

# **Covid-19 pandemic and Changed Circumstances**

**The applicability of Article 79 of the CISG to  
events of force majeure nature with focus on  
supply contracts in the automotive industry**

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# Abstract

An instantaneous outbreak of an infectious disease that was rapidly declared as pandemic and named as Covid-19 triggered changed circumstances extensively in the lives of individuals but also on market balance and international trade. Due to Covid-19, the global economy plunged into recession. Alongside with other impacts, suppliers signed in international contracts suffered problems due to their incapability of contractual performance *e.g* because of entry bans and infected employees set to obligatory quarantines.

In general, contractual non-performance leads to breacher's liability for damages. When the parties have included a so-called force majeure- clause or apply the provisions of the CISG, the situation could be different depending on the surrounding circumstances. CISG is widely ratified globally, and some scholars consider that Article 79(1) reflects exemptions of force majeure nature. The mentioned Article does not explicitly state that pandemic, nor anything shall be regarded as sufficient to trigger such rights for contractual exemption. It can be generally considered that Article 79(1) and (2) CISG applies to pandemic situations with specific requirements for qualification. Whether it is in the mutual interest of the parties, opting out of such provision is possible. Still, veritable possibilities for invoking the right of opting out are dependent on several statutory factors that have to be invariably considered while creating an agreement.

The automotive industry has a great impact on world trade in general due to its great market size and the huge quantity of employment in the industry. Therefore, it serves as a good focus point to reflect the impact of Covid-19 and the possibilities for the seller or the supplier to exempt from its contractual obligations.





# Foreword

To me, this thesis marks an end of a significant phase in life, but also a beginning of a completely new, interesting and inspiring start with new challenges.

Therefore, I would like to thank my family for inspiring me and teaching me certain values I will forever cherish. In addition, I believe that I would not have achieved my current level of success without the interminable support of my close friends, especially Iida Leinonen, Oona Kukkola, and Petra Salkoviiri who have supported me in every goal I have decided to pursue. Finally, I would like to thank my thesis supervisor Dr. Johan Axhamn for guidance, valuable discussions, support and patience during this process, and my superior at work, lawyer Rauli Viippola, for all the mentoring and help I have received.



# Abbreviations

Article 79 CISG	Article 79 of the United Nations Convention on Contracts for the International Sale of Goods
CCI	The Chamber of Commerce and Industry of Russia
CISG-AC	CISG Advisory Council
CISG / the Convention	United Nations Convention on Contracts for the International Sale of Goods
Covid-19	A global pandemic caused by severe acute respiratory syndrome, identified as SARS-CoV-2, named as Covid-19
EC	European Commission
EU	European Union
GDP	Gross Domestic Product
ICC	International Chamber of Commerce
IMF	International Monetary Fund
LCCI	London Chamber of Commerce and Industry
MISE	Ministry of Economic Development in Italy
OECD	Organisation for Economic Co-operation and Development
PIL	Private International law
UN	United Nations

UNCITRAL	United Nations Commission on International Trade Law
USA	United States of America
WHO	World Health Organization
WTO	World Trade Organisation

# 1. Introduction

## 1.1 Background

One of the main functions of contract law is to enable the contracting parties to create circumstances that give certainty and predictability for the future for each other.<sup>1</sup> One factor creating certainty is a well-known principle, *pacta sunt servanda*. When translated to English, it means ‘agreement must be kept’, thus it is creating grounds for the contracting parties to mutually trust each other to fulfil the obligations agreed upon in the contract made between them. An exquisite expression concerning the law in general, but with a certain importance towards the discussed subject, have been presented in a British case, where it has been stated that: ‘The function of the law is to enable rights to be vindicated and to provide remedies when duties have been breached.’<sup>2</sup> When it comes to contract law, awarding damages is used to provide remedies to a contracting party when his/her contractual rights have been infringed by actions of another party.<sup>3</sup> Thus, a contract creates a binding bond between the contracting parties, and, in principle, an unfounded deviation from obligations agreed upon within a contract allows the party whose interests have been violated to recover from such fault by certain actions, *e.g.* by claiming damages.

Despite the contract being signed, legal and valid, such unexpected events may occur that change the surrounding circumstances essentially affecting the possibilities to fulfill the contractual obligations. This could be a natural phenomenon, an unexpected event during cargo transport that causes a delay of the products in the load or a fire in a manufacturing facility forcing to shut down a factory essential

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<sup>1</sup> Ewan McKendrick, *Force Majeure and frustration of contract* (Informa Law from Routledge 2nd ed., 2013) P4

<sup>2</sup> *Chester v. Afshar* [2004] UKHL 41 [2005] 1 A.C. 134 para. 87

<sup>3</sup> Melvin Aron Eisenberg MA, Robert Cooter, ‘Damages for breach of contract’ (1985) 73 California Law Review <https://heinonline.org/HOL/LandingPage?handle=hein.journals/calr73&div=51&id=&page=> accessed 16 April 2021

for production and thus causing inevitable contractual non-performance.<sup>4</sup> To prepare for such extreme circumstances, contracts may include a so-called force majeure -clause, which in its most commonly accepted form is allowing the contracting parties to temporarily postpone the obligations they have agreed upon when signing the contract.<sup>5</sup> The nature of the force majeure clause allows that after the obstacle for fulfilling the contractual obligations has passed, compliance with the contract between the parties will continue as before without claims for damages.<sup>6</sup> It does not matter whether the contract is a long-lasting contract, *e.g.* a supply contract of car segments to a car manufacturer, or considering a one-time delivery exclusively, the force majeure clause applies the same whether a force majeure -clause is included in a contract.

Under the principle of contractual freedom, which is widely accepted and recognized in global basis, the parties are allowed to agree upon the contractual terms they want to use.<sup>7</sup> It is common, that a force majeure -clause is added to the contractual terms as a standard term, which does not include a specific mention about a certain circumstance, which could be *e.g.* a pandemic, to assure a protection coverage over pandemic situations.<sup>8</sup> This could be problematic especially when speaking of pandemics, as generally a pandemic does not constitute a force majeure -exemption, because it can be considered foreseeable due to the fact that health authorities have been warning about possible pandemic for decades.<sup>9</sup> However the outcomes of a pandemic are unique, variable and therefore unforeseeable, and thus

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<sup>4</sup> ZDNet Staff for Tech Legal, 'Earthquake Tsunami forces force majeure relook' (*ZDNet*, 8 April 2011) <<https://www.zdnet.com/article/earthquake-tsunami-forces-force-majeure-relook/>> accessed 7 April 2021; BBC, 'Shell Singapore declares Force Majeure after fire' (*BBC News*, 3 October 2011) <<https://www.bbc.com/news/business-15146474>> accessed 3 April 2021; Matt Leonard, 'Ever Given and the Suez Canal: A list of affected ships and what delays mean for shippers' (*Supply Chain Dive*, 25.3.2021) <<https://www.supplychaindive.com/news/ever-given-suez-canal-evergreen-blocked-shippers-cargo/597295/>> accessed 17 April 2021

<sup>5</sup> Prytz, 'Avtalsstruktur och risk vid köp av nyproducerade bostadsrätter - En riskanalys av avtalsstrukturen i förhandsavtal och upplåtelseavtal' (Student publication for professional degree, University of Lund 2020) P29; European Union, 'COVID-19: Q&A on the temporary impact on contractual procedures' (European Union) < [https://ec.europa.eu/international-partnerships/system/files/covid-19-faq-impact-contractual-procedures\\_en.pdf](https://ec.europa.eu/international-partnerships/system/files/covid-19-faq-impact-contractual-procedures_en.pdf)> accessed 21.5.2021

<sup>6</sup> *ibid*

<sup>7</sup> UNIDROIT, 'UNIDROIT Principles of International Commercial Contracts with Official Commentary: Chapter 1. General Provisions' (1994) See Article 1.1, Comment 1; C-240/97 *Kingdom of Spain v European Commission* [1999] ECR I-06571 para 99

<sup>8</sup> Kari Hoppu, 'Force majeure -tilanteiden tulkinnaista erityisesti COVID-19 -taudin yhteydessä' (2020) Defensor Legis P300

<sup>9</sup> *ibid* P305

could be something that would could be considered to have a force majeure - nature.<sup>10</sup>

Some contracts are a part of formation of supply chains. Supply chains commonly cross some national borders, and this cross-border activity is common *e.g.* in automotive industry.<sup>11</sup> When national borders are crossed, the provisions from the Contracts for the International Sale of Goods (the CISG or Convention) apply. CISG is an international convention which applies to contracts governing the sale of goods between such parties, whose businesses are located in different countries, the contracting parties come from countries that have ratified the convention or when rules of private international law (PIL) lead to applying the law of contracting state of the CISG.<sup>12</sup> In other words, private parties cannot be parties to the convention, but the rules of the CISG apply to them if such party is domiciled such state that has ratified the CISG. It was initially set for creating a uniform law for international sales, unification of international trade law, promoting progressive harmonization, and promoting the predictability of costs caused by foreign laws.<sup>13</sup> Even today, the goals remain the same, and the purposes of the CISG are provided in the preamble of the convention.<sup>14</sup>

More detailed grounds for applicability of the CISG are provided in a journal article by Lisa Spagnolo, where she has claimed that the internal rules of application of the CISG come in four scenarios:

- 1) by direct application by virtue of Article 1(1)(a)
- 2) by indirect application through Article 1(1)(b)

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<sup>10</sup> *ibid*

<sup>11</sup> Felix Richter, 'U.S. Car Industry Most Reliant on Chinese Parts' (*Statista*, 21 February 2020) <<https://www.statista.com/chart/20913/chinese-exports-of-motor-vehicle-parts-and-accessories/>> accessed 10 April 2021; Shaneen Sardar, Young Hae Lee, 'Modeling the Impact of Border Crossing Bottlenecks on Supply Chain Disruption Risk' (2020) 7(2) *International Journal of Engineering and Technology*, <[https://www.researchgate.net/publication/275520746\\_Modeling\\_the\\_Impact\\_of\\_Border\\_Crossing\\_Bottlenecks\\_on\\_Supply\\_Chain\\_Disruption\\_Risk](https://www.researchgate.net/publication/275520746_Modeling_the_Impact_of_Border_Crossing_Bottlenecks_on_Supply_Chain_Disruption_Risk)> accessed 9 April 2021 P692

<sup>12</sup> *ibid*; FondiaVirtual Lawyer, 'Convention on International Sale of Goods (CISG)' (*Fondia*) <<https://virtuallawyer.fondia.com/fi/articles/kansainvalinen-kauppalaki-cisg>> accessed 23 April 2021; CISG art 1(b)

<sup>13</sup> UNCITRAL National Coordination Committee for Australia, 'International Sale of Goods (CISG)- The mandate' (*UNCITRAL National Coordination Committee for Australia*) <<https://www.uncca.org/cisg>> accessed 15.4.2021

<sup>14</sup> *ibid*; CISG, Preamble

3) by agreement between the parties providing that even when neither of the contracting parties is from countries that have ratified the CISG, the parties can however specifically agree to apply the CISG in their contract by incorporating specific provisions of CISG into their contractual terms, and

4) by appropriate law determined by arbitral tribunal, meaning that albeit the contract would not be a subject of the CISG under direct nor indirect application, an arbitral tribunal may consider that the CISG shall be applied as appropriate law or evidence of international usage.<sup>15</sup>

Therefore, the CISG is widely applicable and has great value on global contracts and thereby on functions of international trade. The CISG consist of rules and principles concerning international sales of goods, and it reflects the spirit of flexibility and compromise, meaning that it is not drafted in a strict and precise manner, as it is somewhat open-ended and leaves a choice to the parties to consider what could be the best option for them.<sup>16</sup> The flexibility shows as well from that even if the contracting parties would be from countries that have both ratified the CISG, the parties still have the chance to out draft the application of the CISG from their contract.<sup>17</sup> Hence, to some extent, the CISG is somewhat optional to be used between the parties in practice. The wideness and its' not necessarily binding form may be one reason for the widespread of the CISG, as it effectively providing standards and thus safety for the contracting parties but does not appear as strictly restrictive and truculent.

