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CONDITIONS FOR EXEMPTION FROM THE LIABILITY IN THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS IN ARTICLE 79

YUNUS EMRE AY¹

ABSTRACT

An international sales contract imposes obligations on the parties between the buyer and the seller. They must perform their contractual obligations on time. If one party fails to perform its contractual obligations as required by the contract, the defaulting party must cover the damages of the other party. However, if the defaulting party claims and proves his force majeure claim for his non-performance of his contractual duty as an obstruction, he may avoid his responsibility based on force majeure. “No fault no liability” is a universally accepted legal principle since old times to invoke exemption of liability. It has been subject to numerous legal disputes before national courts and arbitral tribunals. However, its scope varies on the national legal systems and international conventions related to international private law. Therefore, The United Nations Convention on Contracts for the International Sale of Goods (abbreviated as CISG) Article 79 attempts to draw the line of releasing the debtor from liability for non-fulfillment of the contract of sale conditions

in the international sales contract in accordance with international commercial life. Pursuant to CISG Article 79, the three elements of conditions of liability from exemption are impediments beyond the control of the parties, unforeseeability, and unavailability of impediments. These three elements must be the causation of non-performance and the defaulting party has an obligation to inform the other party properly in detail. The purpose of this paper is to analyse the exemption conditions of the liability of the debtor in CISG Article 79. It is very essential to analyse this provision to assess the non-liability exemption claim of the defaulting party because if there are non-liability conditions set by CISG Article 79, there is no breach of the international sales contract. Doctrinal research methods shall be enjoyed in this research.

KEY WORDS

Force Majeure, Unforeseeable changed circumstances, impediment, unavailability, Act of God, unforeseeability

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A. INTRODUCTION

Unforeseeable circumstances have been subject to legal disputes throughout history. It is also possible to face such disputes in international sales law. Natural disasters and changes in economic and political factors may significantly affect the very basis of the bargain between the parties. There may be an earthquake, flood, landslide, or a civil war in one of the production centers or countries, forcing the producer to resort to countries with extreme production costs; import or export bans may obstruct the envisaged flow of the goods in the country of one of the parties; or sudden price fluctuations that did not seem possible at the formation or conclusion of the contract of sale make the seller's performance unduly burdensome or devalue performance of the contract of sale for the buyer. The term "*pacta sunt servanda*" simply puts the parties the obligation to perform the duties of the parties. However, "*impossibilium nulla est obligatio*" has been a recognized principle since the old Roman law period. It means that "*there is no obligation to perform impossible things.*"²

Article 79(1) CISG is the starting point of exemption from liability in international sales law. In Article 79(1) CISG, a party is not responsible for the failure of the contractual obligations if there are three conditions respectively; impediment beyond the control of one or both of the parties, unforeseeability of the impediment, and unavoidability of the impediment. Article 79(2) CISG is a sentence for conflicts involving third parties. Article 79(3) CISG restricts the duration of the exemption to the duration of the existence of the impediment. In Article

79(4) CISG, the obligor party must give information to the other party within a reasonable time when the exemption conditions are met. Article 79(5) CISG points to the exemption from claims damages as the only legal consequence of this provision.³ However, it should be noted that the parties are entitled to exclude partially or wholly the scope of the applicable law as the principle of party autonomy in Article 6 CISG because party autonomy is a very basic principle in the field of private international law. The parties may extend or narrow the scope of the force majeure. For example, sudden inaccessibility to raw material may be clearly added as a legal impediment especially revolving letter of credit relationships in the contract of sale.

B. ELEMENTS OF CONDITIONS OF EXEMPTION FROM THE LIABILITY IN THE CISG

1. LEGAL IMPEDIMENT BEYOND THE CONTROL OF THE PARTIES

The first condition of an impediment is an obstruction beyond the control of the seller. Although a jurist from every legal background has familiar with the term -impediment beyond control-, it can be associated with various concepts like the German -*Unmöglichkeit*- or -*Wegfall der Geschäftsgrundlage*-, the French -*Force Majeure*- or the common law notions of -*doctrine of frustration*- or -*impossibility*- with -*impracticability*- the broader US concept. Given the fact that the concepts have different contents

2 INGBORG SCHWENZER, *Exemption In Case of Force Majeure and Hardship -CISG, PICC, PECL and DCFR-*, *Compra E Venda Internacional De Mercadorias*, Editors: Paulo Nalin, Renata C. Steiner, Luciana Pedrosa Xavier, Curitiba, 2014, pages 365, 366.

