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Grounds of Exemptions From Liability for Failure to Perform in the United Nations Convention on Contracts for the International Sale of Goods (CISG)

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The concept of *force majeure* is of paramount importance in international trade, as it impacts on the rights and obligations of the parties. In particular, in international contracts for the sale of goods, it is quite frequent the insertion of a specific clause pertaining to *force majeure* in order to regulate the impact of an act which is beyond the parties' control (for instance, an embargo) on the validity of the contractual provisions. The Authors will analyse how this concept is regulated in the United Nations Convention on Contracts for the International Sale of Goods and, in particular, in its articles 79 and 80. With a practical approach, the Authors will examine the relevant international case law and doctrine regarding the said provisions and will provide some solutions to draft valid and enforceable contractual clauses.

1. Introduction

Force majeure and hardship are very often invoked in international transactions to avoid contractual liability.

In general terms, *force majeure* «occurs when the performance of a contract is impossible due to unforeseeable events beyond the control of the parties»¹ while

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¹ J. Rimke, «Force Majeure and Hardship: Application in International Trade Practice with Specific Regard to the CISG and the UNIDROIT Principles of International Commercial Contract», in *CISG Database*, 1999-2000, available at www.cisg.law.pace.edu/cisg/biblio/rimke.html. See the definition

hardship «applies in cases where the performance of a party has not become impossible, but the grounds on which the contract was formed has changed dramatically and made the performance of a party onerous».²

In international sales contracts, it is quite common to find clauses dealing with *force majeure* and hardship³.

The United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980 – hereinafter, «CISG»)⁴ does not make any express reference to *force majeure* and/or hardship; however, these concepts can be evaluated and invoked under art. 79 of the CISG.⁵

The present paper aims at providing an analysis of the provisions of the CISG (artt. 79 and 80), which deal with the exemption of liability for damages, based on international case-law and doctrine.

2. Artt. 79 and 80 of the CISG: General Overview

Artt. 79 and 80 of the CISG are the provisions of the uniform regulation dedicated to the grounds of exemption that exclude debtor's liability in case of failure to comply with the contractual obligation.

According to art. 79, paragraph 2, CISG, whenever a breach of contractual obligation occurs⁶ the defaulting party shall be relieved of any liability for damages in so far as he provides evidence that such failure was due to an impediment beyond

of *force majeure* set forth in article 7.1.7 of the UNIDROIT Principles of International Commercial Contract, 2010.

² R. KOFOD, «Hardship in International Sales CISG and UNIDROIT Principles», in *CISG Database*, December 2011, available at www.cisg.law.pace.edu/cisg/biblio/kofod.html. See the definition of hardship set forth in article 6.2.2 of the UNIDROIT Principles of International Commercial Contract, 2010.

³ See the «International Chamber of Commerce Force Majeure and Hardship Clauses», 2003, available at <http://store.iccwbo.org/t/ICC%20Force%20Majeure%20Hardship%20Clause>.

⁴ The text of the CISG is available at www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html.

⁵ I. SCHWENZER, «Force Majeure and Hardship in International Sales Contracts», in *University of Wellington Law Review*, n. 39, pp. 709-725, available at www.austlii.edu.au/nz/journals/VUWLawRw/2008/39.pdf. See Cour de Cassation (Belgium), 19 June 2009, available at <http://cisgw3.law.pace.edu/cases/090619b1.html>.

⁶ B. ZELLER, «Article 79 Revisited», in *Vindobona Journal of International Commercial Law and Arbitration*, n. 14, 2010, p. 153: «It is undisputed that art. 79 is only applicable when a party has breached the contract».

his control, which was insurmountable, unavoidable and unforeseeable at the time of the conclusion of the contract.⁷

Pursuant to paragraph 2 of the aforementioned provision, debtor's liability shall not arise if the failure is attributable to a third party engaged to perform the whole or a part of the contract, that has not properly complied with its obligation due to an impediment under the provision of art. 79, paragraph 1, CISG.

The aforementioned exemption from liability is legitimate and effective for the entire duration of the impediment (art. 79, paragraph 3, CISG). The party that does not perform is required to provide timely and exhaustive information to the creditor about the occurrence and the effects of the circumstances that led to the failure, pursuant to art. 79, paragraph 4, CISG.

In any event, paragraph 5 of the Article at stake specifically provides for the creditor the faculty to exercise all of the remedies set forth by the CISG, except for the right to compensation of damages.

