather than export commitments. Thus, the defendant informed the claimant about the situation and asked the claimant to find a remedy. However, the sole arbitrator rendered an award that the Indian defendant had relied on only a personal confidential letter signed by the under-secretary of a ministry, which means that the State's decision had not been published in

⁴⁸ Enderlein and Maskow (n 29), Flambouras (n 43).

⁴⁹ Note of Secretariat (n 3) para 18.

⁵⁰ See WHO Coronavirus Disease (COVID-19) Dashboard available at <<https://covid19.who.int/>> accessed 17 September 2020.

⁵¹ See UK Cabinet Office (n 3). It is stated that: 'It is recognised that parties to some contracts may find it difficult or impossible to perform those contracts in accordance with their agreed terms as a result of the impact of Covid-19 – including through illness in the workforce, the effects of restrictions on movement of people and goods, revised ways of working necessary to protect health and safety and the closure of businesses.'

⁵² Christoph Brunner, *Force Majeure and Hardship under General Contract. Principles: Exemption for Non-performance in International Arbitration* (Alphen upon Rhine: Kluwer Law International, 2009) 168.

the official gazette. As a result, the arbitrator said: '[I]n the premises, such decision did not have the force of law, or consequentially, the effect of constituting *force majeure* within the meaning of clause. . . of the letter dated'. This conclusion proves that the arbitrator adopted a formal standpoint rather than putting administrative pressure on the party.⁵³

This case is similar to most countries' attitudes towards the exportation of specific types of products, especially medical products. For example, the president of the USA, Donald Trump, made the order that medical supplies such as masks, gloves, and special coveralls would not be exported until COVID-19 ends.⁵⁴ This meant that if the American sellers already have a contract for medical products with another country, they cannot deliver the tools until a second order by President Trump. Thus, the sellers would probably claim a *force majeure* clause, but if the arbitrators request the formal act such as the above case, it can be a difficult situation for the sellers.⁵⁵

It cannot be denied that COVID-19 causes impediments that, in the first place, are mandatory orders by the officials related to national/international trade in many States, especially China and Italy, and then in companies as a natural outcome. If the impediment were only the borderline issue in the supply chain, this could be overcome by paying substantially more money. However, this event is more complex and needs to be resolved. For example, what happens if workers are required to stay at home and are not allowed to travel abroad due to the virus for an unknown period of time? Is the company relieved from exercising precaution?⁵⁶

Whether governments' requirements on the reduction of working hours and their curfew announcement due to COVID-19 cause delays in production can fall into the parties' sphere of risk is a question to be answered. In our opinion, these situations are beyond the parties' sphere of risk and cannot intervene in the situation. Thus, if the obliged party fails to perform his obligations, or there has been no production or less production as a result of the curfew or reduction

⁵³ Werner Melis, 'Force Majeure and Hardship Clauses in International Commercial Contracts in View of the Practice of the ICC Court of Arbitration' available at <<https://www.fidic.org/sites/default/files/10%20Force%20Majeure%20and%20Harship%20Clauses.pdf>> accessed 3 May 2020.

⁵⁴ Ana Swanson, Zolan Kanno-Youngs and Maggie Haberman, 'Trump Seeks to Block 3M Mask Exports and Grab Masks From Its Overseas Customers' <<https://www.nytimes.com/2020/04/03/us/politics/coronavirus-trump-3m-masks.html>> accessed 22 September 2020.

⁵⁵ "President Donald Trump issued an executive order delegating authority under Title III of the Defense Production Act to the International Development Finance Corporation to make loans, make provisions for purchases and commitments to purchase, and take additional actions to create, maintain, protect, expand, and restore *domestic* industrial base capabilities, including in the supply chain in the United States and its territories (the "domestic supply chain"), to respond to the COVID-19 pandemic in May 2020. David F. Dowd Luke Levesseur Marcia G. Madsen, COVID-19 and the US Defense Production Act: Latest Developments" (15 May 2020) <<https://www.mayerbrown.com/en/perspectives-events/publications/2020/05/covid19-and-the-us-defense-production-act-latest-developments>> accessed 20 September 2020.

⁵⁶ Lauri Railas, 'The Coronavirus and Distributorship under the New ICC Force Majeure Clauses (Helsingin Seudun Kauppakamari 12 March 2020) available at <<https://helsinki.chamber.fi/en/the-coronavirus-and-distributorship-under-the-new-icc-force-majeure-clauses/>> accessed 19 March 2020.

of working hours, this non-performance should be regarded as an impediment beyond his capacity.

3. Economic impediment

The economic impediments cause the performance to be ‘excessively onerous’ because the cost of the performance increases.⁵⁷ In general, price fluctuations such as increases or decreases in market prices of goods, changes in the currency, and economic crisis are claimed as a basis for economic impediments.⁵⁸ Whether COVID-19 can result in an economic impediment also requires further attention due to the impact of the pandemic on economies and businesses. To combat a COVID-19 lockdown that weakens economic activities, the demands on most of the products, and even petrol prices, have been reduced significantly.⁵⁶

While examining if COVID-19 is an economic impediment within the context of *force majeure*, it should also be noted that any changes in market prices are usually assumed to be foreseeable and a part of the business risk that all buyers and sellers have to consider.⁵⁹ Even if the economic conditions are regarded within the sphere of the parties’ risk, a reasonable limit for the parties should be drawn. Schwenger explains that ‘exemption under Article 79 should only be considered where the ultimate “limit of sacrifice” has been exceeded’.⁶⁰ Thus, especially in terms of the CISG, the economic impediments should be assessed based on the reasonable limits of ‘the parties’ sphere of risk’, so it can be decided if the economic impediments are beyond the control of the parties. The ‘beyond control’ criterion is also closely related to unavoidability;⁶¹ therefore, the assessment should be made together with the parties’ sphere of risk and the unavoidability of these impediments.