If a contracting party in such contract where the CISG is applied encounters a changed circumstance of a force majeure nature, *e.g* a hurricane wrecking a manufacturing facility of an automotive producer, the provisions of Article 79 of the CISG (Article 79 CISG), more precisely the Article 79(1) of the convention applies. The Article 79(1) CISG justifies failure of performing the contractual

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<sup>15</sup> Lisa Spagnolo, 'The Last Outpost: Automatic CISG opt outs, misapplications and the costs of ignoring the Vienna Sales Convention for Australian lawyers' (2009) Vol 10. Issue 1 Melbourne Journal of International Law  
<[https://www.researchgate.net/publication/228169591\\_The\\_Last\\_Outpost\\_Automatic\\_CISG\\_Opt\\_Outs\\_Misapplications\\_and\\_the\\_Costs\\_of\\_Ignoring\\_the\\_Vienna\\_Sales\\_Convention\\_for\\_Australian\\_Lawyers](https://www.researchgate.net/publication/228169591_The_Last_Outpost_Automatic_CISG_Opt_Outs_Misapplications_and_the_Costs_of_Ignoring_the_Vienna_Sales_Convention_for_Australian_Lawyers)> accessed 14.4.2021 P6-8

<sup>16</sup> Edoardo Ferrante, 'Thirty Years of CISG: International Sales, Italian Style' (2019) No.1 5 Italian Law Journal  
<<http://theitalianlawjournal.it/data/uploads/5-italj-1-2019/87-ferrante.pdf>> accessed 15.4.2021 P88

<sup>17</sup> *ibid* P89



obligations due to impediment 'beyond his control', thus requiring unforeseeability.<sup>18</sup> As it shall be explained and examined further on this thesis, the Article 79(1) can be considered to reflect an exemption of force majeure nature. The remarkably vague form of the provisions in the Article 79 cause differences of opinion and leaves wide margin for interpretation, *e.g.* due to the fact that Article 79(1) nor (2), which widens the scope of exemption due to a third party facing an impediment beyond control affecting the contracting party, do not include any examples about situations that would serve as grounds for exempting.<sup>19</sup> Thus, interpretation of the Article 79(1) and (2) depends largely on what courts consider on case-by-case basis.

Variety of impediments were triggered in 2020, when the global pandemic caused by a virus named SARS-CoV-2, later named as Covid-19, generated many adverse effects on many aspects of trade and development.<sup>20</sup> Problems in supply chains were among the problematic areas in the pool of global issues risen due to the pandemic.<sup>21</sup> One of the industries on the front line of business interruptions caused by the pandemic was the automotive industry.<sup>22</sup> As the world economy has been combatting with enormous problems due to Covid-19, and the suppliers in supply chains have been struggling to fulfill their contractual obligations due to the pandemic, it is essential to examine how the seller can exempt from his/her contractual obligations in situations, where the pandemic has turned the performance of a contractual obligation

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<sup>18</sup> CISG art 79(1)

<sup>19</sup> CISG art 79(2)

<sup>20</sup> Tedros Adhanom Ghebreyesus, 'WHO Director-General's opening remarks at the media briefing on COVID-19 - 11 March 2020' (*WHO*, 11 March 2020) <<https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19--11-march-2020>> accessed 15.4.2021; Wu and others, 'SARS-CoV-2 is an appropriate name for the new coronavirus' (*The Lancet*, 3.6.2020) <[https://doi.org/10.1016/S0140-6736\(20\)30557-2](https://doi.org/10.1016/S0140-6736(20)30557-2)> accessed 15.4.2021; UN, 'Impact of the Covid-19 Pandemic on Trade and Development- Transitioning to a new normal' (*United Nations publication issued by the United Nations Conference on Trade and Development*, 2020) <[https://unctad.org/system/files/official-document/0sg2020d1\\_en.pdf](https://unctad.org/system/files/official-document/0sg2020d1_en.pdf)> accessed 17.4.2021 P12-23

<sup>21</sup> Kristen Holmes, 'Supply chain woes hit health care workers in need of gowns, masks and other protective equipment' (CNN, 21 March 2020) <<https://edition.cnn.com/2020/03/21/politics/supply-chain-issues-fema-hhs/index.html>> accessed 7 April 2021; Jonathan Saul, Sonya Dowsett, Lisa Baertlein, 'Western supply chains buckle as lockdowns spread' (Reuters, 23 March 2020) <<https://www.reuters.com/article/us-health-coronavirus-freight-idUSKBN21A2PB>> accessed 9 April 2021

<sup>22</sup> Pwc, 'COVID-19 and the automotive industry' <<https://www.pwc.com/us/en/library/covid-19/coronavirus-impacts-automotive.html>> accessed 10 April.2021

or obligations impossible.<sup>23</sup>

In turn, it is in equal importance to figure the grounds where the parties cannot be allowed to pause the contract. As will be shown, the automotive industry is one of the most significant industries to the world economy and is highly reliant on successful contractual performances in its supply chains, it serves as an excellent focus point for examining whether a supplier or the seller has a possibility to invoke provisions of 79(1) or (2) due to Covid-19.<sup>24</sup> Hence, to protect the interests of the contracting parties, especially the sellers, in different industries globally, it is vital to figure the responsibilities and possibilities to be relieved from the obligation to perform under a contract when the failure is due to no man, but a rapidly spreading infectious disease.

## **1.2 Aim and research question**

The purpose of this master's thesis is to describe and analyse the possibilities of a seller/supplier of a supply contract to be temporarily relieved from his/her contractual obligations due to an impediment beyond control according to Article 79(1) and (2) CISG, when the impediment is due to changed circumstances of a force majeure nature caused by Covid-19 pandemic. This is to be done with practical reflections from supply contracts of automotive industry.

The research questions are the following:

- 1) On what grounds can the provisions of Article 79(1) and (2) release the seller temporarily from its contractual obligations in a situation with force majeure nature occurred due to Covid-19?
- 2) What is the seller's responsibility of a third party failure of a supply contract when it is due to a changed circumstance caused by Covid-19?

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<sup>23</sup> OECD, 'OECD Policy Responses to Coronavirus (COVID-19)- Stocktaking report on immediate public procurement and infrastructure responses to COVID-19' <<https://www.oecd.org/coronavirus/policy-responses/stocktaking-report-on-immediate-public-procurement-and-infrastructure-responses-to-covid-19-248d0646/>> accessed 22.5.2021 See: summary

<sup>24</sup> OICA, 'Economic Contributions' <<https://www.oica.net/category/economic-contributions/>> accessed 20.4.2021

### 1.3 Scope and constraints

Article 79 can be considered to reflect both force majeure and hardship.<sup>25</sup> The mentioned concepts are commonly used as a basis for exempting from contractual obligations in international trade.<sup>26</sup> As a reiteration from what has been already provided in section 1.1 of this Chapter, a force majeure event refers to an unexpected event outside the opportunities of contracting parties, nor anyone, to influence it. In turn, hardship occurs when an unexpected event changes the equilibrium of a contract.<sup>27</sup> As a result of an event of force majeure nature, the contractual obligations will continue after the impediment has passed, but when hardship comes into consideration, the contract shall be renegotiated or even terminated due to such impediment, which is the general perspective of *e.g.* the International Chamber of Commerce (ICC) according to the ICC Force Majeure and Hardship Clauses.<sup>28</sup>

Therefore, hardship provides a more flexible approach to changed circumstances, whereas force majeure is more devoted to *pacta sunt servanda* as a contractual premise.<sup>29</sup> The concrete difference between hardship and force majeure is that in situations with force majeure nature, the requirement is that the contractual performance has to be impossible when in hardship situations the contractual performance is possible but hard.<sup>30</sup>

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<sup>25</sup> CISG-AC, 'Opinion No 20. Hardship under the CISG' (2020) <[http://cisgac.com/file/repository/Opinion\\_No\\_20\\_CISG\\_and\\_Hardship\\_Official\\_.pdf](http://cisgac.com/file/repository/Opinion_No_20_CISG_and_Hardship_Official_.pdf)> accessed 15.5.2021 P12, P18

<sup>26</sup> Fabio Bortolotti Dorothy Ufot, *Hardship and Force Majeure in International Commercial Contracts: Dealing with Unforeseen Events in a Changing World* (Kluwer Law International 2019) See Introduction

<sup>27</sup> *ibid*

<sup>28</sup> Business Finland, 'Covid-19 Koronavirus ja force majeure -ehto H2020-puiteohjelmahankkeissa' (19.3.2020) <<https://www.businessfinland.fi/494d6d/globalassets/finnishcustomers/news/news/2020/koronavirus-ohjekirje-19-3-2020.pdf>> accessed 15.5.2021 P1; Bortolotti, Ufot (27); Hubert Konarski, 'Force Majeure and Hardship Clauses in International Contractual Practice' (2003) *Intl. Bus. LJ.* <[https://www.researchgate.net/publication/284968473\\_Force\\_Majeure\\_and\\_Hardship\\_Clauses\\_in\\_International\\_Contractual\\_Practice](https://www.researchgate.net/publication/284968473_Force_Majeure_and_Hardship_Clauses_in_International_Contractual_Practice)> accessed 15.3.2021 P3; ICC, 'ICC Force Majeure and Hardship Clauses 2020' (2020) <<https://iccwbo.org/content/uploads/sites/3/2020/03/icc-forcemajeure-hardship-clauses-march2020.pdf>> accessed 15.5.2021

<sup>29</sup> Harald Ullman, 'Enforcement of Hardship Clauses in the French and American Legal System.' (1998) 19 *Cal.* *W.* *Int'l* *LJ Z* <<https://scholarlycommons.law.cwsl.edu/cgi/viewcontent.cgi?article=1467&context=cwilj>> accessed 9 March.2021 P2

<sup>30</sup> Hoppu (n 8) P291, 303

Force majeure nor hardship are not mentioned in the entire CISG, as a result of differing views that different countries have towards the subject of hardship.<sup>31</sup> This thesis aims not to settle whether the Article 79(1) or (2) is equal to neither of the concepts, and thus does not claim that any of the matters in Article 79 would be exactly the same as force majeure. Nevertheless, the author considers that the Article 79(1) and (2) are reflecting exemptions of a force majeure nature. This shall be justified on the basis that the Article 79(1) is concerned with a situation where a contractual non-performance is due to an impediment beyond control which is in line with the general understanding about what is a force majeure event. The Article 79(2) CISG is included in the considerations of this thesis due to its relevance on supply agreements, as the Article 79(2) provides references to the paragraph (1) from the perspective of exempting from contractual obligations due to a failure of a third party, that could be such as a carrier or a transporter of goods, by stating that a third party failure shall be considered as sufficient ground for exemption whether the failure is due to impediment beyond control as stated on Article 79(1) CISG.<sup>32</sup> The concept of the third party in the context of the CISG is rather complex and, therefore, shall be explained and discussed further in chapter 3.3.3.

This thesis is exclusively concerned with impediments occurring due to the Covid-19 pandemic, which shall be considered to have a force majeure -effect on a contract, referring to situations that are unexpected and have only a temporary nature. The temporary nature, which is essential to the general understanding of force majeure, is regulated in Article 79(3) confirming the possibility of reflecting the Article 79 to situations of force majeure -nature.<sup>33</sup> In practice, such situation could be *e.g.* when a supplier cannot send the promised car parts due to entry bans.

Finally, both force majeure and hardship are broad and complex subjects. Due to the word limitation given by the University of Lund to conduct this thesis, it would be insufficient to aim at providing research and discussion covering both

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<sup>31</sup> Ingeborg Schwenzer, 'Force Majeure and Hardship in International Sales Contracts' (2008) 39 Victoria U. Wellington L. Rev. 39 <[https://www.researchgate.net/publication/265032472\\_Force\\_Majeure\\_and\\_Hardship\\_in\\_International\\_Sales\\_Contracts](https://www.researchgate.net/publication/265032472_Force_Majeure_and_Hardship_in_International_Sales_Contracts)> accessed 16.3.2021 P712; Björn Sandvik, 'Voidaanko kontrollivastuuta pitää sopimusoikeuden yleisenä periaatteena? Kontrollivastuun kehitys ja asema sopimusoikeuden järjestelmässä' *Lakimies 2014/5*, (15.10.2014) P651, P656

<sup>32</sup> *Art books case* 10 February 1999 HG 970238.1 Handelsgericht des Kantons Zürich [Commercial Court Canton Zürich] CISG-Online 488

<sup>33</sup> CISG art 79(3)

exemptions, as it would leave the content of this thesis rather superficial. As well on the same grounds, this thesis is exclusively concerned with researching the relationship between the Article 79(1) and (2) CISG to the current Covid-19 pandemic. Thus, no other provisions of Article 79 international rules, proposals or discussions *e.g.* what have been going on in the EU, shall not be considered in this research.<sup>34</sup>

#### **1.4 Materials and method**

To fulfill the purpose of this thesis and to answer the research questions, a legal scientific method is applied. This thesis has been conducted using legal dogmatic method, which can be described as research methodology interpreting and systematizing legal provisions and applicable law.<sup>35</sup> In respect of the provisions of legal dogmatic research, this master's thesis shall be researched from an internal perspective and via systematizing the present law.<sup>36</sup> Legal dogmatic research could include aspects of description, prescription and justification, however research is not required to cover all of the given aspects.<sup>37</sup> Nevertheless, this thesis aims at serving the mentioned aspects.