3 ANDRE JANSSEN, CHRISTIAN JOHANNES WAHNSCHAFFE, *COVID-19 and International Sale Contracts: Unprecedented Grounds for Exemption or Business as Usual?*, *Uniform Law Review*, 2021, page 3.

in different legal systems, it should be avoided that it is interpreted by each legal background.⁴ The OED(Oxford English Dictionary) defines “impediment” as “something that impedes, hinders, or obstructs” and this definition is not under the effect of local usage.⁵ The most popular examples of impediments are natural disasters, wars, governmental sanctions, military coups, blockades, earthquakes etc. Article 79 CISG does not list it and leaves it open-ended.⁶ The notion behind these examples is the idea of being “beyond the control of traders”. The presence of an impediment that is beyond the party’s control is determined based on trade usages, a contractual allocation of risk, and the typical sphere of control of the party in breach in terms of Article 79 of CISG.⁷ In this way, the impediment is considered an important tool to avoid liability due to a controllable occurrence and prevents the abuse of non-performance of the obligations in the contract of sale.⁸ In principle, the seller has an obligation to bear all risks which originate from his business organization. If the seller suffers from a shortage in his production system due to the fact that key employees have left their position in his company, it should not be considered “beyond his control”. Naturally, it should be emphasized that the seller is also responsible for vicarious liability. The same is also valid for the technical equipment in his production system.⁹

Impediments may be basically assessed into three different groups: (1) Governmental decisions (2) Acts of God (3) Economic Impossibility. However, it may take more different forms than these groups.

A. GOVERNMENTAL DECISIONS

Governmental decisions are taken outside of the control of the parties. The classical examples of governmental decisions are embargoes, currency exchange restrictions, trade wars, import-export bans etc. Sometimes, they have restrictive features on the parties’ freedom of trade or enterprise in some industries. In the *Bulgarian Chamber of Commerce and Industry (Coal case)*, the arbitral tribunal ruled that a prohibition on coal exportation by the Ukrainian government constitutes an impediment in Article 79 CISG. Similarly, *National Oil Company v. Libyan Sun Oil Company* case, the arbitral tribunal ruled that the importation ban of Libyan Oil into the USA was considered a state intervention, outside the control of the parties, and is a reason for force majeure. In *Harriscom Svenska, AB v. Harris Corporation* case, the force majeure clause offers the avoidance liability for non-performance of the contract of sale due to the state intervention. Therefore, if the non-performance occurs due to the governmental decision, the obligor may invoke force

4 YEŞİM MÜRİDE ATAMER, *Availability of Remedies other than Damages in Case of Exemption According to Art. 79 CISG*, Büchler/Müller-Chen(eds.), Private Law, National -Global- Comparative, Bern, 2011, page 86.

5 ISHIDA YASUTOSHI, *CISG Article 79: Exemption of Performance, and Adaptation of Contract Through Interpretation of Reasonableness? Full of Sound And Fury, but Signifying Something*, Pace International Law Review, Vol:30, Issue:2, 2018, page 356.

6 International conventions define exemption from liability in the field of international commercial law such as Hague Visby Rules(1961), Hamburg Rules, and CMR Convention.

7 *Covid-19: Impact on Commercial Contracts – CISG/Publications/Insights/Linkaters*. quoted in YASODA PRIYANKARI WIJERATHNA, KALYANI MALA JAYASEKERA, *Legal Implications of COVID-19: Force Majeure and Contractual Obligations in International Sales of Goods*, 13th International Research Conference General Sir John Kotelawala Defence University, page 64.

8 SELENE GÖZEN, *The Invocation of Force Majeure by Sellers due to Coronavirus in International Sales Contracts under CISG*, LLM Final Thesis, Supervisor: Markus Petsche, Central European University, 2021, page 18.