Pursuant to art. 80 CISG – that prevents a party from relying on a failure to perform of the other one, to the extent that such failure was caused by the first party's act or omission – debtor's exemption from liability depends on the possibility to charge the creditor with the relevant failure.⁸

⁷ According to the «UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods», 2012, p. 387, para. 1, available at: http://www.uncitral.org/uncitral/en/case_law/digests.html: art. 79 CISG shall be considered «in the nature of a *force majeure* provision».

⁸ A. MAZZONI, «Cause di Esonero nella Convenzione di Vienna sulla Vendita Internazionale di Cose Mobili e *Force Majeure* nei Contratti Internazionali», in *Rivista del Diritto Commerciale e del Diritto Generale delle Obbligazioni*, 1991, p. 549, states that arts. 79 and 80 CISG: «Configurano le cause di esonero da esse rispettivamente previste come fatti o eventi impeditivi “esterni” alla sfera del debitore. Tuttavia – e qui cessa il parallelismo tra i termini strutturali delle due fattispecie – nella fattispecie dell'art. 79, c. 1, tale “esteriorità” della causa in concreto impeditiva sussiste anche con riguardo alla sfera del creditore, mentre così non è nella fattispecie dell'art. 80. Invero, in quest'ultima fattispecie la nota caratterizzante è data proprio dalla circostanza che l'inadempimento verificatosi traeva origine, in tutto o in parte, da una causa “interna” alla sfera di controllo del creditore; e tanto basta per far considerare questa causa, nei limiti della sua “appartenenza” a tale sfera, “esterna” rispetto a quella del debitore e sufficiente pro tanto a legittimare l'esonero di costui, senza che occorra accertarne ulteriori requisiti qualificanti, quali la ragionevole imprevedibilità o insuperabilità da parte del debitore, richieste, invece, dall'art. 79, c. 1».

3. Art. 79 CISG

The nature of the relevant failure under the provision of art. 79 CISG is not specified: therefore, an objective lack of compliance with a contractual obligation burdening on one of the parties, both vendor and buyer⁹ is sufficient.

Any distinction among different kinds of obligations (i.e. principal and accessory obligations)¹⁰ or failures (i.e. delivery delay, non payment or late payment of the price)¹¹ shall have no relevance; therefore, it is irrelevant to address a mere infringement or a fundamental breach, under art. 25 CISG.¹² This general concept includes as well delivery of goods, which are not in conformity with the contract.¹³

⁹ Y. M. ATAMER, in *UN Convention on Contracts for the International Sale of Goods (CISG)*, Munich, 2011, p. 1057: «In principle, a violation of any obligation as well as any kind of failure to perform might be exempted by art. 79».

¹⁰ For Y. M. ATAMER, *op cit.*, p. 1058, art. 79 CISG «not only includes non-performance regarding the main obligations of delivery, transfer of property and payment, but also non performance regarding accessory obligations, such as concluding a transport insurance, packaging or notification duties».

¹¹ In order to check a wide range of cases in which art. 79 has been applied, see «UNCITRAL Digest of Case Law», *op cit.*, p. 389, para. 9.

¹² About the difference between mere infringement and fundamental breach, see A. FRIGNANI e M. TORSELLO, «Il Contratto Internazionale», in *Trattato di Diritto Commerciale e di Diritto Pubblico dell'economia*, Cedam, Padua, 2010, p. 486: «(...) ai sensi della Convenzione è (mero) inadempimento qualsiasi devianza nell'esecuzione della prestazione rispetto a quanto contrattualmente promesso, anche se tale devianza risulti assolutamente minimale. E', invece, inadempimento essenziale (fundamental breach) ogni inosservanza del contratto tale da privare irrimediabilmente l'altra parte di quanto legittimamente le spetta, a meno che la parte inadempiente non abbia previsto, né avrebbe potuto ragionevolmente prevedere un tale risultato». On this point, I. SCHWENZER, in SCHLECHTRIEM, SCHWENZER, *Commentary on the UN Convention on the International Sale of Goods (CISG)*, Oxford University Press, Oxford, 2010, p. 1065: «The provision primarily deals with breaches of obligations which result in liability under article 45 or 61; in addition, breaches of ancillary obligations or of obligations arising out of the "reversal" of the contract (arts. 81 ss.) also can fall under article 70. Similarly, partial non-performance falls within the scope of article 79».