As the requirements of being beyond a party’s control and the unavoidability of economic impediments are closely connected, the extent to which a party is required to take action to fulfil the contract is also generally determined by contractual risk. According to the ICC’s arbitrations,⁶² economic impediments such as currency exchange, an increase or decrease in market price, and so on

⁵⁷ Christoph Brunner, ‘*Force Majeure and Hardship under General Contract Principles*’ (n 52) 213, Jenni Miettinen, ‘Interpreting CISG Article 79 (1): Economic Impediment And The Reasonability Requirement’ (Master’s thesis, University of Lapland Faculty of Law 2015) available at <<https://lauda.ulapland.fi/bitstream/handle/10024/62487/Miettinen.Jenni.pdf?sequence=1&isAllowed=y>> accessed 29 March 2020.

⁵⁸ Ibid. Carolino Aroya, ‘Change of Circumstances under the CISG’ <<http://www.gbv.de/dms/buls/734889690.pdf>> accessed 19 September 2020.

⁵⁹ Schwenger ‘Article 79’ (n 29) 1142, Miettinen, ‘Interpreting CISG Article 79 (1): Economic Impediment and the Reasonability Requirement’ (Master’s thesis, University of Lapland Faculty of Law 2015) available at <<https://lauda.ulapland.fi/bitstream/handle/10024/62487/Miettinen.Jenni.pdf?sequence=1&isAllowed=y>> accessed 29 April 2020. Brunner, ‘*Force Majeure and Hardship under General Contract Principles*’ (n 52) 215–16.

⁶⁰ Schwenger ‘Article 79’ (n 29) 1142.

⁶¹ Miettinen (n 57).

⁶² ICC case 6281/1989. ICC Nos. 3099 and 3100/1979. ICC Case No. 2216/1974. Miettinen (n 57).

cannot be accepted as a *force majeure* because the wave in economic circumstances must be very exceptional and rapid in effect to become an impediment.⁶³ To meet a *force majeure* clause, a party's performance must become 'physically or legally impossible, not merely more difficult or unprofitable'.⁶⁴

In terms of the CISG, whether economic impediments are within the sphere of Article 79 has been debated.⁶⁵ However, there is no uniform solution for this issue, and divergent opinions have been reached by both national courts and arbitral tribunals.⁶⁶ In one of the cases, the Court of Appeals of Lamia in Greece demonstrated that the high cost of performance under Article 79 of the CISG cannot be assumed as an impediment. A Bulgarian seller failed to supply sunflower seeds to a Greek seller due to the fact that drought had destroyed a large quantity of sunflower seeds. Also, the Danube river level decrement did not allow for the loading of goods on a ship in a river port. The alternative way of delivering the goods in a seaport highly increased transportation costs. Despite these reasons, the Court rejected exonerating the Bulgarian seller from liability under Article 79 and stated:

CISG article 79 does not entitle the promisor to be released from his contractual obligations due to change of the economic background on which the parties relied for the conclusion of the contract, since, in this case, the commencement of transportation by ship could be performed at a seaport (instead by a river port), although this would entail higher costs for the seller.⁶⁷

Considering the above-mentioned fact, if a seller changes his route initially used in the production of the goods for delivering or receiving them and faces higher costs during the process due to COVID-19 measures, this situation will not be within the sphere of *force majeure* clauses under the CISG. However, the recent CISG's Advisory Board opinion holds the view that Article 79 can also be applicable in the case of economic impediments.⁶⁸ With regard to this opinion, economic impediments caused by COVID-19 can trigger the *force majeure* clause under the CISG. Even the Advisory Council suggests this view; what will be the position of arbitral tribunals towards COVID-19-related economic impediments is not easy to predict.

⁶³ Ibid 12–13. See also Miettinen (n 57).

⁶⁴ *Thames Valley Power v. Total Gas & Power*, [2005] EWHC 2208 (Comm).

⁶⁵ Annex 2 CISG AC Opinion No. 20 Scholarly Writings on the CISG and Hardship <http://cisgac.com/file/repository/Annex_2_Opinion_No_20_CISG_Scholarship_on_Hardship.pdf> accessed 19 September 2020.

⁶⁶ Annex 1 CISG AC Opinion No. 20 Case Law on the CISG and Hardship <http://cisgac.com/file/repository/Annex_1_Opinion_No_20_Case_Law_CISG_on_Hardship.pdf> accessed 19 September 2020.

⁶⁷ Greece 2006 Decision 63/2006 of the Court of Appeals of Lamia (*Sunflower seed case*) available at <<http://cisgw3.law.pace.edu/cases/060001gr.html>> accessed 1 May 2020.

⁶⁸ CISG Advisory Council Opinion No. 20 Hardship under the CISG <<http://cisgac.com/opinion-no20-hardship-under-the-cisg/>> accessed 21 September 2020.

Economic impediments are also regarded as hardship,⁶⁹ thus the parties can apply for hardship clauses. The PICC has a hardship clause that specifically deals with economic impediments; therefore, a party can apply for Articles 6.2.2 and 6.2.3 when there is an economic impediment as a result of COVID-19.⁷⁰ On a similar account, the ICC's 2020 Hardship Clause will serve to solve economic impediments raised by COVID-19.

IV. Unforeseeability of the impediment

As a second criterion, it is required that the impediment must be unforeseeable. The ICC's 2020 FMC states that 'it could not reasonably have been foreseen at the time of the conclusion of the contract'. The PICC and the CISG do not contain the word 'foreseeable or foreseen', in particular, like the ICC's 2020 FMC does, but both of them refer to the unforeseeability of the impediment by the wording: '[I]t could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract'.

