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WAR, SANCTIONS AND EXEMPTION FROM LIABILITY UNDER CONTRACTS FALLING WITHIN THE SCOPE OF THE CISG

Abstract

This article analyses the circumstances in which war or sanctions preventing the fulfilment of a contract covered by the CISG entitle the parties to exemption from liability for a contractual breach. It addresses how contractual provisions relate to Article 79 of the CISG. It also focuses on the interpretation of contractual provisions exempting parties from liability for breach of contracts covered by the CISG. It reveals the conditions under which war and sanctions may constitute the grounds for exemption from liability under Article 79 of the CISG in cases in which a buyer or seller has relied on performance by a third party. Finally, the paper addresses the issue of a notification of impediment by the party in breach.

KEYWORDS

CISG, force majeure, hardship, war, sanctions, notification of force majeure

SŁOWA KLUCZOWE

CISG, siła wyższa, trudności, wojna, sankcje, powiadomienie o sile wyższej

1. INTRODUCTION

Ukraine and Poland are parties to the UN Convention on Contracts for International Sales of Goods (the CISG).¹ Accordingly, the CISG can be applied to a contract for the international sale of goods if the seats of business of the contracting parties are located in Poland and Ukraine (Article 1 (1) (a) CISG), respectively, or if the law of Poland or Ukraine is applied to the contract (Article 1 (1) (b) CISG). The consequences of impossibility or hardship in the performance of such a contract due to war or sanctions may be governed by the CISG, in particular by Article 79, which will be applied to the extent that the parties have not excluded the application of the CISG, or derogated from, or modified its provisions, as provided by Article 6 of the CISG.

Application of the CISG may be expressly or impliedly excluded. An implied exclusion must be clearly traced to an intention of the parties to exclude the application of the CISG² (e.g., when the parties have chosen the substantive law of a non-contracting State to apply to the contract).³ In contrast, the choice of the substantive law of a CISG contracting State indicates the willingness of the parties to have the CISG apply, as the CISG forms part of the law of the relevant State.⁴ But a choice of the ‘internal law’ of a contracting State also indicates the parties’ wish to exclude the application of the CISG.⁵ That is, Article 79 of the CISG will apply in full if the contract does not contain provisions governing the exemption of a party from liability in breach of contract, or if the parties have not explicitly or implicitly excluded the application of the CISG, either in general or of Article 79 in particular.

A derogation from the provisions of the CISG occurs when the parties replace them with contractual provisions,⁶ including by supplementing the provisions of the CISG with contractual provisions or by refusing to apply certain of its provisions.⁷

Many international sales contracts contain clauses that create an exemption from liability for their breach. Therefore, this paper initially discusses how contractual provisions of this kind relate to Article 79 of the CISG. Since the answer depends on how the relevant contractual provisions are interpreted, this paper

¹ Status: United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (CISG), <<https://uncitral.un.org/>> accessed 17 November 2024.

² SC Manner, M Schmitt, ‘Article 6’, in Christoph Brunner, Benjamin Gottlieb (eds), *Commentary on the UN Sales Law (CISG)*, Alphen aan den Rijn 2019, 78.

³ CISG-AC Opinion No 16, Exclusion of the CISG under Article 6, Lisa Spagnolo (Rapporteur) 2014, <<https://ciscgac.com/>> accessed 17 November 2024.

⁴ Manner, Schmitt (n 2) 79.

⁵ Beate Gsell and others, ‘CISG Art. 6, Rn. 12’ in W Ball (Her.) *BeckOGK/Wagner*, 1 February 2023.

⁶ Manner, Schmitt (n 2) 80.

⁷ *ibid.*, 81.

also focuses on the interpretation of contractual provisions purporting to create an exemption from liability for breach of contract when the contract is otherwise covered by CISG. The paper then discusses the conditions under which war and sanctions are grounds for application of Article 79 of the CISG. Finally, this article addresses the issue of notification of impediment by the party in breach.