¹³ In this respect, referring to the majority doctrine, I. SCHWENZER, *op. cit.*, pp. 1065-1066; and H. FLECHTNER, «Article 79 of the United Nations Convention on Contracts for the International Sale of Goods (CISG) as Rorschach Test: The Homeward Trend and Exemption for Delivering Non-Conforming Goods», in *Pace International Law Review*, n. 1, 2007, p. 34, available at <http://cisgw3.law.pace.edu/cisg/biblio/flechtner7.html>. See «UNCITRAL Digest of Case Law», in *op. cit.*, p. 389, para. 8; and Rapporteur: Professor A. MR. GARRO, Columbia University School of Law, «Exemption of Liability for Damages under Article 79 of the CISG», October 2007, available at www.cisg.law.pace.edu/cisg/CISG-AC-op7.html: «Article 79 exempts a party from liability for damages when that party has failed to perform any of its obligations, including the seller's obligation to deliver conforming goods».

3.1 *Exemption from Liability of the Defaulting Party under Art. 79, Paragraph 1, CIGS*

Art. 79 CIGS – Paragraph 1

1. 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.

Pursuant to paragraph 1 of art. 79 CISG, to the extent that the obliged party shall not be deemed liable for damages,¹⁴ it is necessary to prove cumulatively that: i) debtor's breach of any contractual obligation is due to an impediment beyond reasonable control and independent of his will;¹⁵ ii) such impediment was not known nor could the debtor reasonably have been expected to take it into account at the time of the conclusion of the contract; and iii) it would be disproportionate to pretend that the obliged party hamper such impediment or act so as to overcome the effects.¹⁶

«The Convention (...) provides in its art. 79 that the irresponsibility of a party for the failure of any of his obligations might occur if it is proven that such failure is due to an impediment beyond his control and that could not reasonably have been expected».¹⁷

¹⁴ Y. M. ATAMER, *op. cit.*, p. 1056: «The obligor is exempt from paying damages only if the impediment causing non-performance was beyond his control. Briefly stated, such an impediment is one, which does not occur in the obligor's sphere over which he exercises control (*Sphärentheorie*). As long as the party can, by taking the necessary precautions, hinder the occurrence of an impediment or overcome the effects of it, an exemption will not take place».

¹⁵ B. ZELLER, *op. cit.*, p. 155: «(...) only events which the breaching party cannot anticipate or make an impact on can be claimed as being an impediment beyond his control. The important fact is that the impediment must be of a type that is uncontrollable». I. SCHWENZER, *op. cit.*, p. 1069: «Exemption of the promisor under Article 79 requires that the unforeseeable and insuperable impediment is the sole reason for the failure to perform». In case the failure has been caused by circumstances under the control of the obliged party, exemption under art. 79 CISG is precluded: to this extent, Bulgarian Chamber of Commerce and Industry, 24 April 1996, available at www.unilex.info/case.cfm?id=422.

¹⁶ See Cour d'Appel de Lyon (France), 27 March 2014, available at <http://cisgw3.law.pace.edu/cases/140327f1.html>: «(..) empêchement indépendant de sa volonté, qui n'est pas prouvé et qui, de toute façon, n'est pas tel que l'on ne pouvait raisonnablement attendre de lui qu'il le prenne en considération au moment de la conclusion du contrat, no qu'il ne puisse le prévenir ou en surmonter les conséquences»; Tribunal Supremo (Spain), 5 June 2014, available at <http://cisgw3.law.pace.edu/cases/140605s4.html>; Tribunal Supremo (Spain), 9 July 2014, available at <http://cisgw3.law.pace.edu/cases/140709s4.html>.

¹⁷ Trib. Monza, 14 January 1993, available at www.unilex.info/case.cfm?id=21.

Burden of proof about the occurrence of all of the aforementioned requirements for the exemption – in addition to: i) the existence of a causal connection between the impediment and the breach of the contract;¹⁸ and ii) the timely notice under Art. 79, paragraph 4, CISG – is placed on the party invoking the provision at stake to be exempted from the compensation arising from its failure to perform.