This criterion for *force majeure* is tested according to the obligor's sphere of risk, so it will be decided whether it is reasonable to expect the parties to predict its occurrence.⁷¹ The observation of foreseeability is made according to a 'reasonable person'; therefore, it can be said that an objective criterion is inserted by these legal instruments for *force majeure* application. The reasonable person who is the focal point for the criterion is defined under Article 8(2) of the CISG as 'a reasonable person of the same kind as the other party would have had in the same circumstances'. Also, the same interpretation of a reasonable person can be found under Article 4.1(2) of the PICC.⁷² Hans Stoll suggests that a person between a 'pessimist who foresees all sorts of disaster' and an 'optimist who never anticipates the least misfortune' should be regarded as a yardstick of application of reasonableness to establish the unforeseeability.⁷³ However, the way unforeseeability and reasonableness will be assessed is not easy to ascertain. The Secretariat's commentary suggests the assessment of unforeseeability on a case-by-case basis.⁷⁴

⁶⁹ Carolina Arroya, Firoozmand, Mahmoud Reza, and Javad Zamani, 'Force majeure in international contracts: current trends and how international arbitration practice is responding' *Arbitration International* 33.3 (2017) 395–413

⁷⁰ Secretariat Note (n 3). Hoekstra (n 18) 117–25.

⁷¹ Schwenger, 'Article 79' (n 29) 1134, Flambouras (n 43) 270.

⁷² UPICC Article 4.1(2): 'If such an intention cannot be established, the contract shall be interpreted according to the meaning that reasonable persons of the same kind as the parties would give to it in the same circumstances.' See also Pichonnaz (n 30) 877 para 35.

⁷³ Hans Stoll, 'Exemptions' in Peter Schlechtriem (eds.), Geoffrey Thomas (trs.), *Commentary on the U.N. Convention on the International Sale of Goods (CISG)* (2nd ed. 1998) para 23, See China 17 September 2003 China International Economic and Trade Arbitration Commission (CIETAC) Arbitration proceeding (Australia cotton case) available at <<http://cisgw3.law.pace.edu/cases/030917c1.html>> accessed 2 May 2020.

⁷⁴ Secretariat Commentary, Art 79 note 6 available at <<http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-65.html>> accessed 11 March 2020.

To satisfy the requirement of unforeseeability, the time when the impediment is possible to occur should also be regarded as being of significance. The criterion in this case is ‘time of the conclusion of the contract’ that leads to the exemption; the defaulting party cannot be expected to assume the risk at the time of the conclusion of the contract.⁷⁵

1. Is COVID-19 an unforeseeable impediment?

COVID-19 was first reported in China in December 2019. Since then, China has taken serious precautions and measures to prevent the spread of the virus. Later, in mid-January, COVID-19 started to be seen outside China, and the World Health Organization (WHO) acknowledged that the reported cases arose ‘in five WHO regions in one month’.⁷⁶ On 30 January 2020, the WHO declared COVID-19 a public health emergency of international concern, and, by 11 March 2020, it was accepted as a pandemic.⁷⁷

Considering the progress of COVID-19, whether it is an unforeseeable impediment and when it can be deemed unforeseeable needs to be examined carefully. However, considering the vagueness of the unforeseeability criterion, its application to the issues in COVID-19 cases also turns out to be problematic. On this account, the Secretariat’s commentary of the CISG states:

It is this later element [foreseeability] which is the most difficult for the non-performing party to prove. All potential impediments to the performance of a contract are foreseeable to one degree or another. Such impediments as wars, storms, fires, government embargoes and the closing of international waterways have all occurred in the past and can be expected to occur again in the future.⁷⁸

Similarly, Joseph Perillo claims:

Anyone who has read a bit of history or who has lived for three or more decades of the twentieth century can foresee, in a general way, the possibility of war, revolution, embargo, plague, terrorism, hyper-inflation and economic depression, among the other horrors that have afflicted the human race. If one reads science fiction, one learns of the possibility of new terrors that have not yet afflicted us, but involve possibilities that are not pure fantasy.⁷⁹

⁷⁵ See the *United States 6 July 2004 Federal District Court (Raw Materials Inc. v. Manfred Forberich GmbH & Co., KG)* available at <<http://cisgw3.law.pace.edu/cases/040706u1.html>> accessed 27 March 2020, *United States 20 August 2008 Federal District Court [New York] (Hilaturas Miel, S.L. v. Republic of Iraq)* available at <<http://cisgw3.law.pace.edu/cases/080820u1.html>> accessed 27 March 2020, *Netherlands 2 October 1998 District Court 's-Hertogenbosch* available at <<http://cisgw3.law.pace.edu/cases/981002n1.html>> accessed 27 March 2020.

⁷⁶ WHO, Rolling Updates on Coronavirus Disease (COVID-19) 1 May 2020 <<https://www.who.int/emergencies/diseases/novel-coronavirus-2019/events-as-they-happen>> accessed 4 May 2020.

⁷⁷ See ‘Rolling updates on coronavirus disease (COVID-19)’ <<https://www.who.int/emergencies/diseases/novel-coronavirus-2019/events-as-they-happen>> accessed 8 September 2020.

⁷⁸ Secretariat Commentary, (n 74) Art 65 note 5.

⁷⁹ Joseph M. Perillo, ‘Force Majeure and Hardship under the UNIDROIT Principles of International Commercial Contracts’ (1997) 5 *Tul. J. Int’l & Comp. L.* 5, 17.

Even though it can be accepted that most of the events may occur within the usual flux of life, one critical point not to be disregarded is the time of the foreseeability of the event. Such impediments must not be assumed once the contract has been concluded.

As indicated by the above heading,⁸⁰ foreseeability is tested objectively by examining if a reasonable person under similar circumstances can take the event into account at the time of the contract.⁸¹ In one case by the ICC,⁸² the State partner of a joint venture had a contract related to cultivating agricultural products. However, the State party did not perform the contractual obligation because the land was not available, as a result of which the State let the refugees from the neighbouring country accommodate the land. The tribunal concluded that the State partner was a public entity, and it must have known of the State action before entering into the contract. The tribunal stated that '[b]efore entering an obligation, everyone must, before, be certain that he has the ability to perform it. If he/she has or must have the slightest doubt about his/her ability to perform at the given time, he/she must make all necessary verifications before promising performance'. Considering the statement in this case, being a State entity as a party in a contract is important in deciding whether or not the event is foreseeable because the tribunal stated that the public entity had known the State's next step in advance.