The main sources used to conduct this thesis are legal sources, such as case law from CISG ratified countries to reflect the matters examined and as a backbone for certain arguments and assumptions, official documents such as communications and reports from agencies, ministries, chambers, organizations and authorities, and academic and scholarly articles such as journals, articles, opinions of professionals and other relevant studies. Due to the recent and constantly evolving nature of this thesis, more specifically Covid-19 and its outcomes, this thesis includes references to other, non-academic sources such as newspaper articles and other internet sources. This shall be done to support given claims and to provide more comprehensive perspectives.

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<sup>34</sup> Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law [2011] 2011/0284 (COD)

<sup>35</sup> Matti Myrsky, 'Vero-oikeudesta dynaamisena oikeudenalana' *Lakimies 2/2000* P164

<sup>36</sup> Jan Smits, 'What is legal doctrine? On the aims and methods of legal-dogmatic research' (2015) No.2015/06 Maastricht European Private Law Institute Working Paper P8

<sup>37</sup> *ibid* P5-7

With a few exceptions, books are not used as a source in this thesis. This is due to restrictions on library access in force to restrict the spreading of Covid-19. As well, access to certain commentaries and other relevant sources was blocked due to the restrictions.

## **1.5 Structure**

This thesis consists of five chapters, each linked to each other. The structure has been created with an aim to provide a logical reading order, leading to well-reasoned understanding of the conclusion.

Chapter two (2) is mostly descriptive with an aim of deepening the knowledge about the surrounding changed circumstances, which have led to arising of the research questions. Thus, the chapter two explains relevant grounds of COVID-19 pandemic and the impact on world trade, with special attention given to the impact on supply chains and automotive industry.

Chapter three (3) examines the applicability of Article 79 CISG to changed circumstances, when a force majeure nature event due to Covid-19 has occurred. This is done with a special focus on the automotive industry. As in chapter 2, in order for assuring deep understanding about the subject matter, the thesis provides some information about the CISG and Article 79 CISG. In addition, the chapter explains more thoroughly how the Article 79 CISG and force majeure are connected. As well, the Chapter examines the liability of a contracting party when a contractual performance turns into impossibility due to third party non-performance due to Covid-19. After that, the Chapter shall examine the practical prospects for a seller/supplier to invoke Article 79 CISG when a force majeure nature event occurs due to Covid-19, researching the expectations for such right.

The Chapter (4) studies the possibilities for the contracting parties/supplier/seller to limit his/her liability on ex ante- phrase of concluding a contract via opting out the CISG or part of is, thus in this thesis focusing on opting out Article 79 CISG. Thus, the discussion in Chapter 4 circumvents around Article 6 CISG and other related articles.

Chapter five (5) provides the conclusion and discussion of this thesis. From the conclusive section the reader shall find a summary of the findings and direct

answers to the research questions alongside with some general thoughts considering the subject and its future prospects.

## **2. Changed circumstances due to Covid-19 pandemic globally and in the automotive industry**

### **2.1 Introduction**

This chapter explains the changed circumstances that have occurred due to Covid-19 pandemic globally and specifically in the automotive industry. Sub-section 2.2.2 discusses what Covid-19 is, where did it come from and how did it spread, whereas 2.2.3 covers the impact of it in world trade and in supply chains. Further the sub-section 2.3.2 addresses the position of automotive industry in the world trade and 2.3.3 discusses the impact of changed circumstances due to Covid-19 on the automotive industry. Thus, this chapter is used to provide the reader with the knowledge one has to have to understand the research as a whole. This chapter ends with a summary provided in part 2.4.

### **2.2 Changed circumstances globally**

#### **2.2.1 Introduction**

Covid-19 pandemic has triggered changed circumstances extensively on both national and global level, causing job losses and banning normal human interactions. The impact of the pandemic is not limited to individuals, as it has caused dramatic changes and fluctuations on world trade. The following discussion shall conclude information considering the pandemic and its impacts, with a special focus given on supply chains and automotive industry.

#### **2.2.2 Covid-19 pandemic from beginning to present**

On the last day of 2019, the World Health Organization (WHO) China Country Office received information considering a pneumonia of an unknown cause,

which had by the 3 January 2020 led to 44 reported cases of it.<sup>38</sup> The virus was first detected in the Wuhan City, situated in Hubei Province of China. By then, WHO did not recommend specific measures for travelers, nor for travel or trade restrictions.<sup>39</sup>

Some of the mentioned 44 patients were dealers and vendors in the Huanan Seafood market, located in Wuhan City, and it was stated that it is highly suggestive that the outbreak is associated with the market.<sup>40</sup> The market was temporarily shut down for sanitation and disinfection, and active following of the close contacts with the infected.<sup>41</sup> However, already in 13 January 2020 the virus had managed to exit the borders of China within a passenger from Wuhan, whose infection was then diagnosed and confirmed in Thailand.<sup>42</sup> The rapid spread began outside the borders of China, and already by the end of January 2020, 18 other countries had reported infections.<sup>43</sup> On 11 February 2020, the virus was named as Covid-19.<sup>44</sup>

By 11 March 2020 the infection numbers had increased rapidly.<sup>45</sup> At the same day, WHO characterized Covid-19 as a pandemic.<sup>46</sup> The word ‘pandemic’ refers to an epidemic that has spread worldwide or at least over a wide area, and has crossed international boundaries at the same time affecting a large variety of people.<sup>47</sup> Five days from the announcement, the European Commission (EC)

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<sup>38</sup> WHO, ‘Pneumonia of unknown cause – China’ (*WHO*, 5 January 2020) <<https://www.who.int/csr/don/05-january-2020-pneumonia-of-unkown-cause-china/en/>> accessed 10 April 2021

<sup>39</sup> *ibid*

<sup>40</sup> WHO, ‘Novel Coronavirus – China’ (*WHO*, 1 January 2020) <<https://www.who.int/csr/don/12-january-2020-novel-coronavirus-china/en/>> accessed 10 April 2021

<sup>41</sup> *ibid*

<sup>42</sup> WHO, ‘WHO statement on novel coronavirus in Thailand’ (*WHO*, 13 January 2020) <<https://www.who.int/news/item/13-01-2020-who-statement-on-novel-coronavirus-in-thailand>> accessed 11 April 2021

<sup>43</sup> WHO, ‘Situation report-10’ (*WHO*, 30 January 2020) <[https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200130-sitrep-10-ncov.pdf?sfvrsn=d0b2e480\\_2](https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200130-sitrep-10-ncov.pdf?sfvrsn=d0b2e480_2)> accessed 12 April 2021

<sup>44</sup> ICTV, ‘News: 2020’ (*The International Committee on Taxonomy of Viruses*) <<https://talk.ictvonline.org/information/w/news/1300/page>> accessed 14.4.2021; WHO, ‘Naming the coronavirus disease (COVID-19) and the virus that causes it’ (*WHO*) <[https://www.who.int/emergencies/diseases/novel-coronavirus-2019/technical-guidance/naming-the-coronavirus-disease-\(covid-2019\)-and-the-virus-that-causes-it#:~:text=The%20International%20Committee%20on%20Taxonomy,two%20viruses%20are%20different.>](https://www.who.int/emergencies/diseases/novel-coronavirus-2019/technical-guidance/naming-the-coronavirus-disease-(covid-2019)-and-the-virus-that-causes-it#:~:text=The%20International%20Committee%20on%20Taxonomy,two%20viruses%20are%20different.>)> accessed 15.4.2021

<sup>45</sup> Ghebreyesus (21)

<sup>46</sup> *ibid*

<sup>47</sup> Kelly Heath, ‘The classical definition of a pandemic is not elusive’ (2011) 89 (7) *Bulletin of the World Health Organization* <<https://www.who.int/bulletin/volumes/89/7/11-088815/en/>> accessed 7 April 2021



required travel restrictions for non-essential travel closing down the external borders of the EU.<sup>48</sup> Other countries started also to shut down their border access and to provide rules for entering the countries.<sup>49</sup>

Despite the active restriction measures, data from WHO shows, that by 10 April 2021 there has been 134,308.070 confirmed cases and 2,907.944 deaths caused by Covid-19.<sup>50</sup> To combat the pandemic, various pharmaceutical companies have created vaccines to create protection from Covid-19, and for instance in EU- area four have been provided an authorization to use.<sup>51</sup> The first vaccine was given on December 2020 in the United Kingdom.<sup>52</sup>

### **2.2.3 Impact on world trade and supply chains**

Due to enormous losses of human lives, closing down external borders of countries and many other functions, the pandemic has significantly affected world trade. According to an estimation by World Trade Organization (WTO) the impact of Covid-19 pandemic would result on between 13-32% decrease in world trade as the pandemic disrupts normal economic activities and life on global level.<sup>53</sup> Furthermore it was stated that the electronics and automotive segments were about to receive the hardest hit due to the complexity of their value and supply-chains.<sup>54</sup> An estimation by the International Monetary Fund (IMF) claimed that the loss in global gross domestic product (GDP) in 2020 and 2021 could reach the amount of nine trillion dollars, and that Covid-19 has led advanced

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<sup>48</sup> European Commission, 'COVID-19: Temporary Restriction on Non-Essential Travel to the E' (Communication) COM 115 final

<sup>49</sup> Pwc, 'COVID-19: Global travel restrictions, entry bans and quarantine measures' (*pwc*, 18 March 2020) <<https://www.pwc.com/sg/en/tax/assets/covid19-information-on-travel-restrictions.pdf>> accessed 8 April 2021

<sup>50</sup> WHO, 'WHO Coronavirus (COVID-19) Dashboard' (*WHO*, constantly updating website, information taken on 10 April 2021) <<https://covid19.who.int>> accessed 10 April 2021

<sup>51</sup> Julia Kollewe, 'From Pfizer to Moderna: who's making billions from Covid-19 vaccines?' (*The Guardian*, 6 March 2021) <<https://www.theguardian.com/business/2021/mar/06/from-pfizer-to-moderna-whos-making-billions-from-covid-vaccines>> accessed 4 April 2021; European Medicines Agency, 'COVID-19 vaccines: authorised' (European Medicines Agency) <<https://www.ema.europa.eu/en/human-regulatory/overview/public-health-threats/coronavirus-disease-covid-19/treatments-vaccines/vaccines-covid-19/covid-19-vaccines-authorised>> accessed 12 April 2021

<sup>52</sup> BBC, 'Covid-19 vaccine: First person receives Pfizer jab in UK' (*BBC*, 8 December 2020) <<https://www.bbc.com/news/uk-55227325>> accessed 6 April 2021

<sup>53</sup> WTO, 'Trade set to plunge as COVID-19 pandemic upends global economy' (*WTO*, 8 April 2020) <[https://www.wto.org/english/news\\_e/pres20\\_e/pr855\\_e.htm](https://www.wto.org/english/news_e/pres20_e/pr855_e.htm)> accessed 17 April 2021

<sup>54</sup> *ibid*

economies, emerging market and developing economies into recession.<sup>55</sup> Covid-19 has touched also the leading economies of the world, and China is an example of that.<sup>56</sup> For China, Covid-19 caused a contraction of 2.6% of the GDP, which amounts vastly loss when put in numbers.<sup>57</sup> However, such contraction and its effect was not nearly as serious in comparison to what happened *e.g.* in India, where the GDP fell by 23.9% as a result of the pandemic.<sup>58</sup>

Global supply chains have a great impact on international trade and have become a usual way of doing business in the global economy.<sup>59</sup> The practical importance is noticeable *e.g.* on development of developing countries, as supply chains have linked such countries to international markets creating competition and helping the developing countries to climb up on the economic scale.<sup>60</sup>

Covid-19 revealed weaknesses in the supply chains of different companies, which led to harmful supply and demand shock.<sup>61</sup> A supply shock refers to anything that would decrease the abilities of the economy to produce goods and services, which could be *e.g.* a situation where a employee cannot do go to work due to lockdown measures.<sup>62</sup> Due to a supply shock, the price level of goods and services rises

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<sup>55</sup> Gita Gopinath, 'The Great Lockdown: Worst Economic Downturn Since the Great Depression' (IMFBlog, 14 April 2020) <<https://blogs.imf.org/2020/04/14/the-great-lockdown-worst-economic-downturn-since-the-great-depression/>> accessed 30 April 2021