2. INTERACTION BETWEEN CONTRACTUAL PROVISIONS DEALING WITH WAR AND SANCTIONS AND ARTICLE 79 OF THE CISG

Courts will rarely allow an exemption from liability based on Article 79 of the CISG.⁸ Article 79 is, therefore, perceived as encouraging the parties to settle, in their contract, the consequences of the impossibility to perform their obligations and, thus, international sale contracts usually include force majeure or hardship clauses. Some may contain special war⁹ or sanctions clauses.¹⁰ They may, for example, list circumstances that will give rise to exemption from liability for the party in breach or that will initiate other mechanisms (e.g., renegotiation of the contract or its cancellation); or, they may define the circumstances that excuse a party's non-performance differently than Article 79 of the CISG does.

Therefore, it is important to determine how Article 79 of the CISG relates to such clauses. The UNCITRAL Digest of Case Law highlights two approaches to this issue. According to the first approach, the existence of a force majeure clause in a contract does not preclude the application of Article 79, i.e., the clause and Article 79 will apply simultaneously.¹¹ Under the second approach, the existence of a force majeure clause excludes the application of Article 79.¹²

⁸ Nevena Jevremovic, 'Article 79 CISG: Testing the Effectiveness of the CISG in International Trade Through the Lens of the COVID-19 Outbreak', in Poomintr Sooksripaisarnkit, Dharmita Prasad (eds), *Blurry Boundaries of Public and Private International Law: Towards Convergence or Divergent Still?* Singapore 2022, 140. Christoph Brunner, Christoph Hurni, 'Article 8', in Christoph Brunner, Benjamin Gottlieb (eds), *Commentary on the UN Sales Law (CISG)*, Alphen aan den Rijn 2019, 95.

⁹ War clauses are defined as a type of force majeure clause, but they more clearly define military risks, may set a lower threshold for causation, and may not require the party in breach to notify the other party of the outbreak of war. See Markus Burianski, Christian M Theissen, Eden Jardine, *War Clauses: Friend (not Foe) of Force Majeure*, 26 August 2019, White&Case, <<https://whitecase.com>> accessed 17 November 2024.

¹⁰ For examples of sanctions clauses, see, e.g., *Consolidated ICC Guidance on the Use of Sanctions in Trade Finance- Related Instruments Subject to ICC Rules*, ICC, 2022, [icc-document-use-of-sanctions-2022.pdf](https://iccwbo.org) <<https://iccwbo.org>> accessed 17 November 2024.

¹¹ *UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods*, New York, 2016, 379.

¹² *ibid.*

Contractual provisions stipulating the consequences of non-performance as a result of certain circumstances (e.g., war or sanctions) may completely or partially exclude the application of Article 79 of the CISG. A complete exclusion takes place when the relevant contractual provisions cover all the issues envisaged by Article 79. A partial exclusion occurs when the parties have included exemption clauses in their contract, but they do not cover all the issues Article 79 provides for. Therefore, it is necessary to interpret the relevant contractual provisions before determining the extent to which Article 79 of the CISG is applicable.

3. INTERPRETATION OF CONTRACTUAL PROVISIONS REFERRING TO WAR AND SANCTIONS

Contracts falling within the scope of the CISG are to be interpreted in accordance with Article 8 of the CISG, which sets out several rules of contract interpretation. Firstly, the contract must be interpreted in accordance with the intent of the party to whom the relevant statement is imputed or who is performing a certain action if the other party ‘knew or could not have been unaware what that intent was’ (Article 8 (1) CISG). However, this rule is rarely applied, because it can be difficult to prove the intent of a party, let alone that the other party knew or could not have been unaware of it.¹³ Therefore, contracts are most often interpreted in accordance with the rule contained in Article 8(2) of the CISG,¹⁴ i.e., ‘according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances’. This provision is construed as indicating that the reasonable person is acting in good faith.¹⁵

Both the subjective standard of interpretation prescribed by Article 8(1) and the objective standard prescribed by Article 8(2) involve determinations by the means set forth in Article 8(3) of the CISG, which is interpreted as providing a non-exhaustive list of circumstances that may be taken into account in interpreting the contract.¹⁶ These include practices and usages that the parties have authorized to be applied to their relations.¹⁷ At the same time, the wording of Article 9(2)

¹³ Donald J Smythe, ‘Reasonable Standards for Contract Interpretation Under the CISG’, *Cardozo Journal of International and Comparative Law* 2016, No 1, 14.