9 PETER HUBER, ALASTAIR MULLIS, *The CISG A New Textbook for Students and Practitioners*, European Law Publishers, 2007, page 260.

majeure in Article 79 CISG in case of the impediment did not occur at the time of the conclusion of the contract of sale.¹⁰ However, it remains unclear whether State-owned enterprises may invoke exemption from liability since they are part of the government.¹¹

B. ACT OF GOD

Act of God is the general name of natural disasters that may hinder the performance of a contract in legal terminology. The most common examples are earthquakes, plagues, floods, tsunamis, epidemics, volcanic eruptions, etc. For example, an agricultural company that has broad lands in Antalya for cultivation and exportation. This company produces and exports crops from its lands in Antalya to a country in a revolving letter of credit relationship with the buyer. In the contract of sale, the crops which were produced in Antalya are subject to exportation. If there is the high level of aridity in Antalya due to climate change, it may be considered an Act of God taking into consideration agricultural experts report and meteorological reports.

There are different cases related to force majeure invocations based on an 'Act of God'. In an ICC arbitral award, the seller suspended the delivery of goods temporarily because drought triggered a decrease in raw materials in the production stage. Therefore, the seller received a statement from the local Chamber of Commerce that drought is beyond human control and prevents the seller from performing

contractual obligations. Although the force majeure clause did not list drought as a force majeure, the seller is entitled to invoke force majeure in the words of 'natural catastrophes' and 'other circumstances outside the control'.¹² This situation may classify the pandemic as force majeure although it is not covered by any contractual provisions.¹³ Considering the decision, it may be claimed that although a contract of sale does not include specific events for force majeure claims, the courts or arbitral tribunals may consider such events "act of God" or "some other circumstances beyond one's control". In similar, a pandemic may be considered force majeure under the term of the Act of God clause. Although COVID-19 may not be considered force majeure at first sight in terms of CISG, the interpretation of the impediment with reference to international practice may accept it as force majeure. It should be noted that the mere existence of the COVID-19 pandemic does not amount to force majeure solely. The effects of COVID-19 trigger force majeure claims. For example, the measures imposed by governments to combat the COVID-19 pandemic are accepted as a *force majeure* reason.¹⁴

C. ECONOMIC IMPOSSIBILITY

Price stability is an important economic factor for the free market economy for predictability. The contract of sale offers certain benefits to both parties where price stability exists thanks to the predictability. After they conclude a contract of sale, they expect interest to receive at the

10 ZAHEERUDDIN MOHAMMED, *The COVID-19 Pandemic – An Impediment in Performance of Contracts*, *Balkans JETSS*, 2020, Issue:2, page 181.

11 See SCHWENZER, *supra* note 24 at 1137. quoted in ZAHEERUDDIN, p. 181.

12 ICC Case No. 8790/2000, ŞERIFE ESRA KIRAZ/ ESRA YILDIZ ÜSTÜN, *COVID-19 and Force Majeure Clauses: an Examination of Arbitral Tribunal's Awards*, *Uniform Law Review*, Volume:25, Issue:4, 2020, p. 9.

13 KIRAZ/ÜSTÜN, p. 9.

14 KIRAZ/ÜSTÜN, pp. 9-10.

end of the performance of the contract of sale. There is the equilibrium of the contract of sale thanks to the price stability. If economic circumstances change and endanger one party to bear unreasonable costs related to the performance of the contract, the party who bears unreasonable costs may invoke non-liability in Article 79 CISG. The crucial point is to determine the threshold of hardship. It is a very sensitive thing to determine how the performance becomes excessively onerous or when the equilibrium of the contract of sale has been altered.¹⁵ The Comments to Article 6.2.2. of the PICC (Principles of International Commercial Contracts) in its first edition of 1994 recommends that an alteration amounting to at least 50% is a “fundamental” alteration. The second edition of the PICC in 2004 does not recommend any figure.¹⁶ In the *Scaform International* case, the parties had reached an agreement for the sale of steel tubes. The price of steel unexpectedly increased by around 70% in the time between the conclusion of the contract of sale and the delivery of goods. The seller tried to reduce the price in the contract of sale, but the buyer insisted on the delivery of the goods at the agreed price. The Belgian Court of Cassation ruled the judgment as following words:¹⁷

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

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

2. Article 7(1) states that in the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.

Article 7(2) states that questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

Thus, to fill the gaps in a uniform manner adhesion should be sought with the general principles which govern the law of international trade.