<sup>56</sup> Yen Nee Lee, 'Here are the 10 biggest economies in the world — before the pandemic vs. now' (CNBC, 20 April 2021) <<https://www.cnbc.com/2021/04/21/coronavirus-worlds-10-biggest-economies-before-covid-pandemic-vs-now.html>> accessed 1 May 2021

<sup>57</sup> The world bank, 'Global Economy to Expand by 4% in 2021; Vaccine Deployment and Investment Key to Sustaining the Recovery' (*The World Bank*, 5 January 2021) <<https://www.worldbank.org/en/news/press-release/2021/01/05/global-economy-to-expand-by-4-percent-in-2021-vaccine-deployment-and-investment-key-to-sustaining-the-recovery>> accessed 16 April 2021

<sup>58</sup> BBC, 'India GDP shows worst quarterly slump in decades' (*BBC*, 31 August 2020) <<https://www.bbc.com/news/world-asia-india-53973772>> accessed 18 April 2021

<sup>59</sup> Albert Park, Gaurav Nayyar, Patrick Low. 'Supply Chain Perspectives and Issues' (*A Literature Review, WTO and Fung Global Institute*, 2013) <[https://www.wto.org/english/res\\_e/booksp\\_e/aid4tradesupplychain13\\_e.pdf](https://www.wto.org/english/res_e/booksp_e/aid4tradesupplychain13_e.pdf)> accessed 12 April 2021 P139; International Labor Organization, '11. Global Supply Chains' <<https://www.ilo.org/global/topics/dw4sd/themes/supply-chains/lang--en/index.htm#1>> accessed 29 April 2021

<sup>60</sup> Alessandro Nicita, Victor Ognivtsev, Miho Shirotori, 'Global supply chains: Trade and economic policies for developing countries' (UN, 2013) <[https://unctad.org/system/files/official-document/itcdtab56\\_en.pdf](https://unctad.org/system/files/official-document/itcdtab56_en.pdf)> accessed 11 April 2021 P1

<sup>61</sup> Willy H. Shih, 'Global Supply Chains in a Post-Pandemic World' (*Harvard Business Review*, issue September-October of the Magazine) <<https://hbr.org/2020/09/global-supply-chains-in-a-post-pandemic-world>> accessed 11 April 2021

<sup>62</sup> Pedro Brinca, Joao B. Duarte, Miguel Faria e. Castro, 'Is the COVID-19 Pandemic a Supply or a Demand Shock?' (2020) No. 31 Economic Synopses <<https://doi.org/10.20955/es.2020.31>> accessed 10 April 2021

while the production decreases leading to market imbalances.<sup>63</sup> In turn, a demand shock refers to a situation where the conditions of the consumers change so that the ability or willingness for purchasing goods and services decreases.<sup>64</sup> In comparison to 2019, it has been predicted that the service trade would fall by 15,4% due to demand shock, denoting the deepest drop since 1990.<sup>65</sup>

Practically, the problems in supply chains can be noted from a data release where it shows, that 1,000 of the world's largest companies or their suppliers own factories and other necessary facilities which are located in areas which have been quarantined in China, Italy and South Korea.<sup>66</sup> Due to many companies being dependent on the products coming from the mentioned countries, the direct effect of such measures on supply chains is clear.<sup>67</sup> A practical indicator of current status of world trade is Container Throughput Index (CTI). Due to international trade being primarily handled by ships and containers, container throughput in ports serves as a realistic instrument for measuring movements of global trade.<sup>68</sup> The indications show, that when the Covid-19 pandemic started, the CTI dropped 10.9 points to 102.5 in February 2020 being the most substantial drop ever observed.<sup>69</sup> In April 2020, the container throughput index was 108.9 points, which means it was 6.5% lower than in the 2019.<sup>70</sup> In 2021, the index has stabilized.<sup>71</sup>

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<sup>63</sup> Alan S. Blinder, Jeremy B. Rudd, 'The supply-shock explanation of the great stagflation revisited' (2008) 14563 NBER Working Paper <<http://www.nber.org/books/bord08-1>> P123

<sup>64</sup> Brinca, Duarte, Castro (n 62)

<sup>65</sup> UNCTAD, 'COVID-19 drives large international trade declines in 2020' (*UNCTAD*, 9 December 2020) <<https://unctad.org/news/covid-19-drives-large-international-trade-declines-2020>> accessed 16 April 2021

<sup>66</sup> Linton T and Vakil B, 'Coronavirus Is Proving We Need More Resilient Supply Chains' (*Harvard Business Review*, 3 May 2020) <<https://hbr.org/2020/03/coronavirus-is-proving-that-we-need-more-resilient-supply-chains>> accessed 30 April 2021

<sup>67</sup> *ibid*

<sup>68</sup> ISL, 'RWI/ISL Container Throughput Index' <<https://www.isl.org/en/containerindex>> accessed 23 May 2021

<sup>69</sup> ISL, 'RWI/ISL Container Throughput Index: sharp drop in February' (*ISL*, 24 March 2020) <<https://www.isl.org/en/containerindex/february-2020>> accessed 13 April 2021

<sup>70</sup> ISL, 'RWI/ISL Container Throughput Index: 6.5 percent below previous year's value' (*ISL*, 26 May 2020) <<https://www.isl.org/en/containerindex/april-2020>> accessed 13.4.2021

<sup>71</sup> ISL, 'RWI/ISL Container Throughput Index: World trade returns to growth path', (*ISL*, 26 February 2021) <<https://www.isl.org/en/containerindex/january-2021>>; ISL, 'World trade remains stable despite lockdown in Europe' (*ISL*, 30 March 2021) <<https://www.isl.org/en/containerindex/february-2021>>; ISL, 'RWI/ISL Container Throughput Index: lockdown dampens container handling in Europe' (*ISL*, 30 April 2021) <<https://www.isl.org/en/containerindex/march-2021>> accessed 23 May 2021

## 2.3 Impact of changed circumstances to the automotive industry

### 2.3.1 Introduction

As will be shown, the significant economic impact on world trade of the automotive industry makes it a great reflection point for this research. The industry is comprehensively creating employment worldwide and is in central position for modern trade due to the way it is organized. Due to its global nature and utilization of expertise from other countries, it took a hard hit due to Covid-19 in many aspects.

### 2.3.2 Automotive industry in world trade

The automotive industry has a great value to the world economy, as the manufacturing industry provides jobs for about nine million people, which is over five percent of the total manufacturing employment in the whole world.<sup>72</sup> The level of output in the automotive industry is equivalent to a global turnover of 1.9 trillion euros.<sup>73</sup> Besides manufacturing, over 50 million people are living from the automotive industry, including *e.g.* from taxi- and bus drivers and driving school coaches.<sup>74</sup> Only in EU the automotive industry creates nearly 14 million jobs and the turnover of the industry represents over 7% of the GDP of the EU.<sup>75</sup> From 2002 to 2020 the EU imports have raised by 25 billion euros and exports by 44 billion euros on the automotive industry.<sup>76</sup>

Globally, China, USA, Japan and Germany have the leading roles of being the biggest car producers, and the leading exporters are Germany, Japan and Canada.<sup>77</sup> The structure of the automotive industry is built so, that the smaller car-parts are ordered from smaller firms to be used by the large automotive companies, thus

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<sup>72</sup> OICA, 'Economic Contributions' (n 24)

<sup>73</sup> OICA, 'The World's Automotive Industry - Some Key Figures' (<<https://www.oica.net/wp-content/uploads/2007/06/oica-depliant-final.pdf>> accessed 30 April 2021 See 5-8

<sup>74</sup> *ibid*

<sup>75</sup> European Commission, 'Automotive industry' <[https://ec.europa.eu/growth/sectors/automotive\\_en](https://ec.europa.eu/growth/sectors/automotive_en)> accessed 30 April 2021

<sup>76</sup> Eurostat, 'International Trade in Cars- EU exports, imports and trade balance in motor cars, 2002-2020' <[https://ec.europa.eu/eurostat/statistics-explained/index.php?title=International\\_trade\\_in\\_cars](https://ec.europa.eu/eurostat/statistics-explained/index.php?title=International_trade_in_cars)> accessed 2 May 2021

<sup>77</sup> Judit Nagy, Zsofia Jámor, 'Competitiveness in global trade: The case of the automobile industry' (2018) 63(218) *Ekonomski Anali* <[https://www.researchgate.net/publication/328452102\\_Competitiveness\\_in\\_global\\_trade\\_The\\_case\\_of\\_the\\_automobile\\_industry](https://www.researchgate.net/publication/328452102_Competitiveness_in_global_trade_The_case_of_the_automobile_industry)> accessed 2 May 2021 P80

creating supply chains.<sup>78</sup> The chains in the industry have turned into a global production network, which means that such chains are in crucial importance for the industry to function properly.<sup>79</sup> As the industry relies strongly on working supply chains, malfunctions in the chain can create massive difficulties to suppliers, sellers and buyers.

### 2.3.3 Changed circumstances in the automotive industry

Information concerning problems in automotive industry due to Covid-19 started already on February 2020, when Nissan reported that it was temporarily shutting down its production due to supply chain problems, as the company could not get necessary car segments from China due to the pandemic.<sup>80</sup> On the same month, Hyundai faced another type of problem due to Covid-19, as the company had to shut down its' factory because of an employee with an infection, and the other employees who were in close contact with the infected one, were assigned to quarantine and to being tested for the infection.<sup>81</sup> The situation was same for Ford, which then decided to shut down all of its' manufacturing sites in North America to clean up the facilities.<sup>82</sup> In addition, other well-known auto manufacturers such as Ferrari, Renault, and PSA Group as the owner of Peugeot, Citroen, Jeep, Opel and many others have ended up temporarily shutting down their manufacturing facilities as a result of the pandemic.<sup>83</sup>

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<sup>78</sup> Timothy Sturgeon and others, 'Globalisation of the automotive industry: main features and trends' (2009) 2(1-2) *International Journal of Technological learning, innovation and development* <[10.1504/IJTLID.2009.021954](https://doi.org/10.1504/IJTLID.2009.021954)> accessed 18 April 2021 P9

<sup>79</sup> International Labour Organization, 'The future of work in the automotive industry: The need to invest in people's capabilities and decent and sustainable work' (2021) <[https://www.ilo.org/wcmsp5/groups/public/---ed\\_dialogue/---sector/documents/meetingdocument/wcms\\_741659.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---sector/documents/meetingdocument/wcms_741659.pdf)> accessed 25 April 2021 P4

<sup>80</sup> Reuters staff, 'Nissan to halt production at Japan factory due to coronavirus' (*Reuters*, 10 February 2020) <<https://www.reuters.com/article/us-china-health-nissan-idUSKBN20419A>> accessed 20 April 2021

<sup>81</sup> Reuters Staff, 'Hyundai shuts down factory after worker tests positive for coronavirus' (*Reuters*, 28 February 2020) <<https://www.reuters.com/article/us-china-health-southkorea-hyundai-motor-idINKCN20M08I>> accessed 30 April 2021

<sup>82</sup> Mich Dearborn, 'Ford reduces North America Production to help keep workforce safe, boosting Coronavirus containment efforts' (*Ford Media Center*, 18 March 2020) <<https://media.ford.com/content/fordmedia/fna/us/en/news/2020/03/18/ford-reduces-north-america-production-to-help-keep-workforce-saf.html>> accessed 30 April 2021

<sup>83</sup> Clare Duffy, 'Ferrari suspends production in Italy because of coronavirus' (*CNN Business*, 4 May 2020) <<https://edition.cnn.com/2020/03/15/cars/ferrari-suspending-production-coronavirus/index.html>> accessed 21.4.2021; Renault, 'Groupe Renault shuts down production activities at its industrial sites in France' (*Renault Group Site Media*, 4 May 2020) <<https://en.media.groupe.renault.com/news/groupe-renault-shuts-down-production-activities-at-its-industrial-sites-in-france-aa2c-989c5.html>> accessed 21 April 2021; Psa group, 'COVID-19 : Groupe PSA décide de fermer ses usines en Europe' (*Communiqués de presse*, 16 March 2020) <<https://archives-media.stellantis.com/fr/covid-19-groupe-psa-décide-de-fermer-ses-usines-en-europe>>

One of the reasons for the industry having a hard hit due to Covid-19, is due to the fact that the automotive industry has adopted mass production as a standard production strategy.<sup>84</sup> For mass production to function, it requires a quantity of employees present in the assembly line, turning the car parts into a fully functioning vehicle. As Covid-19 spreads through close contact, the virus has favourable conditions for spreading in mass production facilities.<sup>85</sup> In addition, it is no surprise that the problems in working supply chains have had a major impact on the proper functioning of the automotive industry, as one automotive vehicle consist of variety of different segments coming from different countries. To provide an example, Volkswagen Jetta with manual switch consist of parts coming 4% from USA or Canada, 34% from Mexico and 17% from Brazil.<sup>86</sup> The statistics do not provide any explanation about the surplus from the aggregate percentage provided, which means that 45% of the car parts come from statistically not recorded countries. The auto gets assembled in Mexico, from where it is spread out to the markets.<sup>87</sup> Thus, the process of turning different pieces of segments into a good suitable for consumer markets requires operations of various different countries, hence resulting that entry bans and global issues for availability of segments due to Covid-19 touch the automotive industry directly and with great impact.

