Spotlight on COVID-19: Analysis of the "Impediment" under CISG Article 79 and Suggestions for China

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Abstract. Under the influence of global public health events such as COVID-19, the social and economic order has been damaged, and the possibility of the buyer and seller to default on the international contract has increased. Although with the exemption provisions in article 79 in the United Nations convention on international sales contract, the clause is often applicable to the materialization of the war and strike. In the face of economic impediment, there are still a larger dispute, and based on the official ambiguity of impediment in article 79, countries tend to agree to the domestic concepts. In this paper, the impediment has been compared with hardship and Force majeure, and the two laws systems have been conducted to compare whether COVID-19 can be identified as an impediment from the two aspects of exemption time standards and third-party default. This paper also attempts to make suggestions to the courts of China from the application of the law, the review of the intention and statement of the application of article CISG79, and how to identify the breach of contract caused by Covid-19.

Keywords: CISG 79; Force Majeure; Default of third party; COVID-19; Chinese court.

1. Introduction

During the COVID-19 epidemic, many international business trades could not continue, for example some countries had imposed self-imposed embargoes, product workers had lower production efficiency for the infection of COVID-19 or the consideration of goods elevates. This meant that there were many breaches of contract, so that some parties needed to invoke CISG 79 to claim a damage exemption. The subsection(1) of Article 79 stipulates the constitutive elements that the parties can be exempted from liability based on the impediment, and the subsection(2) stipulates the circumstances and exceptions under which the party can be exempted from liability under the default by the third party. The subsection(3)and(4) rule the time limitation and notification system respectively, and subsection(5) limits the scope of exemption to compensation. Wars, strike, flood and such material events and emergencies are authorized as the impediment under Article 79 in CISG. Whereas, it is uncertain if a new epidemic is a form of impediment for the sake of its economic, biological obstacles to the contracts. And until today, the definition of impediment and its application are still vague. Due to the great variety of concepts in the domestic laws of various countries, the results of the judicial practice of various countries are not uniform, which increases the variability, instability and unpredictability in the application of the CISG[1]. Spontaneously, hardship (difficulty of performance), the change of circumstance and Force majeure are carried issues and problems relative to the impediment. Furthermore, in such a perplexing environment, how should China, the first International trading country, deal with itself and what solution should it have? To solve these problems, it is necessary to discuss the concept of the impediment and figure out the relation of impediemnt, Force majeure and hardship first. What consists of the impediment? Is a force majeure an impediment? After figuring out the concept of the impediment, if a force majeure is an impediment, then if the COVID-19 epidemic is a force majeure, the COVID-19 epidemic might be an impediment. This paper analyzes the literature and jurisprudence of Germany, the United States and China and then find the standards to identify COVID-19 as a force majeure. At last , to deal with future

contractual risks, this paper provides some suggestion for identifying a new epidemic as a force majeure in the future.

2. What is the Impediment Under CISG?

The principle *pacta sunt servanda* gave relevant liability of the changed contract to the obligor. But here came to the *impossibilium nulla est obligatio* which means no obligation to fulfill something impossible. The history of this performence-exemption for default origins from Roman law and diversifies in different countries and law systems[2]. In America, the contracting party with non-delivery, failure to make timely delivery, or incorrect delivery could be exempted due to the defense of impracticability[3]; In UK, they equip impossibility and frustration; In China, we have statutory Force mejeure as well as France. And usually, contract equip provisions of Force majeure for uncertain matters. But when there are not such provisions, the contract might be applied to United Nations Convention On Contracts For The International Sale Of Goods (CISG) which has rules of impediment under Article 79[4], the international counterpart of exemption, when both parties agree to apply CISG as the applicable law or there is no objection to the CISG in litigation.

2.1. The Definition and Constitution of Impediment:

As of today, the official definition of impediment remains unclear. And the constituting factors of it are: (1) beyond parts' control; (2) could not reasonably be expected to have taken it into account; (3) could not reasonably be expected to have avoided or overcome it or its consequences[5]. Although Some scholars argued whether the "avoid" and "overcome" are optional because of the "or" that connects them in the original article. In fact they are not alternative, but both mandatory[6]. "Avoid" refers to the most effective action to be taken before obstacle[7]. For instance, In the 1999 Sino-German citrus can sales contract dispute arbitration, the Chinese seller claimed the default resulted from a massive flood occurred in Hunan province and asked exemption due to this impediment. CIETAC reviewed the evidences previously signed and submitted by parties. "The Weather and Climate Summary" provided by the seller had already stated that the extreme weather occurred before in the Citrus field and there were signs of extreme weather ahead. Finally, CIETAC held that even if the force majeure event occurred, the Chinese sellers should have avoided it[8].

