# COVID-19 in the Context of the CISG: Reconsidering the Concept of Hardship and Force Majeure


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## 1 Introduction

In the year 2020, no matter deserved more discussion than COVID-19, a name given to a newly discovered strain of coronavirus. On 11 March 2020, the World Health Organization declared COVID-19 as a 'pandemic'.[1] As of 18 January 2021, there have been 93,805,612 cases worldwide with recorded 2,026,093 deaths.[2] Different countries adopt different measures in an attempt to contain and combat the spread of

[1]World Health Organisation (2020a).
[2]World Health Organisation (2020b).

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this deadly virus, including imposing city lockdown, banning international travel, demanding quarantine, etc. These measures either directly or indirectly hinder and negatively impact on the international trade of goods. For example, on 26 May 2020, six crew members on board a livestock carrier *Al Kuwait* was found to have contracted the coronavirus. They were sent to the hotel quarantine, while the remaining 42 crew members had to stay on board and had to undergo health checks.[3] This caused significant delay to the carriage of 56,000 sheep valued at US$12 million.[4] *Al Kuwait* was only allowed to leave Western Australia in mid-June 2020.[5] This is just one of the examples of the nature of the hindrance caused by COVID-19. As the year 2020 marks the 40th anniversary of the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (CISG), it is hence a good opportunity to examine the concept of hardship and force majeure and how such concept is applicable in the context of the current pandemic situation. In this article, the authors argue that in reality, it is hard for one of the parties to an international sale transaction governed by the CISG to attempt to invoke the concept of hardship and force majeure to its advantage in light of the current pandemic situation. In doing so, in Sect. 2 of this article, the authors will outline the concept of hardship and force majeure, as in Article 79 of the CISG. Then Sect. 3 of this work will involve the authors' attempt at applying such understanding of the concept to different scenarios involving hindrances or difficulties caused by the COVID-19 situation. Afterwards, in Sect. 4, the inadequacy of the CISG to protect the contracting parties adversely affected by COVID-19 will be highlighted with suggestions on how the parties may protect themselves by the use of the force majeure clause in their contract.

## 2 Force Majeure and Hardship in the Context of Article 79 of the CISG

From the outset, it must be noted that the terms 'force majeure' and 'hardship' are used here only as convenient references since Article 79 of the CISG does not contain these terms. Article 79 lays down exemptions. However, as per Article 79 (5), a breaching party is only exempted from liability for damages. Other remedies remain available to the innocent party.[6] To invoke this exemption, of course, the

[3] Laschon et al. (2020).

[4] Feld (2020).

[5] AAP (2020).

[6] These remedies include the right for performance suspension as per Article 71, the right for price reduction as per Article 50, the right to avoid the contract as per Article 48, 64, or 73, the right to claim interest as per Article 78, and the right to claim for expenses used in goods preservation as per Articles 85 and 86. CISG-AC Opinion No. 20 (2020), para 9.1.

breaching party needs to prove that its situation falls within the ambit of Article 79 (1), which provides:

> 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 problem is no definition of the term 'impediment' is provided in the CISG. An academic commentator suggested that any interpretation of this word must be done within the context of the CISG itself without any resort to similar notions such as force majeure or frustration used in the context of domestic laws.[7] All he could do was to proffer a wide definition of the term that it 'describes an objective outside force that interferes with the performance of the contract. . .'[8] In other words, this term refers to 'circumstances of the external sphere which also encompasses the object of the obligation'.[9] While there might have been some doubts whether the term 'impediment' encompasses 'hardship', since 2007, the CISG Advisory Council has opined that it does.[10] It came to reiterate this again in early 2020.[11] While any opinion rendered by the CISG Advisory Council has no binding legal effect, it is authoritative and deserves to be respected.[12] From the opinion, it appears that any mounted difficulty in performance from what was perceived at the time of the contract conclusion alone will not suffice to constitute hardship. Instead, this notion connotes the situation when 'the performance of the contract has become excessively onerous or if the utility of performance has considerably decreased, or if the equilibrium of the contract has been fundamentally altered'.[13] To determine whether the increasing difficulty in performance amounts to such hardship or not, the CISG Advisory Council further laid down some broad criteria, which include:

(a) whether the risk of a change of circumstances was assumed by either party;
(b) whether the contract is of a speculative nature;
(c) whether and to what extent there have been previous market fluctuations;
(d) the duration of the contract;
(e) whether the seller has obtained the goods from its own supplier;
(f) whether either party has hedged against market changes.[14]

As shall be analysed below, any attempt to apply one or more of these criteria to prove that the COVID-19 situation or any measure to prevent the spread or flatten the curve leads to hardship is likely to be an uphill one. Indeed, COVID-19 and any

[7] Zeller (2018) paras 12.23–12.28.