All the Covid-19 related issues in automotive industry are not resulting from supply chain problems nor the infected employees. The lack of semiconductors necessary for car manufacturing occurred as a result from car manufacturers cancelling their orders for semiconductors due to the pandemic, when the consumer electronics manufacturers raised their orders as they predicted the increased demand on home

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accessed 21 April 2021; Stellantis official website, see 'Menu' and 'Brands' <<http://www.stellantis.com>> accessed 21 April 2021

<sup>84</sup> Xiang Zhang, Rongqui Chen, 'Forecast driven or customer-order-driven? An empirical analysis of the Chinese automotive industry' (2006) *International Journal of Operations & Production Management* <<https://doi.org/10.1108/01443570610666993>> accessed 22 April 2021 P669

<sup>85</sup> WHO, 'Coronavirus disease (COVID-19): How is it transmitted?' (*WHO*, 13 December 2020) <<https://www.who.int/news-room/q-a-detail/coronavirus-disease-covid-19-how-is-it-transmitted>> accessed 22 April 2021; CDC, 'Manufacturing Workers and Employers- Interim Guidance from CDC and the Occupational Safety and Health Administration (OSHA)' (*CDC*, 16 April 2021) <<https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-manufacturing-workers-employers.html>> accessed 23 May 2021

<sup>86</sup> NHTSA, 'Part 583 American Automobile Labeling Act Reports' (*NHTSA*, 2021) <[https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/documents/2021\\_aala\\_alpha\\_011321.pdf](https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/documents/2021_aala_alpha_011321.pdf)> accessed 19 April 2021

<sup>87</sup> NHTSA, 'MY2021 AALA Alphabetical' (*NHTSA*, 2021) <[https://www.nhtsa.gov/sites/nhtsa.gov/files/documents/2021\\_aala\\_alpha\\_011321.pdf](https://www.nhtsa.gov/sites/nhtsa.gov/files/documents/2021_aala_alpha_011321.pdf)> P4

electronics as people were obliged to stay at home.<sup>88</sup> As a result of the lack, about 10,000 employees have been prevented from going to work due to a temporary shutting down of a factory.<sup>89</sup> Therefore the Covid-19 related problems in the industry are not exclusively concerned with external coercions, as the explained issues result from error of judgment.

Covid-19 is considerably unique by its effect on the whole industry, when before the industry has suffered from other kinds of problems related to *e.g.* emission forgeries and Brexit.<sup>90</sup> Due to Covid-19, the automotive industry needs to find ways to adjust and prepare for the future. In order to safeguard the interests of the suppliers and other contracting parties on the industry, the contracts created within have a significant importance.

## 2.4 Summary and conclusions

Covid-19 pandemic has had great impact on world trade. Among other things, many economies have plunged into recession and the GDPs of different states have decreased. For preventing the virus from spreading, prevention measures such as entry bans and quarantines have been taken, resulting in problems in many aspects but also in world trade and supply chains of automotive industry.

The impact has been great on the automotive industry due to the industry relying largely on functioning supply chains and the products being manufactured from many segments coming from different countries. As well, the mass productive nature of the industry has a share on the impact, as the employees are usually in close interaction with each other in the manufacturing facilities. Thus, it is in emphasized importance for the contracting parties to protect their interests.

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<sup>88</sup> Niclas Storås, 'Loppu mikä loppu' (*Helsingin Sanomat*, 24 February 2021) <<https://www.hs.fi/talous/art-2000007939925.html>> accessed 29 April 2021

<sup>89</sup> *ibid*

<sup>90</sup> Russell Hotten, 'Volkswagen: The scandal explained' (*BBC News*, 10 December 2015) <<https://www.bbc.com/news/business-34324772>> accessed 21 April 2021; ACEA, 'Fact sheet: Brexit and the auto industry' (*ACEA*, 1 March 2019) <<https://www.acea.be/news/article/fact-sheet-brexit-and-the-auto-industry>> accessed 29 April 2021

# **3. Applicability of Article 79 (1) and (2) CISG to changed circumstances of a force majeure nature due to Covid-19 generally and on possible scenarios of automotive industry**

## **3.1 Introduction**

This chapter is focused on possibilities for the seller to apply Article 79(1) and (2) CISG when changed circumstances of a force majeure nature have occurred due to Covid-19. Sub-section 3.2.2 introduces the CISG and its general applicability, when 3.2.3 deepens the discussion specifically to Article 79 CISG. As stated in the introductory Chapter 1, force majeure and Article 79 CISG contain similarities in between, and despite the definition of force majeure not being strictly regulated by law similarly in every global jurisdiction, the common understanding about force majeure overlaps with the provisions of Article 79 CISG. This is further examined in sub-section 3.3.1, where from the discussion shall turn into determining whether Article 79 CISG considers that pandemics, and therefore Covid-19, fulfil the requirement of “impediment beyond control”. In 3.3.3 the seller’s possibility to invoke Article 79(1) CISG pursuant to Article 79(2) CISG due to a failure of contractual performance of a third party of a contract with references to supply chain shall be examined. 3.4.2 moves to explain the burden of proof under Article 79 CISG, as in what needs to be shown by the seller in order for the Article to be invoked, and 3.3.3 examines the reasonable grounds for preparation for a pandemic when concluding a contract. The chapter ends on conclusions provided in section 3.5.



## 3.2 CISG and Article 79 CISG

### 3.2.1 Introduction

CISG is an international convention regulating about sales of goods when the places of business of the contracting parties are in different states.<sup>91</sup> When it is not excluded, it is applicable automatically to the contracting states of the CISG and when the rules of private international law leads to the application of the law of a contracting state of the CISG.<sup>92</sup> The CISG requires, that when interpreting the convention, international character, need to promote uniformity and observance of good faith have to be taken into account, and issues arising from the CISG but are not specifically regulated in it need to be settled uniformly with the general principles of CISG, and if there are none to be found, those are to be settled in conformity with the private international law applicable.<sup>93</sup> The CISG is commonly used to provide regulation to contracts between domestic corporations.<sup>94</sup> The Article 79, which in central importance to this thesis, is included in the CISG.

### 3.2.2 CISG

The CISG was entered into force 1 January 1988.<sup>95</sup> It is the first treaty considering trade which have been accepted widely on global level, and nowadays, it is in force in 94 countries, consisting of both developed and developing states.<sup>96</sup> Citing to what has been stated at the website of the United Nations (UN): “The purpose of the CISG is to provide a modern, uniform and fair regime for contracts for the international sale of goods. Thus, the CISG contributes significantly to introducing certainty in commercial exchanges and decreasing transaction costs.”<sup>97</sup> In addition, due to its great ability to adapt into new ideas and

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<sup>91</sup> CISG art 1(1)

<sup>92</sup> IICL, 'Guide for Managers and Counsel: Applying the CISG' (*IICL*, revised May 2010) <<https://iicl.law.pace.edu/cisg/page/guide-managers-and-counsel-applying-cisg>> accessed 13 May 2021; CISG art 1(1)(a)(b)

<sup>93</sup> CISG art 7

<sup>94</sup> IICL (n 92)

<sup>95</sup> United Nations, 'Chapter X: International Trade and Development: United Nations Convention on Contracts for the International Sale of Goods' <[https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=X-10&chapter=10&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=X-10&chapter=10&clang=_en)> accessed 30 April 2021

<sup>96</sup> Joseph Lookofsky, *Understanding the CISG:(Worldwide) Edition*, (Kluwer Law International 2017) See: Chapter 1 Introduction and overview; UN, 'Status: United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (CISG)' (UN) <[https://uncitral.un.org/en/texts/salegoods/conventions/sale\\_of\\_goods/cisg/status](https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg/status)> accessed 15 April 2021

<sup>97</sup> UN, 'United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (CISG)' <[https://uncitral.un.org/en/texts/salegoods/conventions/sale\\_of\\_goods/cisg](https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg)> accessed 16 April 2021

challenges, it can react and keep up with the changes of the world.<sup>98</sup> Therefore the importance of the CISG is increasing in the constantly changing world, as the challenges coming within modernization, technologization and *e.g.* with battling global warming increase the need for adaptability in some contractual aspects. As the CISG is a convention, countries that have decided to ratify the CISG are required to take the CISG as a part of their national law in one way or another, and it is therefore applied by the member states own legal officials, tribunals and courts.<sup>99</sup> Due to this, when a contracting state of CISG is referring to the state's national legislation, it is referring to the CISG.<sup>100</sup>

The CISG Advisory Council (CISG-AC) aims to support the understanding considering the CISG and promote and assist on the uniformity of interpretation of the CISG.<sup>101</sup> It is a private initiative, which means that it operates separately from the guidance of United Nations Commission on International Trade Law (UNICTRAL), which makes the functioning of CISG-AC possible, as if it was not so, an official body capable of amending by decree would inevitably become political and unworkable.<sup>102</sup> Further specified purposes of the CISG-AC are defined in the bylaws of it, which are *e.g.* to issue and publish opinions and declarations on the interpretation, application, and in general the role of the Convention and to address issues brought to the Council via requests of individuals or organizations within the international community or on the Council's own initiative.<sup>103</sup>

The global market for goods and services require the global trade to function properly, and it is important that the contracts between parties from separate countries are created in such form, which equally safeguards the interest of the

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<sup>98</sup> Bruno Zeller, 'CISG and the unification of international trade law' (2007) P2

<sup>99</sup> United Nations, 'Frequently Asked Questions regarding the Convention on the Rights of Persons with Disabilities' <<https://www.un.org/esa/socdev/enable/convinfaq.htm>> accessed 20 May 2021; Eduskunta/Riksdagen, 'Valtiosopimukset' <<https://www.eduskunta.fi/FI/naineduskuntatoimii/kirjasto/aineistot/kv-jarjestot/kansainvalisen-oikeudentietopaketti/Sivut/Valtiosopimukset.aspx>> accessed 23 May 2021

<sup>100</sup> CeDe Group AB v Kan Sp z o.o. (2020) Högsta Domstole, Stockholm, T 6032-16 (Högsta Domstole, Stockholm) See part 20

<sup>101</sup> CISG-AC, 'Scope and Aims' <<https://www.cisgac.com>> accessed 23 May 2021

<sup>102</sup> Christopher Kee, Edgardo Munoz, 'In Defence of the CISG' (2009) 14 Deakin L Rev. <<https://doi.org/10.21153/dlr2009vol14no1art133>> accessed 15 May 2021 P113

<sup>103</sup> CISG-AC, Bylaws <<http://cisgac.com/cisg-advisory-council-bylaws/>> accessed 3 May 2021 Article I

contracting parties. It can be concluded, that the CISG is essential for the development of global trade as it promotes uniformity of international trade.

### 3.2.3 Article 79 CISG

In general, the CISG creates grounds for strict liability for the seller.<sup>104</sup> Article 79(1) CISG provides exemption from the liability by stating, that a contracting party ‘is not liable for the 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.’<sup>105</sup> The Article 79 CISG includes other related provisions, concerning the time period of the exemption, requirement to notice the other party about occurred impediment and the right of the parties to use any other rights than claiming damages.<sup>106</sup>

Hence, Article 79(1) CISG regulates the possibility to exempt from *pacta sunt servanda*. Similar exemptions from contractual liability has been seen in classic Roman law, where the binding nature of a contract could be exempt by the principle of *impossibilium nulla est obligatio* and in canon law by the principle of *rebus sic santibus*.<sup>107</sup> Providing possibilities to exempt from contractual obligations when impediment beyond control occurs creates safe basis and more equal grounds for

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<sup>104</sup> Wolf Michael Kühne, ‘The impact of COVID-19 on international supply contracts’ (*DLA Piper*, 4 May 2020) <<https://www.dlapiper.com/en/italy/insights/publications/2020/05/the-impact-of-covid-19-on-international-supply-contracts/>> accessed 16 April 2021

<sup>105</sup> CISG art 79

<sup>106</sup> *ibid*

(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.