«To the extent that the issue of burden of proof can not be excluded, and therefore does not constitute a gap falling outside the scope of international sale of mobile goods regulation under the provisions of the CISG, it is often (and, in the opinion of this Court, rightly) made reference to art. 79, para. 1, of the Convention that – with respect to the failure to perform – expressly refers to the burden of proof. According to this provision, in fact, “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”. (...) Art. 79, placing on the defaulting party the burden of proof that the failure to perform is due to an impediment beyond his control, implicitly acknowledges that, on the contrary, the proof of the failure to perform – that means of the irregular or defective execution – is borne by the counterpart, in other words, by the party that has received it».¹⁹

The impediment, which might lead to liability exemption shall take place through circumstances which are all external to the debtor’s control.²⁰

«Thus, an exemption in the sense of article 79 CISG can only be assumed if objective circumstances, which prevent the fulfillment of the contractual obligations and show no connection to the person of the seller, are present. The opposite

¹⁸ Y. M. ATAMER, *op. cit.*, p. 1056: «The obligor can only exempt himself from a non-performance which has a causal link to the impediment».

¹⁹ Trib. Vigevano, 12 July 2000, in *Giur. It.*, 2001, p. 280. In the same sense, Trib. Pavia (Italy), 29 December 1999, available at www.unilex.info/case.cfm?id=734; and Trib. Bolzano (Italy), 27 January 2009, available at www.unilex.info/case.cfm?id=1671. See «UNCITRAL Digest of Case Law», in *op. cit.*, p. 392, para. 20.

²⁰ A. MAZZONI, *op. cit.*, p. 554: «(...) l’impedimento suscettibile di legittimare l’esonero deve prima di tutto essere “esterno” alla sfera di controllo del debitore (...). È escluso, quindi, che il debitore-venditore possa liberarsi, nel caso di consegna di bene non conforme al contratto, adducendo come impedimento esonerativo lo stato delle conoscenze tecniche al momento in cui egli stesso ha prodotto il bene, ovvero il fatto che egli ha acquistato il bene in quelle condizioni da un terzo, ovvero ancora la circostanza che turbolenze produttive o organizzative interne alla sua impresa hanno determinato la carenza di qualità promesse o ritardi o difetti di imballaggio ecc. In questi casi (...) è il debitore a dover sopportare il peso dell’oggettivo inadempimento, posto che la causa dell’inadempimento stesso si è prodotta o è “transitata” all’interno della sua sfera di controllo».

applies in case of personal circumstances that prevent the seller from fulfilling his obligations».²¹

Circumstances causally linked to events falling within debtor's control shall not be deemed as grounds of exemption under the provisions of art. 79, para. 1, CISG.²² Among these, for instance, the following situations shall be included: the impossibility for a car seller to transfer the ownership to the buyer because of the car theft;²³ the impossibility for a vendor to comply with the obligation to deliver the goods, owing to the failure of his supplier;²⁴ the temporary lack of funds of a specific currency;²⁵ the absence of appropriate locals to be destined as warehouse for the storage of goods;²⁶ a juridical mistake on the interpretation of the contract.²⁷

In order to make the liability exemption at stake effective, the requirement of the event unpredictability at the time of the conclusion of the contract must also be met.²⁸ For the purpose of an adequate analysis of such particular case, the judge – with respect to the provision of art. 8, para. 2, CISG – shall have to ascertain if, given the circumstances at the moment of the conclusion of the contract, the obliged party was reasonably expected to foresee the event that hampered the regular fulfillment of the relevant obligation.²⁹ Among the circumstances which might be deemed

²¹ Oberlandesgericht, München, Germany, 5 March 2008, available at <http://cisgw3.law.pace.edu/cases/080305g1.html>.

²² A. FRIGNANI, M. TORSELLO, *op. cit.*, p. 488: «(...) la normativa convenzionale richiede che l'evento impeditivo dell'adempimento (o di un corretto adempimento) non sia riconducibile all'obbligato (si pensi alle sue possibili difficoltà finanziarie) o al suo apparato produttivo-organizzativo (si pensi ad uno sciopero endo-aziendale), ma rappresenti un fattore esogeno rispetto al "rischio contrattuale" gravante su quest'ultimo». For Y. M. ATAMER, *op. cit.*, p. 1072: «Any endogenous impediment, such as death or severe illness, cuts in the energy supply, breakdown of a machine, failure of production or accounting systems or data processing equipment or internal labour disputes will not suffice for exoneration even if they were unforeseeable or uncontrollable. (...) Only if the illness is an epidemic or the whole energy supply system of a region broke down or a general strike in certain business sector is called out will the impediment be qualified as an extraneous one».

²³ Oberlandesgericht München (Germany), 5 March 2008, available at <http://cisgw3.law.pace.edu/cases/080305g1.html>.