¹⁴ *ibid.*

¹⁵ Ewa Rott-Pietrzyk, *Interpretacja umów w prawie modelowym i wspólnym europejskim prawie sprzedaży (CESL)*, Warsaw 2013, 116.

¹⁶ Christoph Brunner, Christoph Hurni, ‘Article 8’, in Christoph Brunner, Benjamin Gottlieb (eds), *Commentary on the UN Sales Law (CISG)*, Alphen aan den Rijn 2019, 95; Ewa Rott-Pietrzyk (n 15) 122.

¹⁷ See Art. 8 (3) of the CISG.

of the CISG gives rise to the conclusion that the parties to a contract may agree to apply usages both explicitly and implicitly.¹⁸

It is recognized that documents published by the ICC may be used to interpret a contract even if the parties have not agreed to do so.¹⁹ Thus, it can be assumed that a force majeure clause that the parties have included in an international sale of goods contract may be interpreted by applying the ICC force majeure clause,²⁰ which covers '(i) war (whether declared or not), hostilities, invasion, act of foreign enemies, [and] extensive military mobilisation'.²¹ Mention of war, both declared and undeclared, is very important, since the case law evidences different approaches to whether an undeclared war can be considered a war. For example, even before the full-scale invasion of the territory of Ukraine, Ukrainian courts had noted that armed invasion by Russian troops was a well-known fact.²² 'War' and similar expressions (e.g., 'war-like operations', 'insurrection', 'rebellion', 'civil war') have been a subject of interpretation by the courts of other States. In such cases, although the courts did not directly state that the respective conflict was a well-known fact, they interpreted the term 'war' from the perspective of common sense.²³ In cases heard after the attack on Pearl Harbor, American courts used two approaches to the understanding of 'war' as a factor affecting the performance of contractual obligations. The first approach was that war exists if it is declared by the authorized bodies of a particular State.²⁴ The other was that war exists when, in fact, it is ongoing.²⁵

¹⁸ See Art. 9 (2) of the CISG.

¹⁹ Brunner, Hurni (n 16) 98.

²⁰ ICC Force Majeure Clause, 2020, [icc-forcemajeure-hardship-clauses-march2020.pdf](https://iccwbo.org) <<https://iccwbo.org>> accessed 17 November 2024.

²¹ *ibid.*

²² *Rishennia Pivnichnoho Apeliatsiinoho Hospodarskoho Sudu vid 25.03.2019*, Sprava 911/1897/18 [Judgment of the Northern Commercial Court of Appeal of 25 March 2019, Case 911/1897/18], <<https://reyestr.court.gov.ua>> accessed 17 November 2024.

²³ See *Kawasaki Kisen Kabushiki Kaisha of Kobe v Bantham Steamship Company, Limited*, 2 K.B. 544, Court of Appeal, 1939, <lawofwar.org/kkk_ofkob_case.htm> accessed 17 November 2024.

²⁴ See, e.g., *Savage v Sun Life Assurance Co.*, United States District Court, W.D. Louisiana, MoNooe Division, 1944, <<https://casetext.com/case/savage-v-sun-life-assur-co>> accessed 17 November 2024; *Pang v Sun Life Assurance Co.*, Supreme Court of Hawaii, 1945, <<https://casetext.com/case/pang-v-sun-life-assurance-co>> accessed 17 November 2024; *Rosenau v Idaho Mutual Benefit Association*, Supreme Court of Idaho, 1944, <<https://casetext.com/case/rosenau-v-ida-mut-benefit-assn>> accessed 17 November 2024; *West v Palmetto State Life Insurance Co.*, Supreme Court of South Carolina, 1943, <<https://casetext.com/case/west-v-palmetto-state-l-co>> accessed 17 November 2024.