(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.

(3) The exemption provided by this article has effect for the period during which the impediment exists.

(4) The party who fails to perform must give notice to the other party of the impediment and its effect on his ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, he is liable for damages resulting from such non-receipt.

(5) Nothing in this article prevents either party from exercising any right other than to claim damages under this Convention.

<sup>107</sup> CISG-AC (n 25) ‘Hardship under the CISG’ P4

the contract, as when the risk of undue damages is smaller, neither of the parties cannot benefit from the other party unreasonably.

For the exemption to be valid under Article 79(1), the exempting party is required to fulfill several conditions. The conditions require, that the impediment which caused the non-performance was beyond the control of the contracting party so, that he/she could not do anything in one's power to stop the event and that he/she could not have been reasonably expected to be prepared for it when concluding the contract.<sup>108</sup> Example of a situation which would fulfill the both conditions would be when a train transporting automotive segments from a country to another gets derailed due to a torrent.

In addition, the referred conditions require, that the contracting party could not reasonably be expected to have avoided it or its consequences and that the party could not reasonably be expected to have overcome it or its consequences.<sup>109</sup> At this part, the assessment could get considerably tricky, as the ground for what could be expected and what could not, can be discretionary.

Article 79(2) CISG shall be applied when a contractual non-performance is due to a failure of performance of a third party whom the contracting party has engaged to perform the whole or a part of the contract.<sup>110</sup> Such a third party could be e.g. a transporter of cargo truck. Paragraph (a) of the Article 79(2) CISG refers to Article 79(1) CISG by stating, that whether the non-performance of a third person is due to the provisions of Article 79(1), meaning an event where an impediment beyond control has occurred, the contracting party shall be exempt from his/her contractual obligations, and paragraph (b) concludes, that whether an impediment beyond control have occurred to the third person, would be exempt if the provisions of that paragraph were applied to him.<sup>111</sup>

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<sup>108</sup> Yasutoshi Ishida, 'CISG Article 79: Exemption of Performance, and Adaptation of Contract Through Interpretation of Reasonableness-full of sound and fury, but signifying something.' (2018) (*Pace Int'l L. Rev.* 30) <<https://digitalcommons.pace.edu/pilr/vol30/iss2/3/>> accessed 14 April 2020 P4

<sup>109</sup> *ibid*

<sup>110</sup> CISG art 79(2)

<sup>111</sup> CISG art 79(2)(a); CISG art 79(2)(b)

Article 79 CISG is rather complex, and the complexity is shown at its finest in a comparison of some decisions provided in article by PhD Oral. In one decision, the arbitration tribunal considered that an avalanche in a place that is usually snowy in December did not fulfill the requirements of impediment beyond control, but and in another, rather later criticized decision, the Court considered that the freezing of the port in December in St. Petersburg could not be expected and thus was a subject to exemption under Article 79.<sup>112</sup> The demonstrated comparison presents the difficulty of the evaluation of the subject, and raises questions about the downsides caused by the wide scope of the Article.

### **3.3 Article 79 CISG in relation to changed circumstances due to Covid-19**

#### **3.3.1 Introduction**

Article 79 provides protection over a contracting party if one has encountered an impediment beyond control. Nevertheless, the Article does not conclude any examples nor specific ground rules alongside the mentioned, which raises the need for examination of the subject matter. The applicability is somewhat crucial especially when considering the impact of Covid-19, as a quantity of problems in international level and thus in international contracts has triggered.

#### **3.3.2 Article 79 CISG and force majeure**

As a concept, force majeure has already been encountered frequently during this research. Recapitulating from before, force majeure event is anything which is unpredictable by their nature, *e.g.* a natural disaster or an unexpected economic event, scope being thus truly broad.<sup>113</sup> The concept of force majeure is not new, and has been used before the CISG was invented. As an example, already in 1918, a decision from the Supreme Court of Sweden stated, that the seller could get released from contractual obligations due to “ekonomisk force majeure” in a situation where

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<sup>112</sup> Tugce Oral, 'Exemption from liability according to the art. 79 of the Convention on International Sale of Goods (CISG)' (2019) 9.20 Tribuna Juridică <<http://tribunajuridica.eu/arhiva/An9v3/12.%20Tugce%20Oral.pdf>> accessed 18 April 2021 P650

<sup>113</sup> Guglielmo Maria Caporale, Alex Plastun, Inna Makarenko, 'Force majeure events and stock market reactions in Ukraine' (2019) Vol 16 No 1. Investment Management & Financial Innovations <[https://www.researchgate.net/publication/332129478\\_Force\\_majeure\\_events\\_and\\_stock\\_market\\_reactions\\_in\\_Ukraine](https://www.researchgate.net/publication/332129478_Force_majeure_events_and_stock_market_reactions_in_Ukraine)> accessed 30 April 2021 P334

the unexpected rising of prices was considered as a force majeure which occurred because of a market deviation resulting from the second world war.<sup>114</sup>

Nowadays, in both civil and common law doctrines an impossibility of performing a contractual obligation is sometimes referred to as force majeure.<sup>115</sup> However, force majeure does not have a valid meaning under common law, and therefore its application is decided case-by-case.<sup>116</sup> Despite the concept being alien in common law doctrines, such as in Britain, such courts have had to take a stand considering force majeure, as it is commonly used in contracts.<sup>117</sup> Although it is accepted, force majeure does not automatically apply in civil law courts either, and if the contract does not include a force majeure clause, the local statutory provisions will be applied.<sup>118</sup> Hence the actual concept of force majeure in itself is not binding, but while the contract is being concluded, it may be added to the contract by the will of the contracting parties.

Due to its varying and unsettled nature, it is no surprise that the concept itself has not been referred to directly in the Article 79 CISG. However, it can be considered to provide similar provisions to force majeure, and internationally the Article has been considered as a force majeure- article.<sup>119</sup> This is due to the fact that the Article 79(1) provides the grounds for exempting from contractual obligations when there is a situation unforeseeable for the contracting parties, which is similar to the force majeure as generally understood. Hence, it can be concluded that although there is

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<sup>114</sup> Jan Hellner, Jan Ramberg, *Speciell avtalsrätt* (Köprätt, Juristförlaget 1999) P148

<sup>115</sup> Joseph Perillo, 'Force majeure and hardship under the UNIDROIT principles of international commercial contracts' (1997) 5 Tul. J. Int'l. & Comp <[https://ir.lawnet.fordham.edu/faculty\\_scholarship/783/](https://ir.lawnet.fordham.edu/faculty_scholarship/783/)> accessed 1 May 2021 P7

<sup>116</sup> Yohannes Hailu Tessema, 'Force Majeure and the Doctrine of Frustration under the UNIDROIT Principle, CISG, PECL and the Ethiopian Law of Sales: Comparative Analysis' (2017) 33 JL Pol'y & Globalization <<https://heinonline-org.ludwig.lub.lu.se/HOL/Page?handle=hein.journals/jawpglob58&div=7&&collection=journals>> accessed 1 May 2021 P34; Cornelius Grossmann, Stephen d'Errico 'COVID-19: Four key considerations for legal positions on force majeure' (EY, 7 May 2020) <[https://www.ey.com/en\\_gl/covid-19/covid-19-four-key-considerations-for-legal-positions-on-force-majeure](https://www.ey.com/en_gl/covid-19/covid-19-four-key-considerations-for-legal-positions-on-force-majeure)> accessed 2 May 2021

<sup>117</sup> William Swadling, Ewan McKendrick (ed), *The Judicial Construction of Force Majeure Clauses* (2nd Ed, Informa Law 1995) P7

<sup>118</sup> Damian McNair, 'Force Majeure Clauses' (DLA Piper, 12 June 2012) <<https://www.dlapiper.com/en/us/insights/publications/2012/06/iforce-majeurei-clauses/>> accessed 3 May 2021 P1; Grossmann, d'Errico (n 116)

<sup>119</sup> Sandvik (n 31) P656

no direct mention about the concept of force majeure, the CISG is addressing similar provisions in the Article 79.<sup>120</sup>

### **3.3.3 General applicability of Article 79(1) and (2) CISG on changed circumstances due to Covid-19**

As previously stated, the Article 79 CISG does not contain any practical examples considering its applicability. It has been accepted by the international practice, that epidemics are beyond the control of the contracting party, and thus the Covid-19 pandemic can be considered as impediment beyond control meant in Article 79 CISG.<sup>121</sup> When a force majeure clause of a contract expresses pandemic as an event which allows exempting from contractual obligations, the circumstances triggered by Covid-19 is unquestionably serve as grounds for exempting from contractual obligations.<sup>122</sup> If the contract terms do not specifically mention that, the situation requires more evaluation.

According to CISG-AC, Article 79 CISG pandemic are recognized as an unexpected change of circumstance.<sup>123</sup> Thus it can be confirmed that in Covid-19 constitutes an impediment beyond control under Article 79 CISG. However, due to the nature of Article 79 CISG, it has to be kept in mind that each case shall be considered individually and decided case-by-case.<sup>124</sup>

When reflecting the requirement for impediment beyond control to Covid-19, somewhat usual approach is to assume, that the non-performance is due to external disadvantage, such as entry ban or a lack of availability. Although, one of the various reasons for contractual non-performance during Covid-19 pandemic could be economic issues. Economic problems are not usually considered as a basis for force majeure, but due to pandemic, if it can be shown that a contracting party has major economic issues directly due to the pandemic, it should serve as a ground for

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<sup>120</sup> Gizem Alper, Brianna Bell (ed) 'COVID-19: Force Majeure Under CISG' (*Jurist*, 27 May 2020) <<https://www.jurist.org/commentary/2020/05/gizem-alper-force-majeure/>> accessed 1 May 2021

<sup>121</sup> Franz Kaps, 'The COVID-19 Pandemic and Commercial Contracts' (*The European Association Of Private International Law*, 1 December 2020) <<https://eapil.org/2020/12/01/the-covid-19-pandemic-and-commercial-contracts/>> accessed 1 May 2021

<sup>122</sup> Christian Twigg-Flesner, 'A comparative Perspective on Commercial Contracts and the impact of Covid-19 - Change of Circumstances, Force Majeure, or what?' (*Katharina Pistor, Law in the Time of COVID-19*, 2020) <<https://ssrn.com/abstract=3582482>> accessed 4 May 2021 P3

<sup>123</sup> CISG-AC (n 25) 'Hardship under the CISG' P3

<sup>124</sup> Kühne (n 104)

force majeure exemption and thus fall in the scope of Article 79(1) or (2) CISG.<sup>125</sup> However, courts have been refusing to exempt parties from liability even when the economic circumstances change significantly and unforeseeably.<sup>126</sup> Settling whether economic issues constitute basis for force majeure exemption and thus could be used to invoke Article 79(1) or (2) require more consideration and decision by some court of a contracting state of the CISG. From the authors point of view, economic problems arising from Covid-19 can be occur as inevitable, and whether sufficiently proven that the non-performance arises directly from impediment beyond control due to Covid-19, economic issues should have a temporary justification for non-performance due to Article 79 CISG.