²⁴ Bundesgerichtshof (Germany), 24 March 1999, available at <http://cisgw3.law.pace.edu/cases/990324g1.html>. See «UNCITRAL Digest of Case Law», in *op. cit.*, p. 390, para. 14.

²⁵ Tribunal of International Arbitration at the Russian Federation Chamber of Commerce and Industry (Federation of Russia), 17 October 1995, available at <http://cisgw3.law.pace.edu/cases/951017r1.html>.

²⁶ Bulgarian Chamber of Commerce and Industry, 12 February 1998, available at www.unilex.info/case.cfm?id=420.

²⁷ I. SCHWENZER, *op. cit.*, p. 1072: «The correct legal assessment of the contractual obligations lies within the promisor's typical sphere of risk».

²⁸ Y. M. ATAMER, *op. cit.*, p. 1075: «Foreseeability is a part of risk allocation in the contract».

²⁹ I. SCHWENZER, *op. cit.*, p. 1068: «The decisive test is whether a reasonable person in the shoes of the promisor, under the actual circumstances at the time of the conclusion of the contract and taking

as predictable, any impediment caused by contrast with the existing laws at the time of the conclusion of the contract shall be included, such as, for instance, a blockage of goods at the custom owing to a lack of compliance with the regulations of the importing State or whose the export is prohibited.³⁰

Furthermore, the impediment shall have to meet the requirements of the «reasonable inevitability or, otherwise, shall be insurmountable at the time of its execution».³¹ For this reason, the defaulting party shall be bound to prove that no other means were available – even if much more burdensome from an economic point of view – to the extent of overcoming the consequences of the impeditive event and of complying with its contractual obligation.³²

In case the vendor is required to deliver generic goods, available on the market even though with additional cost, it shall be highly difficult to demonstrate such impediment to be insurmountable.³³

«The (Seller) also stated that the events should be qualified as an impediment beyond its control. According to article 79 CISG, the (Seller) is not liable for the non-delivery of these mandarins, if it evidences that this was caused by an impediment which was beyond its control and that it could not reasonably be expected

into account trade practices, ought to have foreseen the impediment's initial or subsequent existence».

³⁰ Bulgarian Chamber of Commerce and Industry, 24 April 1996. See «UNCITRAL Digest of Case Law», in *op. cit.*, p. 391, para. 17. See, U.S. District Court, Northern District of Illinois, East. Div. (USA), 6 July 2004, available at www.unilex.info/case.cfm?id=987: «Mr. Forberich testified that although ice breakers are normally used to allow for shipping, the winter of 2002 was the worst winter in St. Petersburg in almost sixty years and that ice interfered with shipping at the end of November and that even the icebreakers were stuck in the ice. He also testified that these were “unexpected weather conditions”. Whether it was foreseeable that such severe weather would occur and would stop even the icebreakers from working is a question of fact for the jury. In so holding, the Court notes that the freezing over of the upper Mississippi River has been the basis of a successful force majeure defense. See *Louis Dreyfus Corp. v. Continental Grain Co.*, 395 So.2d 442, 450 (La.Ct.App.1981). *In sum*, because questions of fact exist as to whether the early freezing of the port prevented Forberich's performance and was foreseeable, Forberich's *force majeure* affirmative defense may be viable and summary judgment would be inappropriate».

³¹ A. MAZZONI, *op. cit.*, p. 556.

³² I. SCHWENZER, *op. cit.*, p. 1068: «An exemption may only be considered where the ultimate “limit of sacrifice” has been exceeded». According to Y. M. ATAMER, *op. cit.*, p. 1075: «To avoid the effects of an event means that the obligor usually needs to act before the event takes place. He cannot just wait for the event to happen like a casual bystander. The effects on contractual performance of a flood, which was announced a couple of days in advance, or of a war, which was likely to start, or of a law, which was sent to parliament, can be alleviated if the required measures are taken in a timely manner».