[8] *Ibid.,* para 12.30.

[9] Schwenzer (2016), p. 1133.

[10] CISG-AC Advisory Opinion No. 7 (2007), paras 26–40.

[11] See in general CISG-AC Advisory Opinion No.20 (2020).

[12] Sooksripaisarnkit and Garimella (2019), para 1.07.

[13] CISG-AC Advisory Opinion No.20 (2020), para 4.2.

[14] *Ibid.,* Black letter text 7.

preventive measure strike at the heart of the notion 'impediment' in the CISG, especially on the point of foreseeability. Situations in many countries around the globe have reflected the fluctuating nature of this pandemic. While initial restrictions may have proved to be successful in flattening the curve, there is always a possibility of a second wave or even (in some countries) a third wave, which necessitates re-introduction of restrictive measures. This brings in further question. In the unlikely situation that the breaching party can successfully prove the impediment, as per Article 79(3), the exemption is only effective so long as the impediment exists. How should one draw the line as to when such impediment is taken to disappear? With global supply chains and manufacturing operations in different countries, but with different degrees of success in controlling the spread of COVID-19 in different countries, any evaluation whether the situation falls within the ambit of hardship or impediment is even more complicated.

Within the system of global supply chains, the language of Article 79(2) of the CISG must also be borne in mind:

> 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.

This provision makes it difficult for both the party itself and the third party whom he engaged to invoke as they need to pass the criteria set out in Article 79(1) to avail of the exemption. Yet it is difficult to identify the third person falling within the ambit of this Article 79(2). The CISG Advisory Council suggested that a distinction has to be made between, on the one hand, suppliers or subcontractors that do not fall within the ambit of this provision and, on the other hand, the third person whom the seller engaged *independently* 'to perform all or part of the contract directly to the buyer'.[15] Whether the seller can bring himself within the scope of Article 79(1) for the act of the suppliers or subcontractors is a separate question.[16] Arguably, Article 79(2) creates a fine distinction that is difficult to draw in practice.

Indeed, Article 79 as a whole is poorly drafted. As Zeller cited, one of the commentators described this provision as 'the convention's least successful part of the half-century of work towards international uniformity'.[17] An analysis of the substantive flaws of this provision can be the subject of a separate article on its own, and it is beyond the scope of this work. What this article seeks to demonstrate in the next part is that Article 79 has also proved to be the least successful provision in protecting parties to international sales transactions against liabilities for damages amidst financial difficulties they are facing in the climate of COVID-19.

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[15]CISG-AC Advisory Opinion No. 7 (2007), paras 18 and 19.

[16]*Ibid.,* 18.

[17]Zeller (2018), para 12.23.

## 3 Applying Article 79 of the CISG in the COVID-19 Situations

Perhaps how hard it is to prove hardship in the context of Article 79 can be observed from the experience of the CISG Advisory Council itself. In producing an opinion and suggesting criteria to determine hardship, which the authors outlined above, the CISG Advisory Council analysed ten cases rendered by courts across seven States Parties.[18] Among these ten cases, only in one case that the court held that the hardship was established in accordance with Article 79. That case was *Scafom International BV v Lorraine Tubes S.A.S*.[19] This case concerned a buyer from the Netherlands and a seller from France. The contract was about the sale of steel tubes. The contract contained no price adaptation clauses. Before the delivery, there was an increase by 70% in the price of the steel. The seller sought to negotiate the contract. The buyer refused and instead insisted on contract performance as per the originally agreed price. It was held by the court in Belgium that the unforeseen increase of price was sufficient to amount to hardship within the context of Article 79, and in this instance the buyer was ordered to re-negotiate the contract with the seller.