"Overcome" means that the party takes measures to minimize the loss or remove the adverse consequences after the obstacle[9]. Only the party acted both prior and afterwards, they would have chance to argue the impediment in contractual performance. So "avoid" and "overcome" are both to be satisfied.

2.2. Whether the Change of Circumstance Could be Qualified as The Impediment:

According to the Article 6.2.2 in Principles of International Commercial Contracts (PICC), hardship is something unforeseen and leads to unfair overburden or eliminated performance-values, which breaks the contracts balance, such us taxes, quotas and pandemic. The CISG Advisory Council Opinion No.7 claimed the changed circumstance beyond reasonable consideration (hardship) might be impediment. However, whether impediment can cover hardship has experienced a process from most denial to gradual recognition globally.

The typical hardship is the unreasonable fluctuation of consideration, which is unfair overburdens for buyers or sellers. At the beginning, it is believed that the increase of row materials or procurement costs is not the impediment. And hardship exists in each country with various applications. The refuse to cover hardship under Article 79 is to avoid countries using domestic laws to fill the gap (whether hardship belongs to the impediment), which supports the principle of international unity and independence of CISG[10].

Recently, this idea began to change. In a transaction of warm-rolled steel tubes between French seller Exma and Dutch buyer ScafomInternational BV, their goods abruptly rose by 70% before delivery so that the seller messaged buyer to hope to renegotiate the consideration. However, the

buyer refused it and brought a lawsuit (the applicable law is CISG). Although the appellate court said the economic hardship is not the impediment, the supreme court recognized the hardship by highly rising prices amounted to the impediment and reversed the judgment of the appellate court so the seller Exma could be exempted by CISG Article79(1)[11]. Reviewers called it a landmark judgment to recognize the unreasonable price increase (the fluctuation of prices, hardship) as the impediment under CISG and gave other jurisdiction the reasons and targets.

But the hardship dos not show up in the texts in CISG and CISG dos not exclude hardship definitely (as the "gap" above). The gap could be filled by the hardship in UNIDROIT[12]. If the change belongs to hardship in UNIDROIT, it belongs to impediment.

2.3. Relationship Between Impediment and Force Majeure:

The relationships of hardship, the change of circumstance, Force majeure and impediment are all popular in the survey. But most scholars noted the Force mejeure is the most similar form to the impediment.

Force majeure are universal in countries and international trades. In civil law system, they are legal institutions. In France, the Force majeure is out of control, unforeseeable, unavoidable and non-performance. And in common law system, parties can use the Force majeure clauses in contract to constraint the rights[13]. As for the consequence, Force mejeure and impediment both exempt obligors to perform[14].

Some scholars directly replace impediment with force majeure. But impediment and force majeure do not have same concept and scope. In the civil law system, force majeure is defined by lists, such as terrorism, earthquakes, strikes, war, and so on[15]. From the list, it could be seen that these relevant events as force majeure are more physical and material. Although there is no official list and clear definition of impediment, according to the arbitration and judgment of international sales contracts in recent years, impediment includes not only physical impediment, but also economic impediment[16], such as the sudden government tax rate, quota adjustment, and the rapid increase in international transportation costs under COVID-19. These economic impediments are more biased towards hardship.

Furthermore, the Force majeure shows that the contract cannot be performed because of the event. But this "non-performance" element does not exist in the constitutive elements of impediment. Whether parties are with non-performance, delay performance, or performance difficulty(hardship), they all can use CISG79 to defend.

It’s no doubt that based on the event features and elements, it can be seen that the force majeure is a part of the impediment.

3. COVID-19 Can be an Impediment and The Standard:

If COVID-19 can be considered as force majeure, it could be considered as an impediment of CISG 79. In the following, this paper will discuss how civil law and common law identify this issue.

Much of the literature and case law points to a similar conclusion globally as to whether COVID-19 can be a force majeure. However, each legal system has a different standard for judging it. In these three law systems, most of them believe that the outbreak was uncontrollable and unforeseeable at the time of the outbreak, which is a kind of force majeure, but it is no longer a force majeure at the later stage, as the outbreak has gradually become normalized, which is a controllable event, and if there is a breach of the contract again, CISG79 cannot be invoked to exempt from the liability. But it also has some different things.