Governments took harsh measures against COVID-19, such as lockdowns and import/export bans, and, thus, where a public authority or entity is a party to a contract, the question of whether non-performance due to these measures imposed by the government would be deemed to be foreseeable is open for discussion. In this regard, the Secretariat's Note holds the idea that the measures imposed were beyond the control of the public entities.⁸³ Most of these measures were adopted quickly, and these measures have been changed on a daily basis with regard to the spread of COVID-19. Thus, even though there has been a risk of imposing harsh measures, when these will be imposed or how strictly they will be applied could not have been known by all of the public entities or authorities.

Another ICC case highlights the time of the occurring impediment.⁸⁴ According to the case, two companies signed the contract for the sale of petroleum-based products. The respondent's government started to control the currency exchange; thus, the respondent could not make a payment. Additionally, the contract covered a clause that listed *force majeure* events as impediments caused from legislation or regulation by Algeria (Algeria was not the respondent's government). The tribunal found that when the contract was

⁸⁰ See Heading 'IV. Unforeseeability of Impediment'

⁸¹ Pichonnaz (n 30) 877 para 35.

⁸² ICC No. 12112/2009 in Albert Jan van den Berg (ed.), XXXIV Yearbook Commercial Arbitration 77–110 (2009).

⁸³ Note of Secretariat (n 3) footnote 14.

⁸⁴ ICC Nos. 3099 and 3100/1979.

issued, the regulations were already in force, so it could not be assumed to be a *force majeure*. In terms of COVID-19, whether or not the parties were aware of the measures imposed by the government to prevent the spread of COVID-19 will come into consideration. Their awareness may lead to a rejection of their *force majeure* claims on COVID-19.⁸⁵

In ICC Case no. 2216/1974,⁸⁶ *force majeure* was an issue due to the falling of the market price for petrol. After entering a contract, there was a significant decrease in the price of petrol. Therefore, the respondent refused to take delivery, arguing that the fall in price was considerable, so it excused the respondent's performance. Plus, he or she was claiming that the intervention of government financial authorities to prevent currency losses constituted *force majeure*. However, the ICC tribunal considered that the change in market price risk was foreseeable and that its risk could have been allocated. Also, the respondent had already received a letter from the relevant authority, so the change in circumstances was obviously foreseeable. The tribunal concluded that there is no doctrine or case law precedent that proves such legislation could be accepted as *force majeure*.

On a similar account, there has been a remarkable decrease in petrol prices after COVID-19 issues.⁸⁷ Because people have to stay at home, and national and international travel was banned, the need for petrol was reduced.⁸⁸ As noted above,⁸⁹ covering these economic impediments under Article 79, based on the Advisory Board's suggestion, all of the requirements set by the article should be fulfilled. Thus, it is important to reveal whether these price fluctuations can be deemed to be foreseeable or not. Here, the tribunal believed that the risk of these impediments lay in the sphere of the obliged party. Economic conditions generally are seen as the risk that the parties have undertaken while concluding a contract; however, COVID-19 has been affecting economies beyond all possible predictions. For example, the losses that airlines experienced exceeded the expectations made at the beginning of the pandemic.⁹⁰ Even these sectors could not have foreseen the worst scenario in the middle of the pandemic: how can

⁸⁵ *Algerian v African State enterprise*, ICC Case Nos. 3099 and 3100, 30 May 1979. See also *Sigvard Jarvin and Yves Derains Collection of ICC Arbitral Awards 1974-1985/Recueil des Sentences Arbitrales de la CCI Vol. I* (Kluwer Law and Taxation Publishers 1994) 67.

⁸⁶ ICC Case No. 2216/1974, Award Abstract and Commentary, Digest of ICC Awards.

⁸⁷ Farhad Taghizadeh-Hesary, Economic impacts of the COVID-19 pandemic and oil price collapse (18 May 2020) <<https://www.asiapathways-adbi.org/2020/05/economic-impacts-covid-19-pandemic-and-oil-price-collapse/>> accessed 10 September 2020.

⁸⁸ *Ibid.* See also 'OPEC trims 2020 oil demand, sees doubts about 2021 on virus fallout' <<https://economictimes.indiatimes.com/markets/commodities/news/opec-trims-2020-oil-demand-sees-doubts-about-2021-on-virus-fallout/articleshow/77511946.cms>> accessed 10 September 2020.

⁸⁹ See Heading '3. Economic Impediment'.

⁹⁰ 'Covid-19: Air France-KLM reports €815 million first-quarter operating loss' (France 24, 7 May 2020) <<https://www.france24.com/en/20200507-covid-19-air-france-klm-reports-€815-million-first-quarter-operating-loss>> accessed 21 September 2020, 'IATA Updates COVID-19 Financial Impacts- Relief Measures Needed-' (IATA, 5 March 2020) <<https://www.iata.org/en/pressroom/pr/2020-03-05-01/>> accessed 21 September 2020, 'European COVID-19 Impacts Continue to Worsen as Border Restrictions Remain' (IATA, 13 August 2020) <<https://www.iata.org/en/pressroom/pr/2020-08-13-01/>> accessed 21 September 2020.

these price fluctuations be deemed to be ‘foreseeable’ and all of the risk laid on the obligor? These economic conditions should be carefully examined case by case.