While this case appeared to suggest that an increase in price of 70% is sufficient to establish hardship, the court in Germany took a different approach in case number 1 U 167/95.[20] The case involved a buyer from the United Kingdom and a seller from Germany. The buyer agreed to purchase 18,000 kg of iron molybdenum from the seller at the price of US$9.70 per kilogram. The contract contained a force majeure clause, which could exempt the seller's liability due to defined force majeure events. Later, the seller informed the buyer that the suppliers charged a higher price for the iron molybdenum and they could only supply the lower quality consignment. After negotiations, the buyer accepted the change. The delivery was delayed for over three months, and the buyer had to find replacement for the supply of iron molybdenum at the price of US$30 per kilogram. The buyer sought damages against the seller. The court held that the buyer was entitled to damages. The seller was not allowed to invoke and rely on Article 79. In other words, hardship was not established in this case even with the increase of the price by 300%. This case was in stark contradiction to the hardship that was so successfully established in the *Scafom* case mentioned above.

These conflicting judgments indicated the fact that there is no objective standard for the application of Article 79. Even if those criteria laid down in the CISG Advisory Council may be taken as an attempt to establish an objective standard, as shall be discussed below, in fact these criteria are hard to apply in practice. Neither is there any detailed guidance on how each of these factors is to be evaluated. This is not to mention that the criteria laid down by the CISG Advisory Council is by no

[18] See Annex I CISG-AC Opinion No 20 (2020).

[19] *Scafom International BV v Lorraine Tubes S.A.S* (Hof van Cassatie, 19 June 2009).

[20] Case number 1 U 167/95 (Oberlandesgericht Hamburg, 28 February 1997).

means exhaustive. Judges in different countries may introduce other criteria. Judges from different jurisdictions may develop their own interpretation or place different weight on each criterion, which will make it hard to glean any rationale in each case for the decision reached.

Difficulties of applying Article 79 become more obvious when one considers the context of the COVID-19 situation. During this time of the global pandemic, different countries have adopted different measures in an attempt to control the spread of the virus. While some countries may downplay the pandemic, most of the developed countries have chosen to impose a stringent lockdown to prevent new waves of cases. Taking Australia as an example, the government of Western Australia declared the state of emergency on 15 March 2020 and laid down measures such as prohibiting non-essential indoor and outdoor gatherings, imposing a two-week self-isolation for those arriving at Western Australia and preventing international cruise ships from docking.[21] The Federal Government of Australia also imposed export restrictions on essential equipment, namely 'disposable face masks, disposable gloves, disposable gowns, goggles, glasses or eye visors, alcohol wipes, hand sanitizers'.[22] In contrast, Sweden chose not to impose a full-scale lockdown during this pandemic. Its strategy is different from that of Australia and indeed other Nordic nations. As put in the media:

> Sweden has largely relied on voluntary social distancing guidelines since the start of the pandemic, including working from home where possible and avoiding public transport. There's also been a ban on gatherings of more than 50 people, restrictions on visiting care homes, and a shift to table-only service in bars and restaurants. The government has repeatedly described the pandemic as 'a marathon not a sprint', arguing that its measures are designed to last in the long term.[23]

While it is not within the scope of this work to assess the efficiency of the various approaches to contain the virus, an observation that can be made is that these different approaches may exert varying degrees of impacts on international sales transactions. Indeed, one fundamental question is: Is the pandemic itself a sufficient ground for the parties to establish hardship under Article 79? To answer this question, it is submitted that at least there are two points that need to be considered.

First, in reality, it is fact sensitive depending on whether the parties to the international sale contract are adversely affected by the measures imposed by the relevant countries involved. For example, in a contract for the sale of disposable face masks between a buyer in Thailand and a manufacturer in Australia, restrictions imposed by the Federal Government in Australia would mean that the seller will not be able to perform the contract. In this kind of straightforward situation, it is reasonable to suggest that the seller most likely can establish hardship pursuant to Article 79. Likewise, if the manufacturer of disposable face masks needs at least 100 workers to operate, it may find itself in difficulties due to the restrictions on the

[21]The Western Australian Government (2020).

[22]Department of Home Affairs (2020).

[23]Savage (2020).

number of workers that could gather at the same location.[24] Alternatively, if such manufacturer is not located in a country where such restrictions are imposed, then it cannot rely on the Article 79 exemption. This seems to be simple enough. However, experiences have suggested that different countries resorted to different levels of restrictions at different times, depending on how serious the spread of the virus was in a particular moment. Such caused unpredictable or arguable consequences in terms of establishing hardship under Article 79.