³³ I. SCHWENZER, *op. cit.*, p. 1074. Y. M. ATAMER, *op. cit.*, p. 1084: «The failure of any supplier of the seller to provide him with generic goods, never by itself, constitutes an impediment in the sense of art. 79. Even if the failure was absolutely unforeseeable for the seller, he still is under the duty to procure the goods from another source».

to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences. The Court orders the (Seller) to evidence these factors. More specifically, it will have to show that, as a result of the enduring frost, during the relevant period, no other Ellendales were available which met the agreed standard, and also, that it could not reasonably be expected to have taken the enduring frost and the possibility that it may not have been able to fulfill its obligation to deliver these mandarins into account at the time of the conclusion of the contract».³⁴

Circumstances which might be led to the *force majeure* – such as, for instance, earthquakes, floods, storms, fires, measures adopted by public authorities (*factum principis*), embargo,³⁵ epidemic diseases, war,³⁶ acts of terrorism or piracy,³⁷ riots³⁸ – might constitute an exemption under art. 79, par 1, CISG;³⁹ for this circumstances as well, in any event, it shall be necessary to give evidence that all the requirements set forth by law are met.⁴⁰

On whether it would be possible to recognize the exemption known by Italian law as *hardship* – that means the situation in which a radical change in the balance

³⁴ Arrondissementsrechtbank Rotterdam (Paesi Bassi), 12 July 2001, available at <http://cisgw3.law.pace.edu/cases/010712n1.html>.

³⁵ Hungarian Chamber of Commerce and Industry Court of Arbitration (Ungary), 10 December 1996, available at www.unilex.info/case.cfm?id=424.

³⁶ U.S. District Court, New York, Southern District (USA), 20 August 2008, available at www.unilex.info/case.cfm?id=1465.

³⁷ Acts of sabotage committed by the debtor's dependents – who cannot be considered as third party, under art. 79, par. 2, CISG – fall outside the scope of art. 79, para. 1, CISG, given that such circumstances come within debtor's sphere and therefore are subject to his control.

³⁸ I. SCHWENZER, *op. cit.*, p. 1070 ss.

³⁹ R. KOFOD, «Hardship in International Sales CISG and the UNIDROIT Principles», available at www.cisg.law.pace.edu/cisg/biblio/kofod.html: «Article 79 does not expressly mention the term *force majeure*, but is nevertheless, clearly governing the classical *force majeure* situations».

⁴⁰ A. MAZZONI, *op. cit.*, p. 556: «(...) né una guerra, né un embargo, né una catastrofe naturale, né un disastro industriale, né un fatto del principe, né la contrarietà a disposizioni valutarie, né uno sciopero è in sé un fatto che esonera alla stregua della CVIM. (...) Alcuni esempi (...) lo scoppio di una guerra, che colpisca il paese nel quale ha sede lo stabilimento del venditore da cui era stato contrattualmente previsto che dovessero essere esportati i beni, può non essere ritenuto fatto sufficientemente impeditivo, se il venditore può eseguire attraverso una succursale (o anche una filiale giuridicamente autonoma ma sottoposta al suo controllo) situata in un altro paese non colpito dalla vicenda bellica. Ancora, l'embargo che precluda l'esportazione o la consegna del bene compravenduto può non essere ritenuto fatto impeditivo ragionevolmente imprevedibile, se al tempo della conclusione del contratto la possibilità dell'embargo era già stata minacciata dalla comunità internazionale o da determinati Stati, provvisti di forza sufficiente per renderlo effettivo». In the same sense, N. KAUR «Impediment: A Concept Under CISG, UNIDROIT and Indian Contract Law – A Comparative Analysis», in *Vindobona Journal of International Commercial Law and Arbitration*, n. 15(1), 2011, p. 93.

of the original contractual obligations has rendered the obliged party's performance excessively onerous – there is not a clear position neither amongst the authors, nor in the pertaining limited case law.⁴¹

According to a school of thought,⁴² Art. 79 should not be deemed as a provision suitable to include the case of *hardship*:

«(...) The case of hardship falls outside the scope of the Convention both as a remedy (exemption) and as a mean to claim for termination (*rectius*: dissolution) of the contract. And it is not questionable that if such Convention was actually applicable to the contract, it should be deemed to be *a priori* prevented the faculty to invoke hardship with respect to the obligation of delivery without an effective comparison of the requirements set forth by law».⁴³

This position should be analyzed with respect to a different understanding, that might now have prevailed,⁴⁴ according to which «economic impossibility» entails liability exemption under the provision of art. 79, CISG:

«Article 79(1) CISG (...) 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

⁴¹ A review of the pertaining case law is provided by «UNCITRAL Digest of Case Law», in *op. cit.*, p. 390, para. 15; see, in particular, «CISG-AC Opinion No. 7», para. 26.