Another ICC case discussed the foreseeability of *force majeure* claims. According to this case, a Romanian company signed a contract to sell scrap metal to a German company. The contract had a provision for the seller to get an export license, but the seller failed to do so. Also, the contract included that *force majeure* was to be considered as described in the 1990 Incoterms—pre-determined contract terms published by the ICC.⁹¹ The tribunal stated that Incoterms defined *force majeure* as ‘non-performance arising out of causes beyond either party’s control and without any fault or negligence by the non-performing party’. Even though the seller defended himself, claiming that the failure of obtaining the license was beyond his control, the tribunal concluded that the fact that the seller already had four years to get the license could not be a sudden event in the economic or political situation of Romania. Therefore, the seller should have known his country’s export regulations and procedures. Finally, the seller had full responsibility for not obtaining the license.⁹²

In terms of foreseeability, when the impediment exists is significant. Thus, it is said that the foreseeability of the impediment depends upon the time of the conclusion of the contract. It might be asserted that for all of the contracts concluded before COVID-19, it was reported that the parties could not have estimated the potential consequences. For the contracts concluded after the announcement of COVID-19 cases in China, a case-by-case analysis should be made. The Secretariat’s Note suggests assessing the foreseeability according to the times of the conclusion of the contract:

- 1) before 31 December 2019; (ii) on or after 31 December 2019 but before 13 March 2020 (pandemic declared by WHO) or when the health crisis was in the public domain in the relevant country, whichever happened first; (iii) during the state of emergency of the relevant jurisdiction (i.e., the period during which extraordinary measures were implemented in the jurisdiction); and (iv) after the state of emergency has ended.⁹³

This suggestion seems reasonable to test the foreseeability of COVID-19.

The first cases were reported in Wuhan, China, and, soon after, the Chinese government imposed travel bans and a general lockdown within this area. If a contract was concluded after the imposition of these measures with a Chinese party that was located in Wuhan, and his undertakings were related to Wuhan, it is acceptable that the impediment was foreseeable. UNIDROIT’s Note assesses the foreseeability regarding the place of business of the parties and States and, similar to our view, agrees that if COVID-19 had reached the parties’ place of business, the foreseeability of the impediment would have been found.⁹⁴

⁹¹ ICC Case No. 112253/2002, See from 21 ICC Bull. 66 (2010).

⁹² Ibid.

⁹³ Note of Secretariat (n 3) footnote 11.

⁹⁴ Ibid.

If the contract was concluded after COVID-19 with a Chinese party located outside a place where strict measures were taken (for example, outside of Wuhan), was the impediment still foreseeable? On this occasion, a distinction can be drawn between the contracts made after COVID-19 was declared in China and those made after the declaration of the pandemic by the WHO. If the contract was concluded before the declaration of the pandemic with a Chinese party located in the area that had not been hit by COVID-19, whether the parties can foresee the impediment could be analysed case by case and in consideration of the general situation within the country. But if the contract was concluded after the declaration of the pandemic, considering the professional capacity of the parties, the parties should analyse the situation and take into account the contagious nature of the virus and the additional measures taken by the government day by day. Therefore, for any contract made after the report of COVID-19 in China with a Chinese party or any involvement with China-related parties or goods, COVID-19 might have been deemed to be a foreseeable impediment. Akin to our view, the Secretariat's Note states that 'the closer the jurisdiction of the places of business of the parties to a country where the health crisis is already present, the more reasonable it would have been to expect them to foresee the pandemic and its consequences on the performance of contracts'.⁹⁵

It can be seen from this analysis that the time of the conclusion of the contract, the parties' place of business where the virus had reached, and the relationship between the contracting parties and the other parties located in the areas affected by the pandemic are of significance. In order to offer a general foreseeability test, it must be examined when the parties had concluded their contracts, whether the countries they are located in, or connected to, had been contaminated by the virus, whether the governments in these contract-related locations had implemented measures, and what these measures were. According to the answers given to these questions, the tribunals should reach a decision on the foreseeability of the *force majeure* event.

Hence, a contract concluded with the parties located in States that were not hit by the virus or where the contract does not have any connection with States contaminated by the virus (for example, where the performance of the contract is not dependent on some materials produced in a contaminated State) after COVID-19 was reported should be treated as unforeseeable. In the case of the conclusion of the contract after the declaration of the pandemic by parties who were located in COVID-free States, the foreseeability should be assessed with regard to the facts of the situation and the professional capacity of the parties. By professional capacity, we refer to a reasonable merchant who acts diligently.⁹⁶ For contracts concluded after the outbreak by parties located in States hit by the

⁹⁵ Note of Secretariat (n 3) para 21.

⁹⁶ Pichinnoz (n 30) 877 para 34.

virus, the foreseeability will be decided based upon the measures implemented by the government.

All of the views presented to clarify foreseeability within the context of COVID-19 are our suggestions, so it is not clear whether these suggestions will be applied by arbitral tribunals or courts. For example, in respect of a failure to deliver the goods allegedly connected to the 2002–3 Severe Acute Respiratory Syndrome (SARS) epidemic, a tribunal constituted under the rules of the China International Economic and Trade Arbitration Commission rejected a plea of *force majeure* under Article 79 of the CISG, asserting that the impediment was foreseeable because the outbreak of SARS happened two months prior to the signing of that contract.⁹⁷ Therefore, the question of the foreseeability test for COVID-19 will be answered by arbitral tribunals and courts.

V. Impossibility to avoid or overcome

In order to apply for a *force majeure* clause, there must also be no possibility of avoiding or overcoming it or its consequences. The ICC's 2020 FMC reads: '[T]hat the effects of the impediment could not reasonably have been avoided or overcome by the Affected Party'. The CISG and the PICC have a similar emphasis for the parties 'to have avoided or overcome it or its consequences'. The main difference between the languages of these instruments is that, while the ICC FMC only considers the avoidance and overcoming of 'the effect of the impediment', the CISG and the PICC clauses require one to overcome or avoid 'the impediment itself' and its effects.⁹⁸

For all of these legal instruments, the impossibility of avoiding or overcoming the impediment or its effects must be observed along with other criteria discussed above. However, when the wording of the CISG and the PICC are examined, they both use 'or' after their two requirements, contrary to the wording of the ICC's 2020 FMC, which employs 'and' before imposing the third criterion. The preference for the word 'or' gives the idea that the defaulting party should either prove that they could not reasonably foresee the impediment or he or she could not have avoided or overcome the impediment and its consequences, so he or she should not prove both situations. Despite this wording, proving the unforeseeability of the impediment does not merely suffice to trigger *force majeure* according to the literature and the case law.⁹⁹

Along with the unforeseeability, this criterion is also hard to ascertain since it is necessary to decide whether the impediment or its consequences are unavoidable or insurmountable. This criterion is also examined in accordance with reasonability, which does not give a precise threshold for determining the

⁹⁷ China 5 March 2005 CIETAC Arbitration proceeding (*L-Lysine case*) <<http://cisgw3.law.pace.edu/cases/050305c1.html>> accessed 13 September 2020.