Another equally important point also is the timing of the contract formation. If the contract was concluded by the parties before the pandemic, the party that became adversely affected could argue that the pandemic was not reasonably expected. The more problematic part lies in the situation where the contract was concluded after the onset of the pandemic. For such contract concluded, it is likely that the parties will be taken to foresee or reasonably expect that the pandemic can affect the performance of their contract. In such case, neither party will be able to rely on Article 79 to discharge its liability in damages. This proposition is supported by an arbitration case decided by the China International Economic and Trade Commission (CIETAC) on 5 March 2005.[25] The case involved a contract concluded on 20 June 2003. During this period, there was an outbreak of the Severe Acute Respiratory Syndrome (SARS), which is described as 'a viral respiratory illness caused by a coronavirus'.[26] During this outbreak, 8,098 people were infected and 774 died.[27] While the infection rate of the SARS outbreak was much lower than what we have seen now in respect of COVID-19, the overall mortality rate from the SARS was around 15%.[28] Back to the fact of the case before the CIETAC, the contract in this case involved a buyer from the Netherlands and a seller from China for the sale of 445 tons of L-lysine. The seller only delivered 289 tons, so the buyer cancelled the undelivered L-lysine and claimed for the difference between the contract price and the market price, along with interest. The seller relied on Article 79 and pleaded that non-delivery was due to the SARS outbreak. Hence, it should not be liable for the price difference. The tribunal held that the seller was liable to pay damages. It refused to apply Article 79 in this case since the contract was concluded two months after the start of the SARS outbreak, and the seller should have been reasonably expected to take this outbreak into consideration at the time the contract was concluded. Therefore, the tribunal held that the situation did not fall within the ambit of Article 79(1).

[24] Assuming the manufacturer's business does not fall within the exemption of essential business that is allowed to operate during the lockdown.

[25] *L-Lysine case* (2005).

[26] Centers for Disease Control and Prevention (2004).

[27] *Ibid.*

[28] World Health Organisation (2003).

Indeed, the reasonable expectation test under Article 79(1) may cause further complications for the parties in the time of this present pandemic. At the moment, it is inevitable to see new waves of infections globally. Using Singapore as an example, the first confirmed case there was on 23 January 2020.[29] The outbreak appeared to be under control until the second wave of cases happened in March, and the Singaporean government imposed a lockdown, which was referred to as 'circuit breaker', from 7 April 2020 to 1 June 2020. Starting from 2 June 2020, the lockdown was gradually relaxed, and the outbreak appeared to be under control again. The question is whether the same reasonable expectation test applies at different stages of the pandemic. Suppose an international sale contract was concluded with a Singaporean supplier prior to 7 April 2020, would it be reasonable to expect that the supplier could foresee the subsequent lockdown, which would adversely affect the supplier's ability to perform? As no one will be able to predict whether or not there will be a second 'circuit breaker' in Singapore, likewise it would not be reasonable to say that the Singaporean supplier could foresee the first 'circuit breaker'. If the rule laid down in the CIETAC arbitration case mentioned above is strictly applied, then the Singaporean supplier would not be able to rely on Article 79 at all as the contract was concluded after the pandemic. In this regard, the reasonable expectation test laid down in Article 79(1) may prevent the party that has been adversely affected by the COVID-19 situation to seek exemption. This raises doubt whether this Article 79 can successfully serve the purpose of protecting the parties from impacts of impediment.

To fully comprehend the difficulties from the application of Article 79, the authors will attempt to apply the criteria to determine hardship laid down by the CISG Advisory Council using the scenario taken from the *Al Kuwait* incident mentioned earlier. Indeed, ever since the pandemic, there have been reported incidents of cargo ships trapped at sea. While in most situations goods were allowed to load or unload, it was estimated as of 2 August 2020 that around 300,000 cargo ship workers have not been able to leave cargo ships.[30]

In the *Al Kuwait* scenario, the ship arrived at the Port of Fremantle on 22 May 2020 to load 56,000 sheep and 420 cattle. Upon arrival, several crew members were reported to be unwell. Later on, 21 crew members were tested positive for COVID-19. As a result, crew members were put in quarantine and the loading was delayed.[31] In March 2020, a ban was imposed by the Australian government for the export of sheep between 1 June 2020 to 14 September 2020 to prevent sheep dying on vessels due to high temperature and hot weather.[32] In this situation, assuming there was a contract for the sale of sheep between a buyer from Kuwait and a seller from Australia with the choice of law clause stipulating the CISG and assuming further that the delivery of the sheep was significantly delayed due to the quarantine and the

[29] Goh (2020).