²⁵ *New York Life Insurance Co. v Bennio*, Circuit Court of Appeals, Tenth Circuit, 1946, <<https://casetext.com/case/new-york-life-ins-co-v-bennion>> accessed 17 November 2024; *Stankus v New York Life Ins. Co.*, Supreme Judicial Court of Massachusetts. Worcester, 1942, <<https://casetext.com/case/stankus-v-new-york-life-ins-co>> accessed 17 November 2024.

When determining the moment when a war broke out for the purposes of a force majeure clause, it is necessary to determine what exactly may affect the contractual obligations and proceed from this point: has there been a formal declaration of war, or conduct of hostilities without such a declaration? Certainly much depends on how the force majeure clause is formulated. If the clause uses the term ‘war’, it should be understood that the moment of outbreak of war can be interpreted in different ways.

When included in contractual provisions, the term ‘sanctions’ can also be interpreted by considering usages widely known in international trade, in particular, as unified by the ICC, which understands sanctions to be ‘measures that restrict customary trade and financial relations with a country, entity or individual’.²⁶ Sanctions include ‘import and export bans, freezing of funds and assets and restrictions on admissions (travel bans)’.²⁷ Since sanctions may be imposed by international organizations (e.g., the UN) or by certain countries or blocs of countries (e.g., the EU), the concept of sanctions, where the force majeure clause refers to them, will be interpreted based on the legal provisions that imposed the relevant restrictions.

4. WAR AND SANCTIONS AS A GROUND FOR THE APPLICATION OF ARTICLE 79 OF THE CISG

4.1. WAR AND SANCTIONS AS AN ‘IMPEDIMENT’ FOR THE PARTIES TO A CONTRACT

If a contract falling within the scope of the CISG does not contain a force majeure, war, sanctions or hardship clause, it will be necessary to analyse whether the relevant situation meets the requirements of Article 79 of the CISG, which has been called ‘a not overly generous exception clause’²⁸ and which exempts contracting parties from liability for non-performance of the contract if the non-performance was caused by an impediment beyond the control of the breaching party. Traditionally, such impediments include ‘warfare ..., terrorist attacks and sabotage, acts of state (orders, laws, decrees, etc.) ... explosions, fire, destruction of machinery, [and] a long general interruption or collapse of energy supply.’²⁹

²⁶ Sanctions: Basic Guide for SMEs, ICC, 2022, <<https://iccwbo.org/content/uploads/sites/3/2022/10/icc-guide-on-sanctions-for-smes-october-2022.pdf>> accessed 17 November 2024.

²⁷ *ibid.*

²⁸ Michael G Bridge, ‘Force Majeure and International Supply Contracts’, *Transnational Commercial Law Review* 2020, No 1, 77.

²⁹ Christoph Brunner, ‘Article 79’, in Christoph Brunner, Benjamin Gottlieb (eds), *Commentary on the UN Sales Law (CISG)*, Alphen aan den Rijn 2019, 570.

Acts of the State include sanctions, embargoes, as well as export and import bans.³⁰ The impediment must also have been unforeseeable to the party in breach at the time it entered into the contract, and it must have been unavoidable.³¹ The standard of a reasonable person acting in similar circumstances is used to assess whether an event was foreseeable and avoidable.³² An impediment is foreseeable if the debtor knew about it at the time he entered into the contract or could reasonably have been expected to know about it based on all the circumstances.³³ That is why a war that took place after the conclusion of a contract is considered to be an unforeseeable impediment, while a war that took place before the conclusion of a contract is a foreseeable impediment.³⁴ However, whether war as an impediment was foreseeable should be decided on a case-by-case basis, considering all the circumstances. Since a war can affect the whole country or be confined to regions, a war can also be considered a foreseeable impediment in some but not in other parts of the same country.