⁹⁸ Filip De Ly, 'Analysing the ICC Force Majeure Clause 2003' in Fabio Bortolotti and Dorothy Ufot (ed), *Hardship and Force Majeure in Commercial Contracts: Dealing with Unforeseen Events in a Changing World* (Kluwer Law International 2019). Also, Pichinnoz (n 30) 874 para 25.

⁹⁹ See Secretariat Commentary (n 74).

unavoidability. The avoidance is interpreted as precautions being taken ‘before’ the occurrence of the event,¹⁰⁰ whereas it is stated that the defaulting party can offer substitutes to enable performance in order to overcome the impediment.¹⁰¹

1. Whether the effects of COVID-19 could be avoided or overcome by reasonable steps?

As discussed above, the CISG and the PICC examine the unavoidability of the impediment itself. In the case of COVID-19, the avoidability of the occurrence of this outbreak should not be expected or imposed on the parties. It is also not reasonable to anticipate that a party can avoid the impositions of rough measures by governments. Therefore, COVID-19 cases should investigate if the non-performing party could have avoided or overcome ‘the effects of the impediment’. Whether the consequences could have been avoided or overcome must be examined on a case-by-case basis.

For example, if the seller failed to deliver the goods due to the restrictions or prohibitions on transportation, the question as to the possibility of following an alternative route should be asked. The *Macromex Srl v Globex Int’l Inc* case displays similar features to the situation with COVID-19.¹⁰² The contract was about the purchase of chicken legs to be delivered to Romania. But, after the contract, an avian flu breakout started, so the Romanian government banned all chicken imports that were not certificated by a certain date. The seller claimed that the contract had no *force majeure* clause; therefore, the tribunal applied the CISG’s Article 79 to fill the ‘gap’. According to the tribunal decision, the seller satisfied the first, second, and fourth elements of *force majeure* under the CISG (there was an impediment beyond a party’s control that was unforeseeable by that party and the party’s non-performance was due to that impediment). However, the tribunal found that the seller did not meet the third element and that the impediment could not be reasonably overcome. Therefore, the tribunal concluded that the seller could have shipped to another port in a neighbouring country, as the buyer had proposed.¹⁰³

¹⁰⁰ Atamer (n 28) para 54, Tallon (n 29).

¹⁰¹ Schwenzer, ‘Article 79’ (n 29) para 14. See Secretariat Commentary (n 74), American Arbitration Association 23 October 2007 (*Macromex Srl. v. Globex International Inc.*) Interim Award <<http://cisgw3.law.pace.edu/cases/071023a5.html>> accessed 22 March 2020.

¹⁰² *Ibid.* 2008 U.S. Dist. LEXIS 31442 (S.D.N.Y. 2008) (award enforced in the U.S.). See also Turkish law accepted epidemic diseases as one of the *force majeure* events. The Supreme Court Assembly of Civil Chambers judgment (2017 /11-90 and 2018/1259, 27.06.2018) addressed; ‘Force majeure is an extraordinary incident that occurs outside the activity and operation of the responsible debtor, which leads to the violation of a general norm of behaviour or debt in an absolute and inevitable manner, which cannot be foreseen and resisted. Natural disasters such as earthquake, flood, fire, and epidemic diseases are considered as *force majeure*.’

¹⁰³ Mark Augenblick & Alison B. Rousseau, ‘Force Majeure in Tumultuous Times: Impracticability as the New Impossibility It’s Not as Easy to Prove as You Might Believe’ *The Journal of World Investment & Trade* 13 (2012) 59.

Since the beginning of the coronavirus outbreak, countries have started to ban flights to several other countries. Road and rail transportation have also been affected; thus, they are either prohibited or restricted.¹⁰⁴ In this situation, although the seller changed the route for delivery, it was also possible that this new route was closed due to the countries' restrictions. It is observed that every day a new case of the virus is found in a different country; thus, it is impossible to predict where COVID-19 has occurred and when these countries will announce restrictions to transport. The seller might have wanted to deliver the goods even in a different port or follow a different route; however, after arranging the delivery according to these changes, there was a risk that the measures could have been imposed on these places and routes. Therefore, tribunals should observe if the non-performing party would still have failed to perform his obligations once all of the precautions had been taken in a reasonable and timely manner. If the answer is yes, then the tribunal should acknowledge that the impediment was unavoidable or insurmountable.

On a similar account, Bodhisattwa Majumder and Devashish Giri believe that the effects of COVID-19 have been 'far more severe' than epidemics experienced so far; therefore, the parties could not have avoided or overcome its results.¹⁰⁵ In our view, until 11 March 2020, when the WHO acknowledged COVID-19 as a pandemic, nobody considered that COVID-19 would last more than six months and that the measures imposed by States would be harsher day by day. Therefore, mitigation of the effects for COVID-19 should be carefully considered.

'According to a case that was claimed *force majeure* by the buyer regarding an impediment, a Chinese buyer and a seller from Singapore entered into a contract for the purchase of screw-thread steel. According to their contract, the bulk of the payment for the goods would be made with a letter of credit, and a small portion of the money would be paid by direct transfer into an account designated by the seller. The seller would start loading the ship once the buyer transferred the money. Following the signing of the contract, a letter of credit was issued in a timely manner, but the money transfer by the buyer to the seller was delayed. At the same time, the seller made repeated requests to amend the letter of credit to extend the time for the loading of the ship and the term of the validity of credit itself. On two occasions, the buyer agreed to amend it, but, on the third occasion, the buyer wanted to delay the shipping until further notice.'¹⁰⁶ Afterwards, the buyer refused to accept the delivery of the goods on the pretext that no import licence was obtained. The buyer submitted to the arbitral tribunal a certification issued by the Economic Committee of Shantou on 12

¹⁰⁴ IRU, Impact on freight and passenger transport of the global Coronavirus (COVID-19) outbreak <<https://www.iru.org/apps/flash-getfile-action?id=889&file=coronavirus-covid-19-0104.pdf>> accessed 4 March 2020.