3.1. Is COVID-19 A Force Majeure?

3.1.1. How Does Civil Law Judge:

This part will take two countries for example.First of all, in German, many courts will base their judgment on when the contract was signed. They will set up a distinct time standard. For example, in

a German article, it is mentioned that German courts have held that contracts concluded before September 30, 2020, can be exempted by force majeure if the contract is breached due to the epidemic[17]. In other words, the German courts have held that the CISG79 is a form of force majeure in respect of the COVID-19 outbreak before that time limit. However, after that time period, the epidemic could not be invoked as a cause of force majeure.

The China case, as articulated in the Chinese literature, is more oriented towards a problem-specific approach. The judges in each case will approach it differently, depending on their own judgment of the epidemic. Most judges will look at the date of the contract to determine whether CISG79 can be invoked for exemption. For example, in the case of China Factory v. Korea Factory, the Chinese court held that parties' contract was signed after the outbreak of the epidemic and the defendant should have foreseen the difficulties, so it was inappropriate to apply for exemption under CISG79[18].

3.1.2. How Does Common Law System Judge:

In addition, in the common law system, the jurisprudence of the United Kingdom and the United States may not have a clear time limit as in the civil law system, but the criterion for determining whether or not the defaulting party has taken the minimum precautionary measures and whether or not the new outbreak has become normalized. In the common law system of jurisprudence is almost no clear time limit, but there is a trend in the decision from force majeure to force majeure epidemic gradually changed to non-force majeure. In a U.S. decision, a plaintiff sued a Canadian trading building materials company for exemption from CISG79 due to COVID-19, but the U.S. court rejected the defendant's claim because the COVID-19 were no longer a form of force majeure[19] So we can see the common law system, the courts do not have the clear time limit, the standard of judgment presented by the common law system is closer to a trend of epidemic normalization. Judges will judge the extent of the impact of the epidemic on society to determine whether CISG79 can be invoked, which is different from the precise time constraints of the civil law system.

In conclusion, despite some differences of standards, both civil law and common law agree that COVID-19 could be considered as a force majeure.

For the standards, there are many similarities between Germany and China in the determination of force majeure in relation to COVID-19, but the common law system is different from them. This fundamental difference stems from the statutory law of the civil law system and the case law of the common law system. The common law system focuses more on exemptions set out in the contract[20], whereas the civil law system do not have a high level of requirements for such exemptions.

3.2. Provisions on Third-Party Default Under the CISG Provisions

According to the provisions of paragraph 2 of CISG 79, a party may be exempted from liability if the breach of the contract was due to a default of the third-party's obligation to perform all or part of the contractual duties for which the party was hired. As pointed out in the relevant literature, first of all, the third party needs to have a certain degree of independence, and cannot be an employee of any of the parties, but must be an independent third party. What's more, the defaulting party must evident a contractual relationship with the third party, and the third party must have a certain degree of relevance to the contract. Finally, the topic that some scholars often argued is that the limitation on the "performance of part or all of the obligations of the contract" lies in the requirement that the third party must be connected to one of the parties to the contract by virtue of its connection with the other party. And some of the literature also suggests that although the parties have evidence of a third-party relationship, there are other CISG79 exemptions that need to be met in order for the exemption to be successful[21]. In other words, if a party wishes to invoke paragraph 2 of CISG 79 in order to claim exemption from liability, it needs to prove that the non-performing third party has suffered from force majeure obstacles as well as itself, otherwise it will not be able to succeed in its claim for exemption from liability. Therefore, In the author's opinion, in the context of the epidemic, if the parties want to

be exempted from liability by the second paragraph of CISG79, they must prove that the third party suffered from force majeure obstacles as well as they did.

4. Proposals For the Application of CISG Article 79 By Chinese Courts in The Face of Future Pandemics:

4.1. The Importance of The Explanations and Arguments for Applying Article 79 Of the CISG In Their Reasons for Decisions:

Against the backdrop of the new Crown Pneumonia epidemic, it is crucial for Chinese courts to accurately and reasonably apply the force majeure provisions to uphold judicial dignity and safeguard the rights and interests of the parties.