### **3.3.4 Third party failure due to Covid-19 in a supply contract**

Article 79(2) CISG is concerned with a situation, where a third party engaged to the contract of the contracting parties cause a contractual non-performance by his/her own actions.<sup>127</sup> However, when it comes to exempting from contractual obligations under Article 79(2), Opinion No 7. of the CISG-AC states, that in majority of the cases, even the ones where the failure of delivery has been totally unforeseeable for the seller, the requirements for Article 79 has not been satisfied.<sup>128</sup> The core question and the problem of invoking such requirement circulates around the concept of ‘a third person whom [the party claiming exemption] has engaged to perform the whole or part of the contract’, as the Article does not provide any definition about such a third party in practice thus leaving the concept indistinct.<sup>129</sup> Thus, due to a requirement of Article 79(2) CISG, where it is given that both the party claiming exemption and the third person need to fulfill the requirements of Article 79(1), it is crucial to resolve the concept of a third party to invoke Article 79(2).<sup>130</sup>

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<sup>125</sup> Kalyani Wijerathna, Yasoda Jayasekera, 'Legal Implications of COVID-19: *Force Majeure* and Contractual Obligations in International Sale of Goods' (2020) 13th International Research Conference, General Sir John Kotelawala Defence University Sessions in Law <<http://ir.kdu.ac.lk/handle/345/2882>> accessed 21 April 2021 P65-66

<sup>126</sup> David Kuster, Camilla Baasch Andersen, 'Hardly Room for Hardship – A functional Review of Article 79 of the CISG' (2017) 35(1) Journal of Law and Commerce 35 <<https://doi.org/10.5195/jlc.2016.116>> accessed 22 April 2021 P13

<sup>127</sup> CISG art 79(2)

<sup>128</sup> CISG-AC, 'Opinion No. 7. Exemption of Liability for Damages under Article 79 of the CISG,' (2007) <[https://www.cisgac.com/file/repository/CISG\\_Advisory\\_Council\\_Opinion\\_No\\_7.pdf](https://www.cisgac.com/file/repository/CISG_Advisory_Council_Opinion_No_7.pdf)> Para 15

<sup>129</sup> CISG art 79(2)

<sup>130</sup> *ibid*; *ibid* Para 16



The expression provided in the Article 79(2) is referring exclusively to a third person who is independently engaged to the party claiming exemption, meaning that such third party is expected to be an independent distinct person or legal entity, who is economically and functionally independent from the seller.<sup>131</sup> Such a third person is thus expected to be outside the seller's organizational structure and sphere of control and responsibility.<sup>132</sup> Hence, such a third person should be given a narrow scope, which would cover *e.g.* situations where the seller outsources his/her obligation to manufacture the goods according to guidelines of the buyer.<sup>133</sup> If reflected to the automotive industry, exempting under Article 79(2) could be used when a manufacturer of a certain car segment is not able to send the custom made segment in time due to a lockdown, which then results to the car manufacturer being incapable of producing the cars and sending them to car dealers waiting for the cars to arrive on time.

In turn, third party who either enable, assist, or create the preconditions for the seller's delivery of conforming goods are not to be considered as third parties within the scope of Article 79(1), referring to *e.g.* suppliers of raw materials and subcontractors of semi-manufactured parts.<sup>134</sup> In the automotive industry, this could refer to a supplier of screws or other spare parts. Hence, if a third party who is a part of the supply contract by exclusively supplying spare parts fails to provide the promised spare parts, the seller cannot invoke Article 79(1) nor Article 79(2).

However, when the seller has no control over the performance of such supplier, contractual non-performance of a third party Covid-19 would serve as grounds for a contracting party to exempt under Article 79 CISG also when it comes to the failure of a third party who either 'enable, assist, or create the preconditions for the seller's delivery of conforming goods.'<sup>135</sup> The same view has been taken by Dr. Railas in his article, where he has considered, that the distributor can invoke force majeure exemption via relevant provisions of the CISG only if both, the supplier and the distributor, get affected by the same event considered as impediment

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<sup>131</sup> *ibid* para 19

<sup>132</sup> *ibid*

<sup>133</sup> *ibid*, para 22

<sup>134</sup> *ibid*, para 18

<sup>135</sup> *ibid*

beyond control or by the affected party showing that it could not have had avoided or overcome the force majeure event due to relying on just-in-time deliveries.<sup>136</sup>

As well, it has to be noted that *e.g.* if a car segment manufacturer (A), who is creating custom-made car segments to auto manufacturer (B), has to delay the delivery to B due to *e.g.* an entry ban, the auto manufacturer as the affected party is obliged to prove to the car dealer (C) waiting for the delivery from B, that the failure is caused by A and that is due to impediment beyond his/her control.<sup>137</sup> The burden of proof thus shifts from the first non-performance to another, meaning that the one who gets affected by the non-performance has to show it to the next one who will suffer from such failure.

## **3.4 Practical grounds for the seller to invoke Article 79 CISG due to Covid-19**

### **3.4.1 Introduction**

Generally, Article 79(1) justifies a contractual non-performance due to Covid-19 on the basis provided earlier in this thesis. In practise, there are certain factors that serve as boundary conditions for the invocation. This chapter introduces what has to be noted for invoking Article 79 CISG with certain reflections to supply chains of automotive industry for providing practical aspects to the discussion.

### **3.4.2 Burden of proof**

Due to the wording of the Article 79, a succesful invocation of the Article depends largely on the evidence that is provided by the party subject to seeking justified exemption.<sup>138</sup> Thus, he/she has the burden of proof to show that the contractual non-performance was due to an impediment beyond control, the failure and its consequences were unavoidable and the possibilities for overcoming the impediment reasonably were non-existent. Accordingly, a great level of concentration must be paid on sufficient methods of providing proof.

A descriptive starting point for understanding how strongly the burden of proof lies on the responsibility of the seller, is the *Milk Powder* -case, where the seller of a

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<sup>136</sup> Lauri Railas, 'Force Majeure in the Sale of Goods and Covid-19 Logistics- Legal and Commercial Implications' (University of Turku, 7 May 2020) P9

<sup>137</sup> *ibid*

<sup>138</sup> Tribunale di Trieste 17 July 2019 2630/2016, *ALAKart Kft v Pizzul Srl* (2019) para 13

spoiled milk powder argued that as it would have been impossible to detect inactive lipase by the available testing techniques, it should be allowed to exempt from the liabilities under Article 79 CISG. However, the Court held, that the lack of available testing techniques was not enough to serve as proof.<sup>139</sup> According to the Court, as the possibility of the contamination by inactive lipase had to be developed either in the milk delivered from the milk producers, or in the production process at seller's facilities, the seller is liable for either.<sup>140</sup> Hence, the proof has to sufficiently show that the seller's operations have been impeccable in all respects and therefore can be considered as impediment beyond control.

It has to be shown, that the seller has actively done everything in its power to fulfill the contractual obligations and the non-performance was inevitable. The way that the proof should be given shall be governed by the applicable domestic law, and depending on the nature of the product, expert opinions may also be used.<sup>141</sup> The *Milk Powder -case* shows, that a considerably accidental negligence was not considered to serve as ground for proof about impediment beyond control as the failure was not absolutely unavoidable.

The question then arises considering sufficient methods for showing prove that impediment beyond control occurred due to Covid-19. During the pandemic, China, among some other countries has introduced a certificate which aims at proving, that the contractual non-performance is due to conditions caused by the pandemic, and therefore subject to impediment beyond control.<sup>142</sup> According to China Council for the Promotion of International Trade (CCPIT), the force majeure certificates were provided from 2 February 2020 to companies to protect their rights and to reduce the risk of loss caused by the pandemic.<sup>143</sup> Providing such certificates were rather

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<sup>139</sup> *Milk powder case* 9 January 2002 VIII ZR 304/00 Bundesgerichtshof [German Supreme Court] Para 12

<sup>140</sup> *ibid*, para 14

<sup>141</sup> *ibid*

<sup>142</sup> China Council for the Promotion of International Trade, 'CCPIT Provides Covid-19 Force Majeure-Certificates and Other Services' (*CCPIT*, 13 March 2021)

<<https://en.ccpit.org/infoById/40288117668b3d9b0170d2952a7f0799/2>> accessed 2 May 2021

<sup>143</sup> *ibid*

successful, as by 11. March 2020 5,637 certificates were issued to companies in China with a total contract value of 503.5 billion yuan.<sup>144</sup>

In addition, The Chamber of Commerce and Industry (CCI) in Russia and Ministry of Economic Development (MISE) in Italy has also provided similar certificates.<sup>145</sup> As well, some independent organization, such as London Chamber of Commerce and Industry (LCCI) provide force majeure certificates.<sup>146</sup> On the surface the idea appears as outstanding, however, some domestic courts and arbitral tribunals may not see the certificates as sufficient proof due to some issues considering the truthfulness of the certificates. As an example, MISE has no obligation to assure the truthfulness of the claims by the applicant leading to uncertainty and weak foundation for trusting without actual evidence. On the other hand, LCCI has stated in their website, that they “can only certify factual details that can be evidenced.”<sup>147</sup> Therefore the truthfulness of such certificates is highly dependent on what authority or organization is providing the certificate. Thus, when considering whether the force majeure certificates, or any evidence at all, is sufficient enough, it is eventually for the contracting party or ultimately for a national Court applying CISG to decide. For the future, certain international standard for such certificates would be considered and therefore the value and truthfulness of the certificates would increase significantly.

Although it might appear as providing enough proof is nearly impossible, there are still some boundaries of what can be expected for the seller to prove. This is represented in the *Bulbs for four-leaf clover* -case, where the buyer claimed that it is not enough to prove that the fire causing the product to burn was beyond the

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<sup>144</sup> Reuters, 'China force majeure certificate issuance pass 5,600 amid virus outbreak - trade body' (*Reuters*, 11 March 2020) <<https://www.reuters.com/article/health-coronavirus-china-forcemajeure-idUSL4N2B43CK>> accessed 4 May 2021

<sup>145</sup> Ekaterina Pannebakker, 'Force majeure certificates' issued by the Russian Chamber of Commerce and Industry' (*ConflictOfLaws.net*, 17 April 2020) <<https://conflictoflaws.net/2020/force-majeure-certificates-by-the-russian-chamber-of-commerce-and-industry/>> accessed 12 May 2021; Michele Ferrante, 'Managing the impact of the COVID-19 pandemic on IP contracts governed by Chinese law: the SPC's Guiding Opinion on force majeure' (2020) 15(9) *Journal of Intellectual Property Law & Practice* <<https://doi.org/10.1093/jiplp/jpaa131>> accessed 14 May 2021 P689

<sup>146</sup> London Chamber of Commerce and Industry, 'Special Certificates' <<https://www.londonchamber.co.uk/export-documents/special-certificates-page/>> accessed 15 May 2021

<sup>147</sup> André Jensen, Christian Johannes Wahnschaffe, 'COVID-19 and international sale contracts: unprecedented grounds for exemption or business as usual?' (2021) *Unifrom Law Review* <<https://doi.org/10.1093/ulr/unaa026>> accessed 18 May 2021 see III.2; London Chamber of Commerce and Industry (n 146)

control of the supplier.<sup>148</sup> The buyer considered that the seller should have been obliged to prove, that the fire was not caused by the actions of the seller, the seller was following fire safety regulations and undertook everything in its power to prevent the damage or destruction of the goods intended for the buyer.<sup>149</sup> The court considered that such actions were not necessary and showing that the fire occurred, resulting to the destruction of the bulbs was enough.<sup>150</sup> In relation to Article 79 CISG, the importance of an sudden, unexpected impediment gets therefore highlighted. As simple as one can state it, the party subject to failing contractual obligations is obliged to sufficiently show, that there would have been absolutely no possibility to exempt from the impediment.

Given the provided statements, it shall be considered that a supplier of car parts is not obliged to prove the core of the problem to invoke a justification for exemption under 79(1) CISG, meaning that it is not obliged to show all the measures it has done for preventing the impediment. An example of that could be, that if a car supplier is facing a delay due to entry bans or employees infected or set in mandatory quarantines, the car supplier is obliged to show that the entry bans were really in force, the employees were infected or in quarantines and thus it resulted as a shortage of manpower. Thus, *e.g.* if a car-segment manufacturer cannot deliver the segments as agreed, it has to be able to provably show that it has done everything in its power to fulfill the contractual obligations, but it has not been able to do so.

It is improbable that the supplier would have to demonstrate that the employees have had a constant access to hand disinfection gel and have been ordered to wear face masks, but it has no obligation to show that how much they have been used and how it has been controlled. However, it has to be taken under consideration, that due to the complex nature of the subject, the actual application of these provisions requires a valid Court decision.

### **3.4.3 Expectations for ex ante preparations**

To evaluate whether invoking Article 79(1) or (2) CISG is possible, the possibilities of a contracting party for taking the situation under consideration when concluding

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<sup>148</sup> *Bulbs for four-leaf clover case* 4 July 2019 I-6 U 2/19 Oberlandesgericht Düsseldorf [Court of Appeal Düsseldorf] CISG-Online 4614

<sup>149</sup> *ibid*

<sup>150</sup> *ibid*

the contract need to be considered. As stated before, such an impediment that fits the scope of Article 79(1) and (2), has to be unexpected. The question then arises, that as pandemics has occurred before, can Covid-19 be considered as something unexpected in accordance with the Article 79(1) and (2).

The answer is provided in *L-lysine* case from 2005, when the SARS- epidemic was spreading. In the case, the tribunal and the parties agreed, that the SARS- epidemic was to be considered as impediment beyond control. However, the tribunal did not allow the contractual non-performance as the disputed contract was set after the outbreak of the SARS, and thus the situation was not unforeseeable for the parties.<sup>151</sup> Therefore it can be concluded that in contracts created before the Covid-19 started spreading into awareness, the Article 79(1) or (2) shall be applicable, but the situation is different when the contract has been created after the beginning of the pandemic. Then Article 79(1) nor (2) cannot be invoked, as the Covid-19 shall not be considered to constitute an impediment beyond control anymore. However, if another pandemic would occur, it would then be applicable as the unexpected aspect would be restored.