[30] Jankowicz (2020).

[31] Laschon and Menagh (2020).

[32] *Ibid.*

export ban and the buyer decided to claim damages, can the seller rely on Article 79 to discharge it from liability for damages?[33]

To begin with, as mentioned earlier, Article 79(1) only allows the party that can satisfy the reasonable expectation test to invoke the exemption here. The timing of the contract becomes crucial. If the contract was concluded pre-pandemic, it is highly likely that the seller would not be taken as having the pandemic and the export ban in mind at the relevant time. However, any contract concluded after the outbreak raises more complicated question. If the contract was concluded in February 2020, the seller may have been taken as having the pandemic in consideration even though during that time the number of infected cases in Australia was relatively low. Since the export ban was only introduced in March 2020, the seller was unlikely to be taken to foresee this. Any reasonable expectation of export ban could only be applied to any contract concluded after March 2020.

Coming to each criterion laid down by the CISG Advisory Council, taking the first one, whether either party assumed the risk of a change of circumstances, this criterion was explained in the following manner:

> . . .the parties may allocate in their contract the risk for a fundamental change of circumstances. Contract interpretation through Article 8 CISG is paramount in determining whether a party may rely on hardship or not. The choice of a given Incoterms rule places the risk as regards transport, export or import control, tariffs, etc on one of the parties and thus shows that such party has accepted certain risks under the contract. Prior practices between the parties or international usages under Article 9 CISG, may integrate the contract in this matter.[34]

This is unlikely to be applicable to the scenario under consideration. If the disputed contract was formed before the start of the pandemic, it is highly unlikely that the parties could successfully allocate the risks either by contract or conduct since the current pandemic was not in the parties' contemplation at the relevant time. If the disputed contract was formed after the pandemic, it is then highly likely that the parties would be found to take the pandemic into consideration, and thus it is hard for either party to rely on Article 79.

The second criterion is whether the contract is of a speculative nature. The CISG Advisory Council explained that '[i]f the contract is highly speculative, a party may be presumed to have assumed the risk involved in the transaction'.[35] The CISG Advisory Council relied on the case involving the iron molybdenum mentioned above in explaining that the seller there could not depend on Article 79 to exempt its liability for damages due to the fact that the contract was highly speculative. Hence, the threshold to establish hardship was high in that case.[36] This criterion is hard to

[33] In the *Al Kuwait* incident itself, the Australian government granted an exemption to the *Al Kuwait* and the vessel departed from Fremantle with the sheep on 18 June 2020. The first half of the incident is taken here as an example to assess the application of Article 79. See Department of Agriculture, Water, and the Environment (2020).

[34] CISG-AC Advisory Opinion No. 20 (2020), para 7.6.

[35] *Ibid.,* para 7.7.

[36] *Ibid.*

apply in the context of the scenario under discussion here for at least two reasons. First, there is no objective standard to determine whether a transaction is speculative in nature. Applying this to the scenario in the *Al Kuwait* case, there is no definite answer whether a contract for the sale of sheep can be regarded as speculative. Superficially, it does not seem to be. Second, and more importantly, there can be no objective standard that can be used to judge whether the threshold (to establish hardship in Article 79) is proportionate to the level of speculation. In the above-mentioned case on the iron-molybdenum, an increase in price by 300% was not sufficient to establish hardship. There is no definite answer of how high the threshold would be set for the contract of sale of sheep.

Turning to the third criterion, namely previous market fluctuations, the CISG Advisory Council explained that '[c]ourts and arbitral tribunals interpreting Article 79(1) CISG have been very reluctant to exempt a party affected by fluctuations of prices. As such, typical fluctuations of price in the commodity trade generally will not give rise to an acknowledgement of hardship'.[37] The CISG Advisory Council also criticised the *Scafom* case for setting a bad example in allowing the seller to be discharged from liability with a low threshold of value alteration, namely an increase in price by 70%.[38] Applying this reasoning, it is suggested that the seller would have a good chance to establish hardship if the increase in price is at least more than 70%. Even if the seller faces a higher than 70% price alteration, it remains uncertain that the seller can rely on this criterion to establish hardship, considering there is no definite answer as to how the threshold would be set in any particular situation.