4.1.1 Court to Examine the Basis for The Application of Article 79 of the CISG As the Applicable Law：

For a contract dispute case in which a party claims to be free from its obligation and compensation liability for breach of contract due to the CISG epidemic, if it meets the provisions of the Law on the Law Applicable to Foreign-related Civil Relations (2011) on foreign-related factors, and the Chinese court has jurisdiction, it may determine the applicable law of the case in accordance with the conflict of laws norms in Chinese law. If the applicable law contains the CISG, then the case can be tried under Article 79 of the CISG; if the applicable law does not contain the CISG, then it is necessary to identify and apply the content of the legal provisions or case law in the applicable law of the foreign country that is similar to the stipulation of force majeure, instead of taking Article 590 of the Civil Code on force majeure for granted to understand the similar provisions of the extraterritorial law[22].

4.1.2 Courts to Emphasize Interpretation and Argumentation in The Application of Article 79 of the CISG as the Applicable Law：

According to paragraph 3 of Article 7 of the Guidance (III), the court shall strictly scrutinize the contractual exemption claimed by the parties on the ground of epidemic or related preventive and control measures on the basis of Article 79 of the CISG, focusing on the interpretation of the paragraphs of it. This requires judges or arbitrators to pay attention to the interpretation and elaboration of the invoked and applicable provisions in the judgment of individual cases, instead of just giving reasonable conclusions. article 79 of the CISG itself is not clear in its formulation, if Chinese courts have strict interpretation and argumentation in the judgment of individual cases and form a uniform judgment, it will be conducive to the stability of the application of article 79 of the CISG in China. During the interpretation of the CISG, Chinese courts should understand the real intention of the parties and the significance of their representations through the text of the treaty, and clarify the obligations of the treaty and their corresponding rights[23].

4.2. The Application of CISG 79 For the New Crown Pneumonia Epidemic:

First, the court examines the content of the contractual provisions on force majeure. For the scope of force majeure, the parties do possess the entitlement to agree through the terms which are included in the contract, if the force majeure event has been written to include the plague or similar diseases, then the judge through this content, the judge can explain the new crown pneumonia is force majeure. In addition, in the hearing of specific cases, not only to take into account the force majeure clause, but also need to be combined with the whole background of the incident for a comprehensive and specific analysis. Since the emergency response levels are different across China in the context of the epidemic, the judge will have to make a special judgment in the context of the specific case.

Secondly,when judging if the new Crown Pneumonia epidemic could be force majeure, the court should examine whether the prevention and control of the new Crown pneumonia outbreak resulted in a contractual failure-performance, a lack to fulfill the intention of the contract or disequilibrium of contractual-benefits and contractual-profits. Combining the contractual types, intentions, relevant

performance, the effect degree of the epidemic prevention and control on the performance of the contract and other factors in individual cases is considered indispensable, if the parties can still perform the contract after the lifting of the quarantine, or the execution of the contract is not affected by the epidemic, the parties are not entitled to claim force majeure. The court's discretion must be "not to produce unfair results".

5. Conclusion

Among the elements of impediment, "avoid" and "overcome" are the measures that should be done before and after impediment, and both are ipso facto indispensable. However, in hardship and force majeure, which have been compared to impediment by scholars all the years, the relationship between hardship (changes of circumstance) and impediment has changed from refusal to gradual acceptance, and the price increases of materials and products may be regarded as impediment. As for the force majeure, it is considered to be a part of the impediment from its elements and features. In disputes over national sales contracts concerning COVID-19, some courts or arbitration commissions hold that COVID-19 is force majeure, so the impediment under Article CISG79 can be directly applied.

As for whether COVID-19 is enough to constitute force majeure, in mainland legal countries such as Germany, it is based on the signing time of contract, while the common law system pay more attention to the impact and the trend of normalization of COVID-19. Confronted to the contract-breach of an independent third party under the epidemic, if a party claims that he can apply article CISG79 based on the breach of the third party, it must have evidence of some necessary relationship between the third party and either party under the sales contract, and it must also proof that the breach is based on force majeure (COVID-19).

As the situation of epidemic prevention and control in China continues to improve, the social-economic order is experiencing a rapid change, yet consciously or unconsciously, from which we have learned a lot. Globally, no country or individual is immune to sudden major infectious disease outbreaks. Stagnant economic environment will hinder regular production and operation strategies of enterprises both domestic and foreign in a way, and if risk defense arrangements are not made in advance, enterprises will suffer heavy damage or even go bankrupt in an epidemic. Under this circumstance, re-conceptualizing Article 79 of the CISG appears to be necessary, which is an exception to"contract must be observed" in the field of commercial affairs, and gives the party in breach of contract due to a major epidemic the chance to be exempted from the adverse legal consequences, and reasonably establishes the standard , so that the party which has made a breach shall continue to perform its contractual obligations when the epidemic does not have the ability to hinder its execution.