⁴² *Ex multis*, G. DE NOVA, «Risoluzione per Eccessiva Onerosità e Convenzione di Vienna», in *I Contratti*, n. 5, 1993, p. 584: «(...) l'eccessiva onerosità sopravvenuta sembra ipotesi troppo diversa dall'«impedimento» di cui all'art. 79 per poterla in esso ricomprendere». The Author understands that hardship constitutes a shortcoming in the CISG provisions, that should be overcome under the applicable national law.

⁴³ Trib. Monza, 14 January 1993.

⁴⁴ See I. SCHWENZER, *op. cit.*, p. 1076: «According to the new prevailing opinion, so-called economic impossibility, i.e. a change of economic circumstances which is of such gravity that the procurement or fabrication of the goods would cause the seller to incur unreasonable costs in relation to the contract price, can justify exemption under Article 79»; M. J. BONELL, «La Prima Decisione Italiana in Tema di Convenzione di Vienna sulla Vendita Internazionale», in *Giur. It.*, n. 146(1), 1994, p. 148: «(...) se è vero che l'art. 79, 1° comma parla di «impedimento», ciò non significa che si sia voluto delimitare la cerchia delle possibili cause di esonero ai soli casi di impossibilità assoluta ed oggettiva ad adempiere; (...) in linea di massima vi rientrano anche tutte le ipotesi in cui la prestazione, per quanto materialmente e giuridicamente possibile, risulta talmente onerosa per il debitore da non poter essere da lui ragionevolmente pretesa»; and «CISG-AC Opinion No. 7», in *op. cit.*: «A change of circumstances that could not reasonably be expected to have been taken into account, rendering performance excessively onerous (“hardship”), may qualify as an “impediment” under Article 79(1). The language of article 79 does not expressly equate the term “impediment” with an event that makes performance absolutely impossible. Therefore, a party that finds itself in a situation of hardship may invoke hardship as an exemption from liability under Article 79».

manner, can, under circumstances, form an impediment in the sense of this provision of the Convention».⁴⁵

3.2 Debtor's Failure as due to the Failure of a Third Party, under the Provision of Art. 79, Paragraph 2, CIGS

Art. 79 CIGS – Paragraph 2

2. If the party's failure is due to the failure by a third person whom he has engaged to perform the whole or a part of the contract, that party is exempt from liability only if:

- (a) he is exempt under the preceding paragraph; and
- (b) the person whom he has so engaged would be so exempt if the provisions of that paragraph were applied to him

The defaulting party shall be deemed liable towards its counterpart even for the facts of third parties, extraneous to the agreement, that have been engaged after the conclusion of the same in order to perform the whole or a part of the contractual obligations.

Among the meaning of «third party» as contained in the provision at stake, it shall be included any subject with an autonomous legal personality that is not referable to the obliged party's company organization;⁴⁶ among these, for instance, a carrier transporting goods on behalf of the vendor up to a specific place⁴⁷ or a credit institution that gives execution to the buyer's payment order might be included.⁴⁸ Debtor's employees shall not be deemed as «third parties», whereas the counterpart's employees might be considered as such.⁴⁹

⁴⁵ Hof van Cassatie (Belgium), 19 June 2009, available at <http://cisgw3.law.pace.edu/cases/090619b1.html>. See H. FLECHTNER, «The Exemption Provisions of the Sales Convention, Including Comments on "Hardship" Doctrine and the 19 June 2009 Decision of the Belgian Cassation Court», in *Belgrade Law Review*, n. 50(3), 2011, pp. 84-101, available at <http://cisgw3.law.pace.edu/cisg/biblio/flechtner10.html>.

⁴⁶ «CISG-AC Opinion No. 7», in *op. cit.*, para. 19: «(...) are not merely separate and distinct persons or legal entities, but also economically and functionally independent from the seller, outside the seller's organizational structure, sphere of control or responsibility».

⁴⁷ I. SCHWENZER, *op. cit.*, p. 1077: «(...) engaging a carrier to send or transport the goods in a situation where the transport of the goods is one of the promisor's contractual obligations should, as a rule, be regarded as a partial undertaking of performance by a third person and therefore fall under Article 79(2)». See Handelsgericht des Kantons Zürich (Switzerland), 10 February 1999, available at www.unilex.info/case.cfm?id=484.

⁴⁸ Y. M. ATAMER, *op. cit.*, p. 1081.

⁴⁹ I. SCHWENZER, *op. cit.*, p. 1078.