Predictably, it will be difficult to claim exemption from liability under Article 79 of the CISG due to sanctions imposed on the seller or buyer, precisely because the impediment giving rise to the exemption from liability must be ‘unforeseeable’. And case law confirms this thesis. Thus, in *Greek Powder and Cartridge Company S. A. v The Ministry of Defence*, the arbitral tribunal refused to recognize the embargo that the UN imposed on Iraq due to its invasion of Kuwait, because the embargo was not unforeseeable: ‘following the invasion of Kuwait by Iraq forces, it was repeatedly stated by the UN competent authorities that Iraq was at fault in the invasion of Kuwait and consequently was responsible for the imposition of the UN embargo, as well as for its maintenance through its defiance of the UN resolutions’.³⁵

In addition, the impediment must be such that a party in breach ‘could not reasonably be expected to ... have avoided or overcome it, or its consequences’ (Article 79 (1) CISG). Examples of actions a party could take to avoid the consequences of an impediment include choosing a different route for the transporta-

³⁰ *ibid.*, 572.

³¹ Andre Janssen, Christian J Wahnschaffe, ‘Der internationale Warenkauf in Zeiten der Pandemie’, *Europäische Zeitschrift für Wirtschaftsrecht* 2020, 413.

³² Brunner (n 29) 585.

³³ *ibid.*; Ş Esra Kiraz, Esra Yıldız Üstün, ‘COVID-19 and force majeure clauses: an examination of arbitral tribunal’s awards’, *Uniform Law Review / Revue de droit uniforme* 2020, No 25, 457.

³⁴ Christophe Guibert de Bruet, *Armed Conflict and Force Majeure*, Lalive. Lexology, <<https://www.lexology.com/library/>> accessed 17 November 2024; Olaf Hofmann, *Der Ukraine-Krieg und seine Rechtsfolgen für Bauverträge*, THIS, No 9, <<https://www.this-magazin.de/>> accessed 17 November 2024.

³⁵ *Greek Powder and Cartridge Company S. A. v The Ministry of Defence*, ICC Case No 7094/CK/AER/ACS, 2003, <<https://jsumundi.com>> accessed 17 November 2024.

tion of goods; incurring additional (but not too burdensome) costs; and replacing generic items that are the subject of the sales contract with other items.³⁶

It is important to note that the party in breach is burdened with an obligation to overcome the impediment or its consequences. Although this may seem obvious, the case law shows a need to emphasize this point further. For example, in *Hilaturas Miel, S.L. v Republic of Iraq*, the seller, Hilaturas Miel, S.L., was unable to make a shipment due to the outbreak of hostilities in Iraq and the following withdrawal from the transaction of Cotecna, a company that was supposed to inspect the goods for acceptance and payment. The seller argued that '[e]ven in the case of force majeure, Iraq had the obligation to cure any resulting breach at the earliest opportunity it had to do so'.³⁷ The court rejected this argument because it 'would turn the doctrine of impossibility on its head, since it was Hilaturas, and not Iraq, that was unable to perform its obligations under the Contract due to the advent of war and the withdrawal of the Cotecna inspector'.

Not only can war and sanctions make it impossible to perform contractual obligations, but they can also lead to economic hardship, i.e., to situations in which performance of a contract remains possible in principle, but has become too burdensome for the obligor (for example, due to a significant increase in the price of energy or of components required for the manufacture of goods to be furnished under an international sales contract). The question of whether this type of hardship falls within the scope of Article 79 of the CISG was debated during the drafting of the CISG,³⁸ and it is believed that the drafters intended to cover only cases of force majeure.³⁹

Nevertheless, after the adoption of the CISG, it was argued that only in exceptional cases should economic hardship exempt an obligor from liability under Article 79.⁴⁰ Debate on this issue did not stop even after the adoption of CISG Advisory Council opinions 7 and 20, which clearly indicate that hardship is covered under the scope of Article 79 of the CISG.⁴¹ Some authors insist that Article 79 should not cover hardship.⁴² Others fully support opinions No 7 and No 20,

³⁶ Brunner (n 29) 586.