When disputes involving breach of contract due to major epidemics enter into litigation, Chinese courts are expected to reconsider the idea of integrating the handling of disputes involving breach of contract due to epidemics, intensify the reasonable but mandatory duties to proof among the parties, strictly emphasize the application of exemption clauses of the CISG, cautiously figure out the conditions of force majeure and change of circumstance, and establish a long-term mechanism for diversified dispute resolution by taking the implementation of the Civil Code of the People's Republic of China as a valuable chance. As more Chinese scholars conduct in-depth research on international treaties and international uniform substantive law in the future, China's credibility and discourse power in international justice will be greatly enhanced, and China will certainly contribute more Chinese wisdom to the community of human destiny.

Authors Contribution

All the authors contributed equally and their names were listed in alphabetical order

References

[1] Albert H. Kritzer. Guide to Practical Applications of the United Nations Convention on Contracts for the International Sale of Goods. Lslf edition, 1989: 623-624.

[2] Munoz, E. COVID-19 and related public and private measures as an impediment to perform contracts governed by the cisg. Texas International Law Journal, 2021, 57(1): 4.

[3] Uniform Commercial Code, Article §2-615(a).

[4] Gizem Alper. COVID-19: Force Majeure Under CISG. Jurist, 2020.

[5] UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (1980), Article 79.

[6] Kim, S., & Kim, J. Can change of circumstances qualify as an impediment under article 79 of the cisg. Chinese Journal of International Law, 2019, 18(1): 129-164.

[7] Lv Luxi. CISG Interpretation of China in Article 79. Jiangsu: Yangzhou University, 2019. in Chinese.

[8] China International Economic and Trade Arbitration Commission. (2004) Compilation of Award of China International Economic and Trade Arbitration Commission 1997.4[M], Beijing: Law Press. In Chinese.

[9] Lv Luxi. CISG Interpretation of China in Article 79. Jiangsu: Yangzhou University, 2019. in Chinese.

[10] DiMatteo, L. A. Contractual excuseunder the cisg: impediment, hardship, and the excuse doctrines. Pace International Law Review, 2015, 27(1): 279-280.

[11] Scafom International BV vs Lorraine Tubes s.a.s. Belgian Supreme Court, 2009, CISG-online, C.07.0289.N.

[12] Slater, S. D. Overcome by hardship: the inapplicability of the unidroit principles' hardship provisions to cisg. Florida Journal of International Law, 1998, 12(2): 255.

[13] Research Center for Foreign Law Identification. Institutional research reports on force majeure, difficult situations and changes in European countries. Wuhan University, 2020. in Chinese.

[14] Deshwal, S., & Ritu. Contractual Exemption Theories of Force Majeure and Hardship in International Law. International Journal of Law Management & Humanities, 2020, 5: 16.

[15] Tessema, Y. Force Majeure and the Doctrine of Frustration under the UNIDOROIT Principle, CISG, PECL and the Ethiopian Law of Sales: Comparative Analysis. Journal of Law, Policy and Globalization, 2017, 58: 34.

[16] UNIDROIT PICC Article. 6.2.2(1) & PLACL Article.84(1).

[17] Gomaa, M. The execution of the international public contract at the era of the COVID-19 pandemic. Foundation for Law and International Affairs Review, 2021, 2(1) :58-72.

[18] Asia Aquatic Food Co., LTD vs Shandong Xinhua Jin aquatic products Co., LTD. 2020, China Pkulaw database. in Chinese.

[19] D'Amico Dry D.A.C. v. Mcinnis Cement Inc.469 F. Supp. 3d 185 (S.D.N.Y. 2020).

[20] Natarajan, P. May the force majeure be with you: the impact of COVID-19 on the force majeure clause in international commercial contracts. Santa Clara Journal of International Law, 2022, 21(1): 12.

[21] Xie Yinyan. CISG79 Research on the exemption system for third party reasons[C]. Shanghai: Shanghai People's Press, 2020, 7: 3-5, 9. in Chinese.

[22] Chen Weizuo. Determination of Applicable Law, Force Majeure Rules, and Application of International Treaties in Foreign Commercial Maritime Disputes Related to Epidemics[N]. People's Court Daily, 2020, June 19. in Chinese.

[23] Zhang, NaiGen. International law of treaty interpretation: First volume[M]. Shanghai: Shanghai People's Publishing House, 2019: 353. in Chinese.