Under these principles, as incorporated inter alia in the Unidroit Principles of International Commercial Contracts, the party who invokes changed circumstances that fundamentally disturb the contractual balance [...] is also entitled to claim the renegotiation of the contract. (cfr. Belgian Court of Cassation, 19 June 2009)”

The *Scaform International Case* is a very good example of economic hardship because the parties expected certain mutual interests for the performance of the contractual obligations when the prices were at a certain level at the pre-conclusion and conclusion of the contract of sale on

15 INGBORG SCHWENZER, *Force Majeure and Hardship in International Sales Contracts*, Victoria University of Wellington Law Review, Vol.39, No.4, 2008, page 715.

16 INGBORG SCHWENZER, *Force Majeure and Hardship in International Sales Contracts*, page 716.

17 ROBERTO PIROZZI, *The Effect of Changing Circumstances in International Commercial Contracts: The Scaform Case*, The Vindobona Journal of International Commercial Law and Arbitration, Volume:16, Issue:2, 2012, pages 213, 214. In national legal systems, different price change rates are regarded as the threshold of hardship. See also for more information in some national systems perspectives: MUHAMMAD NABIL AFHAM BIN M FUAD, *The Doctrine of Frustration in Malaysia*, Thammasat Business Law Journal, Vol:11, 2021, pages 7, 8, 9, 10, 11, 12, 13.

the relevant market. After the steel tube price changed suddenly beyond the control of the disadvantaged party, it would need to renegotiate regarding price with the other party. According to *the Scaform International* case, a national court or an arbitral tribunal may apply for a gap-filling rule in CISG Article 7(2) through UNIDROIT principles, the first edition of 1994 PICC (Principles of International Commercial Contracts) or similar rules to determine the economic impossibility.¹⁸

The nature of conditions for exemption from liability is generally claimed by a seller since a seller has more obligations such as production, packaging, delivery, and transportation so on. However, a buyer may claim non-liability conditions based on economic hardship since it can affect the obligation of the making payment. Therefore, economic hardship is a very special non-liability reason than other exemptions from liability reasons.

D. OTHER FORMS

The examples of force majeure are not limited to the above-mentioned categories. Political developments may be considered force majeure. The classical examples are war, revolution, terrorism, riot, civil war, and rebellion.

Moreover, collision, marine accident, and general average may be considered force majeure.

2. UNFORESEEABILITY

The foreseeability criterion should be understood from geographical, historical, and social perspectives. While a certain event may be very ordinary in one place, it may be very extraordinary in different places. For instance, monsoon rain is very ordinary in South Asia, and fires are very ordinary in Australian society. They are completely extraordinary for Europe. While wars and rebels are typical in the Middle East, Canada did not host a war or rebel for over a century. In relation to commercial and governmental sanctions, trade wars have significantly increased in the past couple of years. In line with this, if a U.S. and a Chinese company have agreed on a long-term contract around 2015, they had no possibility to foresee the outbreak of a trade war at the beginning of 2018. Therefore, the foreseeability criterion depends on the socio-economic situation, the geographical region, and the place of business of the contracting parties.¹⁹

It is emphasized by a court or arbitral decision that the unforeseen event must be an exception situation. In the *Tomato concentrate case*, heavy rainfall damaged the production

¹⁸ See UNIDROIT Principles Article 6.2.1.:

“Where the performance of a contract becomes onerous for one of the parties, that party is nevertheless bound to perform its obligations subject to the following provisions on hardship.”