³⁷ *Hilaturas Miel, S.L. v Republic of Iraq*, U.S. District Court, New York (Southern District), 2008, <<https://www.unilex.info/cisg/case/1465>> accessed 17 November 2024.

³⁸ John Honnold, *Documentary History of the Uniform Law for International Sales*, Deventer, 1989, 185, 252.

³⁹ Larry A Di Matteo, *Legal Tradition Bias in Interpreting the CISG: Hardship as Case at Point* in Francesca Benatti, Sergio Garcia Long, Filippo Viglione (eds) *The Transnational Sales Contract*, Milano 2022, 139.

⁴⁰ Peter Schlechtriem, Petra Butler, *The UN Convention on the International Sale of Goods*, Berlin, Heidelberg 2009, 204.

⁴¹ CISG-AC Opinion No 7, Exemption of Liability for Damages Under Article 79 of the CISG, Alejandro M Garro (Rapporteur) 2007, <<http://www.cisgac.com/>> accessed 21 January 2023. 'The CISG governs cases of hardship' CISG-AC Opinion No 20, Hardship under the CISG, E Muñoz (Rapporteur) 2020, para 2, <<http://www.cisgac.com/>> accessed 17 November 2024.

⁴² Larry A Di Matteo (n 39) 135–160.

noting that both force majeure and hardship may be grounds for exemption from liability.⁴³ The latter point of view deserves support because the text of the CISG does not contain a list of impediments, but only gives their characteristics. So, if the hardship meets the characteristics of an impediment as set out in Article 79 (1) of the CISG, a party may be exempted from liability under this article.

To be released from liability under Article 79 of the CISG, defendants must prove a causal link between non-performance and the impediment as characterized in Article 79.⁴⁴ Therefore, the impediment must restrict either the possibility of supply or the possibility of payment.⁴⁵ For example, a causal link exists if, as a result of warfare, the goods to be delivered under the contract were destroyed; if they were located in a territory to which there is no access; or, if sanctions prohibit the performance of contractual obligations.

4.2. WAR AND SANCTIONS AS AN IMPEDIMENT TO THIRD PARTIES

War or sanctions may cause non-performance by a third party engaged by the seller or buyer to perform all or part of the contract. In such cases, the question always arises whether Article 79(1) or Article 79(2) of the CISG should apply,⁴⁶ and the answer determines which party bears the burden of proving the circumstances enabling the exemption from liability under Article 79 (Article 79(1) clearly states that it falls to the party that failed to perform the obligation; Article 79(2) does not).⁴⁷ Exemption from liability on the basis of Article 79 is possible if the person involved in the performance of the contract is a third party within the meaning of Article 79(2) of the CISG, as well as if the failure by the third party can be classified as an ‘impediment’ to the party in breach according to Article 79 (1) of the CISG, and if a war or sanctions that prevented the third party from performing can also be classified as an ‘impediment’ with respect to the third party’s ability to perform.

The main characteristics of third parties under Article 79(2) of the CISG are that they ‘independently participate in the performance and ... perform directly to the creditor’.⁴⁸ Such third parties may include, for example, carriers and sub-

⁴³ Serio G Long, ‘A Single Theory of Impediments Under the CISG: A Latin-American Perspective’ in Francesca Benatti, Sergio G Long, Filippo Viglione (eds) *The Transnational Sales Contract*, Milano 2022, 267; Denis Philippe, ‘Article 79 of the CISG, hardship, risk and renegotiation of the contract’ in Helmut Grothe, Peter Mankowski (eds), *Europäisches und internationales Privatrecht: Festschrift für Christian von Bar zum 70. Geburtstag*, Munich 2022, 284.

⁴⁴ Brunner (n 29) 586.

⁴⁵ *ibid*, 572.

⁴⁶ (n 41) para 2.2. ‘b’.

⁴⁷ *ibid*, para 15.