¹⁰⁵ Majumder and Giri (n 5) 59.

¹⁰⁶ China 4 February 2002 CIETAC Arbitration proceeding (*Steel bar case*) <<http://cisgw3.law.pace.edu/cases/020204c2.html>> accessed 10 September 2020.

June 2001. The seller had to sell the goods to another buyer. The buyer claimed that the seller delayed the booking of a ship to deliver the goods, while the seller claimed that the buyer delayed making payments and receiving the goods.

The tribunal argued that the inability to use the import license was not a '*force majeure*' event that would exempt the buyer from liability. According to Article 79 of the CISG, if the buyer claims exemption for *force majeure*-type reasons, certain conditions must be satisfied. However, the buyer did not inform the seller of the impediment in a timely manner. Therefore, the tribunal concluded that the buyer's situation was not unavoidable and that the buyer should be responsible for the whole loss that occurred because the buyer did not send clear information to the seller about the occurrence of the *force majeure* event in time and provide a valid certification of *force majeure*.¹⁰⁷

To summarise briefly, the Chinese buyer had an import license (which expired on 31 March 1999) to receive the goods when he concluded the contract. On the delivery date, the buyer could not receive the goods from the seller due to the invalid import license. Also, the buyer had not informed the seller about the expired import license. However, since the buyer was not accepting the goods, he did not declare the *force majeure* event regarding the invalid license. Instead, the buyer claimed the deformation of the goods because their contract said that:

the [Seller] is not responsible for the delay on delivery or shipment because of common acceptable events of *force majeure*, but the [Seller] must inform the [Buyer] of the event by phone immediately and airmail to the [Buyer] the certification issued by the official government or chamber of commerce at the place where the disaster occurs to the [Buyer] within fifteen days after the disaster occurs.¹⁰⁸

The seller also suffered from the buyer's action because, if the buyer had informed the seller, the seller could have informed its supplier as well. Also, the seller could have renewed the certificate but he did not. Thus, the seller would not have had any loss. Therefore, the tribunal concluded that the buyer's situation was not unavoidable, and so he should be responsible for the whole loss of the seller. As seen from this case, if the result of the event is avoidable, the tribunal's approach is generally that the event is not *force majeure*.

As for the coronavirus cases, possible *force majeure* claims might be considered based on whether there is an option or not to overcome in practice. Indeed, the very existence of COVID-19 is not enough for a cause of *force majeure*, but the tribunal will examine it case by case in detail.

VI. Causality

It is required that the impediment must be 'due to' the impediment. Dennis Tallon's view is that 'impediment must be the exclusive cause of the failure to

¹⁰⁷ *Steel bar case* (n 106).

¹⁰⁸ *Ibid.*

perform'.¹⁰⁹ In Russia's Arbitration Proceeding 406/1998 of 6 June 2000, the seller avoided delivering the goods due to a rise in taxes. Although the seller believed that the increasing taxes caused a *force majeure*, he did not inform the buyer about the circumstances. The tribunal held that:

the [seller] failed to prove presence of the causal connection between the alleged *force majeure* and its failure to [perform its obligations]. In addition to that, the [seller] failed to provide sufficient documentary evidence which, in this case ought to have been certificates of Chamber of Commerce either in the buyer's or seller's country.¹¹⁰

In terms of COVID-19, although it is accepted as an impediment beyond the control of the parties that was unforeseeable and unavoidable, the parties' failure to perform must be a cause of COVID-19. The mere existence of COVID-19 will not trigger the *force majeure* clause, but there should be a direct link between COVID-19 and the non-performance.¹¹¹

VII. *Force majeure* due to third parties

Article 79(2) of the CISG sets a rule for exemption from liability when non-performance is caused by a third party, stating that:

(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.

Whereas the PICC has no similar provision within the scope of Article 7.1.7, the ICC's 2020 FMC also has a clause related to third parties. It states:

2. Non-performance by third parties. Where a contracting party fails to perform one or more of its contractual obligations because of default by a third party whom it has engaged to perform the whole or part of the contract, the contracting party may invoke *Force majeure* only to the extent that the requirements under paragraph 1 of this Clause are established both for the contracting party and for the third party.

The CISG and the ICC's 2020 FMC allow the contractual parties to claim *force majeure* due to a third party's non-performance. But this is available only if the third party's non-performance is acknowledged as a *force majeure* by applying the requirements of *force majeure* defined under them.

¹⁰⁹ Tallon (n 29) 584, *United States 16 April 2008 Federal District Court [New York]* available at <<http://cisgw3.law.pace.edu/cases/080416u1.html>>, *Russia 21 November 2005 Arbitration proceeding 42/2005 (Equipment case)* available at <<http://cisgw3.law.pace.edu/cases/051121r1.html>> accessed 23 March 2020.

¹¹⁰ *Russia 6 June 2000 Arbitration proceeding 406/1998* available at <<http://cisgw3.law.pace.edu/cases/000606r1.html>> accessed 2 May 2020.

¹¹¹ See Note of the UNIDROIT Secretariat (n 3) note 11, Pichinnoz (n 30) 873, para 21.