UNIDROIT Principles Article 6.2.2.:

“There is hardship where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party’s performance has increased or because the value of the performance a party receives has diminished, and

a) the events occur or become known to the disadvantaged party after the conclusion of contract;

b) the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of contract;

c) the events are beyond the control of the disadvantaged party; and

d) the risk of the events was not assumed by the disadvantaged party.” These conditions are very compatible non-liability reasons in accordance with the criteria in CISG Article 79. They are transposition of CISG Article 79(1) as an economic hardship in UNIDROIT Principles. Therefore, this rule is very eligible for gap-filling in CISG Article 7(2).

¹⁹ LJUBEN KOCEV, *The Impact of Covid-19 on the Performance of International Commercial Contracts for the Sale of Goods – Force Majeure and Hardship*, Proceedings of the 1st International Conference Economic and Business Trends Shaping the Future, 2020, page 151.

of tomatoes, and the seller requested invocation of *force majeure* in Article 79 CISG. The Hamburg Appellate Court ruled that the crop of tomatoes was not completely damaged, and thus, the supply was still possible. The reduction of the tomato crop increased the market price of tomatoes burdensome. Therefore, this impediment did not cause the impossibility of the performance of the contract of sale. It was considered under the seller's sphere of control.²⁰ In the same year, the same court delivered a similar judgment in *the Iron Molybdenum* case. A German seller and an English buyer made a contract of sale to supply iron-molybdenum from China in 1994. The goods were not delivered from the seller to the buyer since the seller had not received the goods from its own Chinese supplier. Later, the English buyer concluded a substitute transaction with a third party and filed a civil case against the German seller for the difference between the price paid and the price in the contract of sale. The seller claimed invocation of exemption claiming force majeure in Article 79 CISG since the market price for the relevant product had increased tripled amount after the contract of sale was made between the parties. The court ruled that the buyer was entitled to damages in Article 75 CISG. It emphasized that the seller had an obligation to bear the risk of increasing market prices for relevant goods. The court emphasized the very important detail that a seller has an obligation to make greater efforts where "*the commercial transaction had a speculative feature*", as in this civil case, so the fact that the triple times' increase of the market prices was not reasonable ground to the exemption to the seller.²¹

Normally, such an increase in price may fulfill the economic impossibility criterion but since there is a speculative feature of goods in the relevant contract of sale, there is no unforeseeability criterion. This decision is a good example because it has a high threshold for force majeure events.²²

3. UNAVOIDABILITY OF THE IMPEDIMENT

If the impediment is unforeseeable at the time of the conclusion of the contract of sale and the promisor takes all necessary precautions in order to avoid the impediment or its negative consequences, the unavailability criterion shall be met. Unavailability is closely intertwined with the circumstances of the external character of the impediment event where the attention should be drawn to the behavior of the defaulting party.²³ For example, a Turkish seller and a Spanish buyer concluded a contract of sale. It is decided that the goods are sent from Mersin port to the buyer's place of business in Barcelona. Assuming that parties agreed to DAP Incoterms 2020 or DDP Incoterms 2020. In this situation, the seller has an obligation to prepare his ship seaworthy. If a marine accident destroys his ship and goods due to unseaworthiness, the seller cannot invoke force majeure exemption based on the unavailability criterion. The seller is responsible for stowage, packaging, seaworthiness, etc. They are necessary measures that must be taken by the seller. If he fails one of these criteria, it is impossible to invoke a force majeure claim although a marine accident occurs.

20 MAZZACANO PETER MAZZACANO, *The Treatment of CISG Article 79 in German Courts: Halting the Homeward Trend*, 2013, Comparative Research in Law & Political Economy, Research Paper No.7, 2013, page 22.

21 MAZZACANO, pp. 21-22.

22 DAVID KUSTER/CAMILLA BAASCH ANDERSEN, *Hardly Room for Hardship - A Functional Review of Article 79 of the CISG*, Journal of Law & Commerce, Vol:35, No:1, 2016, page 13.

23 See TALLON, *supra* note 41, at 2.6.4. quoted in GEORG MIKHAEL BAUER, *Exemption of Liability for Damages under Article 79 CISG: Recent Case Law Analysis*, Master Thesis, Graz University, 2014, page 7.