The fourth criterion to be considered is the duration of the contract. The CISG Advisory Council explained this point:

> The time factor causes that hardship events are more likely to occur in some term contracts. However, in principle, the same standard should apply irrespective of the duration of contracts.
>
> A lower threshold of alteration in the parties' performance may only apply in contracts of extended duration if the disadvantaged party's financial ruin is imminent. In this regard, the point in time when the hardship even takes place is relevant to calculate the value of the outstanding performances with respect to the total contract value. . .[39]

An example was provided by the CISG Advisory Council. Assuming in the case of a ten-year contract the parties forecasted the value at 100% and in the fifth year of the contract, there came a hardship event. As a result, the value of the contract came to be reduced by 30%. In this kind of situation, the CISG Advisory Council suggested that 'the adjudicator should consider the remaining 70% forecasted value for the next five years while assessing whether the parties' performances have suffered a fundamental disequilibrium'.[40] While this criterion may provide

[37] *Ibid.,* 7.9.

[38] *Ibid.*

[39] *Ibid.,* paras 7.12–7.13.

[40] *Ibid.,* para 7.13.

good reference in the case of long-term contracts, it is not applicable to common sales and purchase agreements, which are usually agreed on a short-term basis.

The fifth criterion is whether the seller has obtained the goods from its own supplier. The CISG Advisory Council explained this point:

> All circumstances affecting performance should be considered in determining whether a party might be exempted due to hardship. In some instances, the seller may have bought the goods or otherwise secured them from its supplier before the hardship event takes place. The price might have considerably and unforeseeably increased after that time, yet the contract might not be speculative in nature, however, if the seller receives the goods before the occurrence of the hardship event, the seller may not withhold delivery and resale the goods for a larger profit to a second buyer.[41]

In other words, in addition to the timing of contract formation, the timing of delivery is also important for the consideration of the seller's hardship. While this factor is clear and self-explanatory, it is likely to be inapplicable to most of the detrimental consequences of the COVID-19 pandemic since the situation mostly causes either a delay in delivery or a non-delivery. Thus, the timing of delivery is not a factor that needs to be considered.

The last non-exhaustive criterion is whether either party has hedged against market changes. On this point, the CISG Advisory Opinion held:

> Whether any of the parties has hedged or secured against changes in the market should be considered in assessing the existence of hardship. For example, if a seller has bought insurance against hardship, the amount of such insurance may be considered in determining whether the seller can overcome the impediment or not.[42]

While at first glance this criterion is logical, it may not be a feasible assessment in practice. Depending on the amount of the claim, the insurer may take a considerably long time to determine whether a claim shall be determined or not. To take the case in the United Kingdom, one of the largest international insurance hubs, as an example, in *Sprung v Royal Insurance (UK) Ltd*,[43] an insurance claim payment was delayed for more than three and a half years, and eventually the assured could not resume its business. So the payment of claim may not happen before the litigation. Thus, it may be impractical to assess hardship based on whether insurance was purchased against hardship since there is always a possibility that the insurer may not entertain the claim.

Lastly, for a situation similar to *Al Kuwait*, the seller may try to rely on Article 79 (2) to discharge its liability for damages. Article 79(2) requires both the seller and the third party, in this instance the carrier, to pass the criteria in Article 79(1). This becomes circular. What the authors discussed so far demonstrated difficulties for the seller to establish hardship under Article 79(1). So there is no need to consider any further on the question of whether the carrier would be able to establish hardship

[41] *Ibid.,* para 7.14.

[42] *Ibid.,* para 7.15.

[43] [1999] 1 Lloyd's Rep. IR 116.

again as the same difficulties apply to the carrier and it is highly unlikely the carrier will pass the criteria.

To sum up, based on the above analysis, Article 79 is hardly applicable to the current COVID-19 situations. While the CISG Advisory Council has published an opinion as to how hardship can be established, its significance to the current pandemic situation is not much. Most of the criteria are not clearly and objectively defined. In this regard, the parties to international sales transactions should aim to protect their interests by including clear force majeure clauses and also other related clauses in their contract. The last part of this work will provide guidance on how the parties should take these clauses into consideration.