Within the context of paragraph (2), ‘a *third person* whom the party has engaged to perform the whole or a part of the contract’ is not clarified. According to Tallon, this provision is a response to the increasing engagement of a sub-contractor.¹¹² The third person covered under this paragraph is independent and not under the control of the contractual parties.¹¹³ There must be an ‘organic link’ between the main person and this third person who is under the duty to perform either the whole or a part of the main contract.¹¹⁴ Brunner suggests including ‘any third party’ within the scope of this paragraph with regard to the recent economic conditions.¹¹⁵ Variation of the interpretations made in order to define the scope of the third person should not contribute to acquiring different decisions given by courts and arbitrators.¹¹⁶

The CISG and the ICC’s 2020 FMC require that not only the third party but also the main party must be exempt under the paragraph. Therefore, the paragraph seems to set a strict rule for this exemption.¹¹⁷ When a third party is exempt from its failure, the main party cannot be excused *vis-à-vis* the fact that he is under a separate obligation to avoid or overcome the impediment.¹¹⁸ When a case is related to the failure of the third party, how the exemption for non-performance by the parties of the main contract cannot be available requires attention. After the bank of Russia had gone bankrupt, the buyer did not perform an advance payment as a contractual obligation. After the respondent claimed that the opposite party should have been liable because he did not have the official license of the bank of Russia, the tribunal rejected his argument by stating that the respondent should have foreseen that it was necessary to have a license to perform the contract. In sum, the tribunal did not recognize the third party failure, which was not included in the list of *force majeure* events in the contract, as a reason for exemption from liability provided *force majeure* events in the contract as grounds from exemption from liability.¹¹⁹

COVID-19 and its impacts on the economy are more enormous than has been expected. It has created a domino effect in every aspect of trade and

¹¹² Tallon (n 29) 584 (emphasis added).

¹¹³ Schwenzer, ‘Article 79’ (n 29) para 34, Enderlein and Maskow (n 29) 326–7.

¹¹⁴ Tallon (n 29) 585.

¹¹⁵ Bruno Zeller, *Damages under the Convention for the International Sale of Goods* (2nd edn, Oceana Publications 2009) 176, *Germany 24 March 1999 Supreme Court* available at <<http://cisgw3.law.pace.edu/cases/990324g1.html>> accessed 12 March 2020.

¹¹⁶ Joseph Lookofsky, ‘The 1980 United Nations Convention on Contracts for the International Sale of Goods’, in J. Herbotsand R. Blanpain (eds), *International Encyclopedia of Laws, Contracts* (Suppl. 29, Kluwer Law International 2000) 165.

¹¹⁷ Liu (n 29) 527, Cf Enderlein and Maskow (n 29) 527.

¹¹⁸ Alejandro M. Garro, ‘Exemption of liability for damages: Comparison between provisions of the CISG (Art. 79) and the counterpart provisions of the UNIDROIT Principles (Art. 7.1.7)’, in Felemegas (ed.), *An International Approach to the Interpretation of the United Nations Convention on Contracts for the International Sale of Goods (1980) as Uniform Sales Law*, (Cambridge University Press, 2007) 293.

¹¹⁹ Case No 96/1998 decision dated 24 November 1998. See M. G. Rozenberg, *Practice of the International Commercial Arbitration Court: Scientific-Practical Commentary* (International Center of Financial-Economic Development, 1998) pp. 92–3.

business. 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.¹²⁰ The supply chains have been broken, which has affected all contracts around the world. In our opinion, there will be a lot of *force majeure* applications due to a third party's non-performance. These claims will be examined on the ground to determine if the third party's situation rests on *force majeure*; then the contractual party's non-performance will be assessed to find out if he or she could have avoided the impact of this third party non-performance and could have foreseen the impediment; there will also be a considerable amount of *force majeure* confirmation based on a third party's non-performance.

VIII. Conclusion

There is always the possibility of a hindrance that prevents the performance of an obligation undertaken by a contract. As a consequence of such a hindrance after the conclusion of a contract, non-performance may occur. In such cases, a *force majeure* doctrine that covers events such as wars, State interventions, acts of God, and the like appeals to an excuse for the party who fails to perform. After the spread of COVID-19 around the world and its huge impact causing unique challenges in international trade, the applicability of *force majeure* clauses for a party who fails to perform due to COVID-19 has drawn the attention of lawyers and the contractual parties of international trade.

COVID-19 is far more contagious compared to other viruses, such as SARS, Middle East Respiratory Syndrome, or Ebola, which have previously spread and affected the whole world in an unpredictable way. The world has not experienced such a destructive event recently, and we believe that no one could have foreseen either the duration of its existence or its effects on every level of business, economy, health, and other areas. This situation will cause the process to be unpredictable to dispute the resolution part. Although arbitral tribunals previously have dealt with several cases regarding epidemics, such as the bird flu and SARS, COVID-19 has affected things in the world on a different level; hence, it is crucial to predict the arbitral tribunals' attitudes towards *force majeure* events claimed due to COVID-19.

Whether COVID-19 triggers *force majeure* clauses depends upon the wording of the parties' contract, according to which the parties might have agreed to cover epidemic or pandemic as a *force majeure* event. When examining the CISG, the PICC, and the ICC's 2020 FMC, it is possible to claim *force majeure* because COVID-19 can be deemed to be an act of God, and the harsh measures imposed by governments to deal with COVID-19 are an impediment within the sphere of *force majeure*.

¹²⁰ United Nations Industrial Development Organization, 'Managing COVID-19: How the pandemic disrupts global value chains' (World Economic Forum, 27 April 2020) <<https://www.weforum.org/agenda/2020/04/covid-19-pandemic-disrupts-global-value-chains/>> accessed 22 September 2020.

However, to apply the *force majeure* clause, it is also necessary that the event must be unforeseeable and unavoidable or insurmountable. It is not possible to determine a specific time for foreseeability of COVID-19 because each dispute has special characteristics. Also, it is problematic to decide if a party could have avoided the impacts of COVID-19. Yet this article argues that, whether the occurrence of COVID-19 or its impact is foreseeable or avoidable for the parties, its adverse effects are being felt more and more in all areas of society and the world. In our view, the tribunals might take a case by case approach for COVID-19-related *force majeure* claims, excluding, though, certain provisions in the disputing parties' agreements such as specific events, notices, or termination requirements.