It is emphasized that the “unavoidability” criterion is rather ambiguous and will frequently be the most difficult to distinguish between what is possible and what cannot be overcome. This argument is supported by an example, “*if an object is lost at sea and can be fished out in good condition although, at great cost, the final solution will not be the same if the said object is a highly valuable sculpture or merely a machine tool.*”²⁴ If overcoming the impediment or its effects is reasonable for him, the promisor cannot be exempted from his performance in the contract of sale. The international commercial standards are quite high and strict in this regard. Generally, the promisor is expected to overcome an impediment in order to perform the contract of sale as agreed by the parties even if this causes higher costs.²⁵

4. DUTY TO INFORM

In Article 79(4) CISG, the party who fails the performance the contract of sale has an obligation to give notice to the other party who expects the performance of the contract of sale regarding the impediment and its legal consequences within a reasonable time. If the notice is not given, the party who fails the performance the contract of sale due to the impediment is responsible for damages arising out of such non-receipt. This notice must describe whether this impediment is temporary or permanent. If the impediment is temporary, the promisor should explain how many days the consequences of that

impediment could be overcome. Naturally, there must be detailed information. After the promisee gets this detailed information, he decides the avoidance or maintenance of the contract of sale.²⁶ If the impediment in Article 79 CISG is temporary, the promisor has an obligation to perform his contractual obligation after the impediment ends when the delay of the performance does not amount to a fundamental breach. However, as long as this delay in performance amounts to a fundamental breach of the contract of sale in Article 25 CISG, the promisee may enjoy the avoidance of the contract of sale as a legal remedy in Article 49 CISG. In this situation, the promisee has the disadvantage that it is not a possibility to claim damage for non-performance.²⁷ In Russia’s Arbitration Proceeding 406/1998 on 06.06.2000 dated, the seller avoided the delivery of goods due to a rise in taxes. Although the seller believed and claimed that the increasing tax rates is the reason for force majeure as an economic hardship, the information was not given to the buyer regarding the circumstances. The arbitral tribunal ruled that:

“*the [seller] failed to prove the 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.*”²⁸

“*Duty to inform*” should be properly performed to the other party to explain the impediment in very detail.

24 See TALLON, *supra* note 41, at 2.6.4. quoted in BAUER, pages 7, 8.

25 See SCHWENZER, *supra* note 18, 1019 at 14 quoted in BAUER, p. 8.

26 SCHLECHTRIEM/SCHWENZER, Art. 79 Nr. 49. quoted in TUĞÇE ORAL, *Exemption from Liability According to the Art. 79 of the Convention on International Sale of Goods (CISG)*, Juridical Tribune, Volume:9, Issue:3, page 651.

27 ORAL, p. 656.

28 KIRAZ/ÜSTÜN, p. 26.

5. CAUSATION OF NON-PERFORMANCE

Causation is “conditio sine qua non” criterion element for the exemption from liability. The obligor’s non-performance was caused by an external event without the obligor’s own fault such as defective goods, insufficient packaging, etc.²⁹ Namely, if there is no fault, there is no liability. The impediment must affect the performance of a party in a contract of sale. Article 79(1) CISG states “The failure was due to an impediment”. If it is paraphrased, “the failure was due to an impediment” has the same meaning as “the failure was caused by an impediment”. This is the causality between the impediment and the failure. If the “due to” is interpreted as a “but for” nexus, almost everything may be understood as “due to impediment”. For example, a seller lost himself to his thought in watching the latest news of a high-magnitude earthquake, which broke out in a neighbor city and forgot to reserve a ship for the transportation of the goods in the contract of sale, triggering the delay of the delivery of goods. If “due to” is interpreted as “proximate cause” used in tort law, the range of relevant impediments may be confined to some intelligible instances. However, a quest for an appropriate level of nexus is not necessary, because whatever the level of external events may be, the exhaustive modifiers of “an impediment” listed in Article 79(1) CISG will shape qualified impediments in regard to a causal relationship, as well. For example, forgetful seller who is in the above-mentioned situation, we cannot claim that “he could not reasonably be expected to have avoided