⁴⁸ Schlechtriem (n 40) 207.

contractors.⁴⁹ If the reason for the seller's failure is the failure of the seller's third-party supplier, the seller may be exempted from liability 'in certain extreme and exceptional cases',⁵⁰ which include, for example, situations in which the supplier is the only available source of supply, other sources are unavailable due to unforeseen and extraordinary events, or the defects in the available goods are not related to the typical risks of purchase assumed by the seller.⁵¹

5. NOTIFICATION OF AN IMPEDIMENT

Article 79(4) of the CISG obliges the party in breach to notify the other party of the impediment and its effect on the breaching party's ability to perform under the contract; it also provides that the other party must receive the notification. The rule in Article 79(4) is considered to be a derogation from the general rule established by Article 27 of the CISG.⁵² If the aggrieved party does not receive the notification within a reasonable time after the impediment has or should have become known to the party in breach, the party in breach is liable for damages resulting from non-receipt of the notice, which may include, for example, those incurred by a buyer failing to meet obligations to its own customers.⁵³ At the same time, some commentators believe that the obligor will not have an obligation to compensate these damages if the aggrieved party knew about the impediment despite not being notified by the breaching party, as in this case there is no causal link between the obligor's failure to notify and harm to the aggrieved party.⁵⁴

War and sanctions are impediments of which it will be difficult for the aggrieved party to prove he was unaware without notice from the party in breach. In this regard, it is worth mentioning that the existence of war may lead to a search for non-standard solutions to certify force majeure. For example, on 28 February 2022, the Chamber of Commerce and Industry of Ukraine (CCIU) posted on its website a scan of an open letter intended to substantiate force majeure circumstances (military aggression by the Russian Federation against Ukraine) 'from 24 February 2022 until their official ending'.⁵⁵

⁴⁹ (n11) 378; Christoph Brunner (n 29) 569; Tugce Oral, 'Exemption from liability according to the art. 79 of the Convention on International Sale of Goods (CISG)', *Juridical Tribune* 2019, Vol 9, Iss 3, 652.

⁵⁰ CISG-AC Opinion No 7 (n 41) para 25.

⁵¹ *ibid.*

⁵² Schlechtriem, Butler (n 40) 208.

⁵³ Brunner (n 29) 587.

⁵⁴ Beate Gselland others, 'CISG Art. 79, Rn. 77' in W Ball (Her.) *BeckOGK/Wagner*, 1 October 2022.

⁵⁵ Letter of the Ukrainian Chamber of Commerce and Industry No 2024/02.0-7.1, <<https://ucci.org.ua/>> accessed 17 November 2024.

However, Ukrainian law provides no such method of certifying force majeure. Instead, such certificates are issued on an individual basis.⁵⁶ Moreover, force majeure is to be certified by the CCIU in some cases and by regional chambers in others.⁵⁷ There have been cases in which a certificate issued by a regional chamber was not credited as evidence of force majeure if the parties' contract provided that force majeure was to be confirmed by a CCIU-issued certificate.⁵⁸

However, the day after Russia's full-scale invasion of Ukraine, the CCIU issued an order according to which regional chambers were given the right to certify force majeure circumstances even in cases when the issuance of such certificates falls within the competence of the CCIU. The regional chambers received these rights 'temporarily, for the period of martial law on the territory of Ukraine until its termination or cancellation'.⁵⁹ Taking into account the above case law, it may nonetheless be risky to rely on certification of force majeure by a regional chamber if the contract provided for certification by the CCIU.

Moreover, courts do not recognize the CCIU's open letter as proper proof of force majeure in contractual relations.⁶⁰ While the cases did not concern international sales contracts, they nonetheless allow us to predict Ukrainian courts' probable attitude toward use of this letter to substantiate an impediment in international sales cases in which the contract stipulates that a certificate of the CCIU may serve to substantiate the impediment. This approach by the courts cannot be supported, because it contradicts the principle of good faith for a party to deny

⁵⁶ Para 6.2. of Regulation on Certification by the Chamber of Commerce and Industry of Ukraine and by Regional Chambers of Commerce and Industry of force majeure circumstances (circumstances of unstoppable force), approved by the Decision of the Presidium of the Ukrainian Chamber of Commerce and Industry of 15 February 2014, No 40(3), <<https://zakon.rada.gov.ua/rada/show/v0040571-14#Text>> accessed 17 November 2024.