## 4 Conclusion: Force Majeure and Other Contractual Clauses in the Context of COVID-19

In the previous parts, the authors offered an analysis as to the reasons why Article 79 is likely to be of no avail to the parties to international sales transactions that have faced or are facing difficulties due to the impact of the COVID-19 pandemic. In this part, the authors will give brief guidance on how the parties can protect themselves by inserting essential clauses in their international sales contract. The first and foremost is, of course, the force majeure clause. Different organisations have updated new force majeure and hardship clauses in light of the current pandemic. Taking the International Chamber of Commerce (ICC) as an example, it has created both long and short versions for force majeure clauses. In both versions, the term 'force majeure' is defined as follows:

> *Force majeure* means the occurrence of an event or circumstance that prevents or impedes a party from performing one or more of its contractual obligations under the contract, if and to the extent that that party proves:
>
> [a]. that such impediment is beyond its reasonable control; and
> [b]. that it could not reasonably have 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.[44]

In the long version of the clause, the ICC also provides a list of presumed events:

> (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 government

[44]The International Chamber of Commerce (2020).

order, expropriation, seizures 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.[45]

These listed presumed events may indicate the parties' mutual agreement on the scope of impediment. In this sense, the ICC clauses may be better than Article 79 of the CISG in terms of certainty and clarity. Nevertheless, the ICC advised that even though the disputed event falls within one of the presumed events, in relying on the ICC's force majeure clause, the party still needs to prove that the event could not reasonably be avoided or overcome.[46] While the expression 'plague, pandemic. . .' may already be sufficient to cover the current COVID-19 situation, the parties may want to discuss and decide whether the pandemic-related events, such as the lockdown and the export ban, should be explicitly included in the list. Unless otherwise stipulated in the contract, the party that relies on the ICC force majeure clauses will still be required to prove that the effect of the impediment is not reasonably avoidable.

The ICC has created another clause, namely the hardship clause, to provide a more flexible approach for hardship situations. Under the said clause, the term 'hardship' is defined as follows:

Notwithstanding paragraph 1 of this Clause, where a party to a contract provides that:

(a) the continued performance of its contractual duties has become excessively onerous due to an event beyond its reasonable control which it could not reasonably have been expected to have taken into account at the time of the conclusion of the contract; and
(b) it could not reasonably have avoided or overcome the event or its consequences, the parties are bound, within a reasonable time of the invocation of this Clause, to negotiate alternative contractual terms which reasonably allow to overcome the consequences of the event.[47]

Similar to the force majeure clauses, the ICC hardship clause also requires the party that wants to rely on the clause to prove that the disputed event is beyond reasonable expectation and that it is not reasonably avoidable. Different from the ICC force majeure clause, however, the ICC hardship clause provides several options for the parties when hardship is proved. First, instead of a direct discharge from liabilities to perform the contract and pay damages, the party that seeks to rely on the hardship clause is required to re-negotiate contractual terms to overcome the proved hardship.

If the parties fail to agree on the alternative contractual terms under the ICC hardship clause, there are further three options for the parties to choose. First, the

[45] *Ibid.*
[46] *Ibid.*
[47] *Ibid.*

party that seeks to rely on the hardship clause can terminate the contract. Second, either party can invite a judge or an arbitrator to adapt or bring the agreement to an end. If the said party decides to adapt the contract, then the judge or arbitrator can ask the parties to propose alternative contractual terms for re-negotiation. For the third option, either party can directly seek a declaration from a judge or an arbitrator to terminate the contract.[48] While the first and third options are similar in consequence, the second option provides an alternative for the party to seek assistance from legal professionals to re-negotiate the contract. In this regard, it may be reasonable to observe that the ICC hardship clause encourages the parties to settle their dispute by cooperation instead of litigation, which may be a more favourable approach as it may help to preserve the business relationship between the parties.

To conclude, the parties to an international sales transaction should be aware of the fact that Article 79 of the CISG may not be sufficient to protect them from impediment and hardship. Standard contract terms, which are drafted by authoritative international organisations, can be used to protect their interests in this difficult time of the COVID-19 pandemic. The parties, however, should not treat these standard contractual clauses as providing complete solution to their difficulties. The parties are encouraged to seek assistance from legal professionals and formulate their own force majeure clauses (or any other related clauses) that can meet their specific needs in this unprecedented time.

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