. its consequences”, and therefore he cannot invoke the exemption.³⁰

Proving the casual relationship is generally relatively very easy between the legal impediment and the failure of performance. When analyzing the various aspects of the difficulties and identifying all of the conditions that triggered the failure of the performance of contract, causation has to be taken into consideration because even a single difficulty that results in failure to perform that was, for example, foreseeable at the time of the conclusion of the contract of sale prevents any possibility of a damage exemption.³¹ However, in the most of the cases regarding an exempting economic impediment, the buyer or the seller refuses the performance of the contract of sale due to economic reasons. Such claim causes searching other reasons for the failure of the performance. Only proving the changes in economic circumstances is relatively easy compared to the other economic impediments.³²

C. DEFAULT CAUSED BY THIRD PERSONS

Third parties may be involved in the relationship between the buyer and the seller. This situation may reshape and lessen the liability of the seller against the buyer. Article 79(2) CISG governs the failure of the seller that arises out of third parties. Article 79(1) CISG shall be relevant in other circumstances. However, there is no provision regarding the determination of the scope of a third party in Article 79(2) CISG. It remains silent. In the legal doctrine, it is accepted

29 KLAUS PETER BERGER, DANIEL BEHN, *Force Majeure and Hardship in the Age of Corona: A Historical and Comparative Study*, McGill Journal of Dispute Resolution - Revue de Règlement des Différends de McGill, Vol:6, 2019-2020, page 110.

30 YASUTOSHI ISHIDA, *CISG Article 79: Exemption of Performance, and Adaptation of Contract Through Interpretation of Reasonableness? Full of Sound and Fury, but Signifying Something*, Pace International Law Review, Volume:30, Issue:2, 2018, pages 356, 357.

31 JENNI MIETTINEN, *Interpreting CISG Article 79(1): Economic Impediment and the Reasonability Requirement*, Master’s Thesis, University of Lapland, 2015, page 9.

32 MIETTINEN, page 9.

that independent third parties fall on the scope of the third party such as a carrier. Suppliers fall on the scope of control and risk of the seller; therefore, a seller is held responsible for the failures of the suppliers. In CISG Advisory Opinion No. 7, it has been emphasized that “*There is a consistent line of decisions suggesting that the seller normally bears the risk that third party suppliers or subcontractors may breach their own contract with the seller so that at least in principle the seller will not be excused when the failure to perform was caused by its supplier’s default.*”³³ If an independent carrier delivers the goods late or the goods are damaged due to the fault of the carrier, there is no responsibility for the seller.³⁴ A further example of independent third persons is the case that the seller has an obligation to perform certain activities (e.g. montage, instructions) through third persons.³⁵ As far as “third persons” are concerned, the internal relationship between one of the parties of the contract of sale and any other person who carries out under his instruction falls outside the scope of Article 79(2). It can be a worker, subcontractor, agent, or independent firm supplying material. The crux of this situation is that if a party has control over somebody, he cannot invoke Article 79 CISG to overcome his failure.³⁶ For example, if the strike is organized at an industry branch level, there is no impediment since the workers are under the control of the party. If the strike or boycott is organized at the state level, there may be considered impediment but

there is no responsibility for third parties.³⁷ Therefore, it may be claimed that this issue is compatible with vicarious liability.

Another popular issue is procurement risk to analyse the default caused by third persons. As a rule, the seller carries the procurement risk for generic goods.³⁸ It means that even non-performance beyond the control of the seller such as earthquakes, flood, or landslides affecting his suppliers’ ability to perform does not exempt him from liability in damages. It is assumed that the seller always has the opportunity to procure the goods from another source. Namely, as long as substitute goods are accessible on the market, the seller has an obligation to exhaust all possibilities.³⁹ Therefore, the buyer has an obligation to perform the contract of sale until the risk of goods passes from the seller to the buyer. There is performance risk, not payment risk. Before the risk passes from the seller to the buyer pursuant to CISG Article 67-69, the seller has to obligation to attempt to deliver the goods a second time even if the goods are destroyed due to an impediment beyond his control.⁴⁰ However, in the case of the sale of generic goods, for which there is no ready market, especially a sale from particular stock or batch, the seller has only the obligation to procure goods from that stock or batch. The seller is exempted from his liability if production of that batch is destroyed as a result of an unavoidable and unforeseeable event. If such an event only affects the batch partially, the seller has an obligation to

33 Rapporteur: Professor Alejandro M. Garro, ‘CISG-AC Opinion No.7, Exemption of Liability for Damages under Article 79 of the CISG (2007) p. 6. quoted in *Gözen*, pages 38-39.