⁵⁷ See paras 4.1. and 4.2. of the Force Majeure Regulation.

⁵⁸ Postanova Verkhovnoho Sudu vid 26 travnia 2020 roku, Sprava No 918/289/19 [Supreme Court ruling of 26 May 2020, Case No 918/289/19], <<https://reyestr.court.gov.ua>> accessed 17 November 2024.

⁵⁹ Order of the President of the Ukrainian Chamber of Commerce and Industry of 25 February 2022 No 3, <<https://ucci.org.ua/uploads/files/62989f8bb62c2687708951.pdf>> accessed 17 November 2024. Martial law was imposed in Ukraine by presidential decree, initially for 30 days, and was then extended. Decree of the President of Ukraine 'On the Introduction of Martial Law in Ukraine' of 24 February 24, 2022 No 64 with amendments, <<https://zakon.rada.gov.ua/laws/show/64/2022#Text>> accessed 17 November 2024.

⁶⁰ Rishennia hospodarskoho sudu mista Kyieva vid 03 lystopada 2022 roku, Sprava No 910/4879/22 [Judgment of the Commercial Court of Kyiv as of 3 November 2022 Case No 910/4879/22], <<https://reyestr.court.gov.ua>> accessed 17 November 2024; Postanova skhidnoho apeliatsiinoho hospodarskoho sudu vid 02 lystopada 2022 roku Sprava No 917/353/22 [Resolution of the Eastern Commercial Court of Appeal as of 02 November 2022 Case No 917/353/22], <<https://reyestr.court.gov.ua>> accessed 17 November 2024; Rishennia hospodarskoho sudu Kirovohradskoi oblasti vid 29 chervnia 2022 roku, Sprava No 912/507/22 [Judgment of the Commercial Court of Kirovograd Region of June 29, 2022, Case No 912/507/22], <<https://reyestr.court.gov.ua>> accessed 17 November 2024.

knowledge of the war, a well-known fact, merely because they have not received notification of it from another party.

6. CONCLUSIONS

1. Force majeure, hardship, war, and sanctions clauses contained in contracts within the scope of the CISG may exclude the application of Article 79 of the CISG in whole or in part.

2. The use of the ICC force majeure clause to interpret a contract within the scope of the CISG (enabled by Articles 8 and 9 of the CISG) allows for a maximally broad interpretation of the term 'war', to include, among other things, an undeclared war.

3. A war that started after the conclusion of an international sale of goods contract is more likely to be recognized as 'unforeseeable' than the one that started before the conclusion of such a contract.

4. That it should be unforeseeable for sanctions to be imposed against the State that started the war or against persons supporting the outbreak of war after the war began seems doubtful, regardless of when the contract was concluded.

5. Economic hardship can be classified as an impediment under Article 79 of the CISG if it meets the characteristics stated therein.

6. If the war or sanctions prevented a person engaged by a seller or a buyer from fulfilling their duties, the seller or buyer may be released from liability under Article 79(2) of the CISG if: 1) the engaged person meets the criteria of a 'third party' within the meaning of Article 79 (2); 2) a third party's non-performance qualifies as an 'impediment' under Article 79(1) in regard to such a seller's or buyer's failure to perform under the contract; 3) war or sanctions may be qualified as an 'impediment' to the performance of obligations by such a third party under Article 79 (1).

7. War or sanctions are impediments that cannot be unknown to the buyer or the aggrieved party. Therefore, arguments to the effect that the buyer/obligee was unaware of the war or sanctions because it did not receive such a notification are unlikely to succeed.

8. It is advisable to send notification of impediment in accordance with Article 79 of the CISG (as long as the contract does not provide for another method of notification). However, if the impediment is war or sanctions, refusal to recognize the possibility of exemption from liability for breach of contract because the contract specified a notice procedure that the obligor did not observe is contrary to the principle of good faith.

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