34 HUBER/MULLIS, p. 263.

35 HUBER/MULLIS, p. 264.

36 ZELLER BRUNO, *Damages under the Convention on Contracts for the International Sale of Goods*, Oceana Publications, 2005, page 183.

37 KOCEV, p. 151. As it is discussed above, force majeure events are generally classified in four different groups such as governmental decision, act of god, economic hardship and other situations. This example falls on the scope of other situations.

38 See SCHWENZER, *supra* note 18, 1074 at 26. quoted in BAUER, p. 31.

39 See ATAMER, in Kröll/Mistelis/Viscasillas, *supra* note 122, 1083 at 68. quoted in BAUER, p. 31.

40 ATAMER, p. 87.

provide partial deliveries to the buyer.⁴¹ Unlike in the case of the sale of generic goods, in case of a sale of specific goods, the seller bears the procurement risk only if the express or implied terms of the contract of sale state that the good was undertaken by him. In this situation, the seller undertakes to deliver a good, which was already held in his possession. The seller is exempted from liability if the delivery of these goods is obstructed by an unavoidable and unforeseeable event.⁴²

As a result, the third-party default effect is very limited on the exemption from liability in case of the sale of goods.

D. CONCLUSION

Pursuant to CISG Article 79, conditions for exemption from liability are regulated. Article 79(1) is the departure point of exemption from liability in international sales contracts. Pursuant to CISG Article 79(1), a party is not liable for the failure of the contractual obligations if the conditions which are impediment beyond the control of one or both of the parties, unforeseeability and unavoidability of the impediment occurs and have the causation with the unexpected result. It must be proved. Moreover, when these conditions occur, the defaulting party must inform the other party in detail within a reasonable time. If an independent third party that practices transportation and similar obligations causes the non-performance of the contract of sale, there is no fault of the buyer or the seller and no liability. Exemption from the liability is generally claimed by the seller unless currency devaluation occurs. However, it should be noted that although there is no

written CISG Article 79 provision, a high threshold is a necessary condition for exemption from liability in case law.

Third parties may cause conditions for exemption from liability due to their fault that is beyond the control of the buyer and the seller. Under normal conditions, the seller may bear the risk of third parties unless a third party practices his some obligations. Regarding “third persons”, the internal relationship between one party of a sales contract and any person who acts under their instruction is not covered in CISG Article 79(2). This may include employees, subcontractors, agents, or independent suppliers. The crucial point to note is that if a party has control over somebody, they cannot enjoy CISG Article 79 for the exemptions from liability.⁴³ Another doctrinal issue that causes exemption from liability related to third-party default is the procurement of goods on the market. As a general practice, the seller bears the risk of procuring generic goods.⁴⁴ This means that the seller is liable for damages even if non-performance occurs due to uncontrollable events such as natural disasters that impact the suppliers’ ability to perform. It is considered that the seller always has alternative sources to procure the goods. In other words, as long as substitute goods are available on the market, the seller has an obligation to exhaust all possibilities.⁴⁵

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41 See SCHWENZER, *supra* note 18, 1074 at 27. quoted in Bauer, p. 32.

42 See SCHWENZER, *supra* note 18, 1074 and 1075 at 27. quoted in Bauer pp. 32, 33.

43 ZELLER, 2005, p. 183.

44 See SCHWENZER, *supra* note 18, 1074 at 26. Quoted in BAUER, p. 31.

45 See ATAMER, in KRÖLL/MISTELIS/VISCASILLAS, *supra* note 122, 1083 at 68. Quoted in BAUER, p. 31.

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