When the given provisions are applied in practice and to automotive industry, it induces, that if a contracting party created a supply contract at the beginning of the Covid-19 pandemic, and fails to produce or transport a car segment, it does not constitute an impediment beyond control under Article 79(1) nor (2), because the party/seller/supplier has had the possibility to predict the effects of the pandemic. In such situation, the party/seller/supplier has an obligation to pay damages to the parties affected by the breach of contract.

Besides the requirement of certain level of anticipation while concluding the contract, it is essential to consider that foreseeability of a loss arising from damages for a breach of a contract cannot be considered as directly equivalent with impediment beyond control.<sup>152</sup> This was shown in *Coke fuel* -case, where there contracting parties had agreed upon a contract considering shipments of coke fuel. Shortly after concluding the contract, the price of the fuel however increased by

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<sup>151</sup> *L-Lysine case* China International Economic & Trade Arbitration Commission CIETAC (PRC) Arbitration Award, CISG-Online 5007

<sup>152</sup> *Coke fuel case T.K.M.E. GmbH v. P.K. S.A. (2015) S.C. (Pol.)*, CISG-Online 5063

double, and the seller refused to continue the its part of the contractual obligations due to the increase.<sup>153</sup> In this case, the Court settled that limit for settling foreseeable damage to 20 % of the agreed price, thus meaning that the seller was relieved from his/her liability for 80% due to the significant increase over reasonable limit of contractual limit.<sup>154</sup>

When reflecting the *Coke fuel-* case to changed circumstances due to Covid-19, it could be considered that whether the pandemic has caused some increases in prices, *e.g.* due to suddenly increased demand, a 20% increase in the price of the agreed good/service/substance shall be considered as tolerable, but when price increase exceeds the given 20%, such increase can be considered as an impediment beyond control, and thus subject to reasoned non-performance. When reflecting the mentioned to the automotive industry, the similar situation could occur *e.g.* if the increased demand by the electronics manufactures would give a sudden rise to the price of the semiconductors.

### **3.5 Summary and conclusions**

The CISG is serving its purpose for promoting uniformity and general functioning of international trade by contracts. The same applies on the supply contracts of the automotive industry. The vagueness of the CISG is leaving space and opportunities to modify the contract to a form which is uniquely suitable to serve the interests of the contracting parties, and due to an absence of provisions that bind the parties on detail level, it is likely more tempting and therefore offers a lower threshold for countries to ratify it.

In the light of the research findings, Article 79 CISG covers the pandemics. Nevertheless, certain boundary conditions exist. The rule of showing impediment beyond control holds its strong position already when concluding a contract, due to which whether the contract has been created when Covid-19 has already spread and become well-known, the provisions of Article 79(1) nor (2) will not apply. Thus, despite the prominent vagueness in the wording of the Article 79 CISG, the absolute requirement of occurred impediment beyond control alongside with the requirement

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<sup>153</sup> *ibid*

<sup>154</sup> *ibid*

for the impediment being a result of an act of God, is inevitable. However, a rapid change of pricing due to Covid-19 could result to impediment beyond control, whether the market price suddenly climbs up over 20% from the starting point. In such a situation, the impediment has nevertheless occurred, causing indirect effects.

Exempting from contractual obligations under 79(1) and (2) CISG is possible, and even probable when the contracting party, in this context the seller or supplier, has sufficient evidence to show the buyer that accomplishing contractual obligations were impossible due to an impediment beyond control. When reflecting it to issues occurred during Covid-19 pandemic, such evidence could be, *e.g.* a force majeure certificate or another certificate providing verifiable information considering compulsory cleanings in a manufacturing facility if an infected employee has been at work. The same applies in automotive industry and in every other industry.

Nevertheless, to provide unquestionable shield to such interests the parties consider relevant to protect with a contract, it would be advisable to create a force majeure-clause to the contract and specify pandemic as one of the grounds when contractual non-performance is justifiable. As a starting point, a good contractual clause considering force majeure events should specify circumstances the parties consider as sufficient to exempt upon.

## **4. Limitation of liability by opting out the CISG in its entirety or partly**

### **4.1 Introduction**

This chapter studies possibilities of the seller to limit its liability via opting out the CISG in its entirety or by part, *e.g.* the specific Article 79 CISG. Sub-section 4.2.2 explains the method of *ex ante* -exclusion of the CISG or a part of it pursuant to Article 6 CISG. As exempting under Article 6 CISG can be considered as



multidimensional and thus include a certain complexity in drafting of the clauses, the sub-section 4.3.2 aims to resolve the complexity via providing a practical guide and model clauses to be used in contracts for excluding the CISG in its entirety or partly.

## 4.2 Opting out the CISG

### 4.2.1 Introduction

Contracting parties may wish to exclude the entire CISG or specific provisions of it from their contract, and therefore opt out the convention or parts of it.<sup>155</sup> This could be due to purposes of gap filling on some parts where the domestic laws are more suitable for the parties, or for providing easier methods for termination.<sup>156</sup> Whether the contracting parties decide to use their freedom to opt out, it is to be done pursuant to Article 6 CISG, which is enabling such freedom.<sup>157</sup> As the parties are allowed opt out the CISG when they want to do so, the Article 6 reflects the principle of prevalence of party autonomy.<sup>158</sup>

Excluding the complete CISG can be done via a simple expression, which is probably one of the reasons why it is the most popular method of opting out the CISG.<sup>159</sup> Whether the parties will, they can replace the CISG with some other law by expressing it in their contract. If they decide not to, when necessary, the court can decide the law applied on the basis of concepts of private international law.<sup>160</sup> The drafting begins requires more concentration if the parties will is to exclude

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<sup>155</sup> Franco Ferrari, *The CISG and its Impact on National Legal Systems* (Otto Schmidt/De Gruyter European law publisher 2008) P11

<sup>156</sup> Monique Carroll, Simon Brown, Scott Langford, 'To exclude or not to exclude the "Vienna Convention" / CISG?' (*King & Wood Mallesons*, 1 November 2017) <<https://www.kwm.com/en/au/knowledge/insights/vienna-convention-cisg-international-sale-goods-contract-exclude-20171030>> accessed 11 May 2021

<sup>157</sup> Ferrari (n 155) P310

<sup>158</sup> Jack M. Graves, 'CISG Article 6 and Issues of Formation: The Problem of Circularity.' (2011) No 3. *Belgrade Law Review* <<https://digitalcommons.tourolaw.edu/cgi/viewcontent.cgi?article=1386&context=scholarlyworks>> accessed 19 May 2021 P125; Franco Ferrari, 'Remarks on the Uncitral Digest's Comments on Article 6 CISG' (2005) (25 *JL & Com.* 25) <<https://heinonline.org/HOL/LandingPage?handle=hein.journals/jlac25&div=7&id=&page=>> accessed 20 May 2021 P16

<sup>159</sup> Oceane Girard, 'Opting out of the CISG: is the law too complicated for such a popular choice?' (2017) *Vol 6. Manchester Review of Law, Crime and Ethics* <<http://heinonline.org.ludwig.lub.lu.se/HOL/Page?handle=hein.journals/manrvlce6&div=7>> accessed 12 April 2021 P31

<sup>160</sup> Timothy Murray, 'CISG in a nutshell' (*Murray, Hogue & Lannis*) <<http://www.mhandl.com/content/cisg.php>> accessed 15 May 2021

specific provisions. Therefore, the format of such clause has to be structured satisfactorily, and not to only demonstrate the will of the parties, but to follow what the CISG requires.

#### **4.2.2 Ex ante- exclusion of the CISG in its entirety or partly pursuant to Article 6 CISG**

As already disclosed, the possibility to opt out the CISG in its entirety or by part is highly dependent on Article 6 CISG. The Article allows parties to choose domestic laws instead of the CISG and is therefore possibly reducing using of the CISG, but also reflecting a considerably high level of party autonomy and freedom of contract.<sup>161</sup> Nevertheless, according to a generally accepted *ordre public*- principle, such freedom does not mean that matters which are not accepted in the State of jurisdiction are applicable due to the will of the parties, nor contractual terms stating so.<sup>162</sup>

To sufficiently opt out the CISG in whole or by part, ex ante- preparations are required in general, meaning that the will to opt out should be included in the contractual clauses. Common consensus rising from scholarship and cases decided by courts is that exclusion of the CISG or its provisions has to be pursuant to Article 6 CISG, hence meaning that the convention shall apply unconditionally otherwise.<sup>163</sup> Without properly opting out, the provisions of CISG will apply if the contracting parties have their places of business in CISG ratified countries.<sup>164</sup>

When contracting parties of a supply contract want to exclude the CISG or a part of it, it is crucial to provide a clear expression opting out the CISG. This requirement is reflecting from the fact, that the intent of parties need to be designated in accordance with Article 8 CISG, providing that for the purposes of the CISG, intent of the parties should be clearly expressed in the time of concluding

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<sup>161</sup> Kenneth C. Randall, John E. Norris, 'A New Paradigm for International Business Transactions', (1993) 71 WASH. U. L.Q. 616 <[https://openscholarship.wustl.edu/law\\_lawreview/vol71/iss3/3](https://openscholarship.wustl.edu/law_lawreview/vol71/iss3/3)> accessed 16 April 2021 P617

<sup>162</sup> Tuulikki Mikkola, 'Ordre Public- periaatteen soveltamiskynnys: näkökohtia sijaissynnytyjärjestelyn rajat ylittävistä oikeusvaikutuksista *Lakimies 7-8/2014* (2014) P972

<sup>163</sup> CISG-AC, 'CISG-AC Opinion No. 16, Exclusion of the CISG under Article 6' (2014) <[http://ciscac.com/file/repository/CISG\\_AC\\_Opinion\\_no\\_16.pdf](http://ciscac.com/file/repository/CISG_AC_Opinion_no_16.pdf)> accessed 12 May 2021 P5

<sup>164</sup> *Easom Automation Systems, Inc v. Thyssenkrupp Fabco, Corp.*, U.S. District Court, Eastern District Michigan 28 September 2007, CISG-Online 4574

the contract and after it.<sup>165</sup> In situations when such expressions are not applicable, the statements and other conduct of the parties shall be construed as meaning that a reasonable person would have understood the matters when looking at *e.g.* negotiations and practices.<sup>166</sup> For example, in *BSC Footwear Supplies, Ltd. v. Brumby, SL* the exclusion was considered to be done as the parties had stated the aim of using English law, the parties had submitted their petitions, statements and defence and counterclaims according to Spanish domestic law and that the buyer did not raise the issue of applicability of the CISG until appealing.<sup>167</sup>

Therefore, the exclusion does not have to be completely descriptive by its wording. According to CISG-AC, choice of law of a non-Contracting State, choice of a specified domestic statute or code where it would otherwise be displaced by the CISG's application constitute a somewhat non-questionable exclusion.<sup>168</sup> However, the choice of law of a contracting state or a territorial unit of a contracting state shall not be considered a valid expression, and thus cannot be invoked.<sup>169</sup> Opting out can thus be performed without explicitly referring to the CISG. In a sense, such understanding is stressing the uniform nature of the CISG as well as the freedom of contract; when contracting parties wish to apply foreign laws, the convention expresses no interest in intervening, for better or worse, and the exclusion is rather simple.

In addition to the possibilities provided by the Article 8 CISG, the provisions of Article 9 CISG are enabling opting out the CISG without expressly expressing it in the agreement, as the Article 9(2) provides the following: "(2) The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned."<sup>170</sup> Usage refers to an industry-specific established contractual

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<sup>165</sup> CISG-AC, 'CISG-AC Opinion No. 16 Exclusion of the CISG under Article 6' (n 163) P2

<sup>166</sup> CISG art 8(3)

<sup>167</sup> *BSC Footwear Supplies Ltd v. Brumby St.* Audiencia Provincial de Alicante, Spain, 16 November 2000, CISG-Online 1318

<sup>168</sup> CISG-AC, 'CISG-AC Opinion No. 16 Exclusion of the CISG under Article 6' (n 163) Para 4

<sup>169</sup> *ibid*

<sup>170</sup> Girard (n 159); CISG art 9(2)

practice by which the parties have entered into agreements, that are considered to be binding on each other and in contracts made between them.<sup>171</sup> Usage is comparable to an academically disputed concept of *lex mercatoria*, which in turn refers to customary international law arising from uniform and simultaneously applied practices.<sup>172</sup> For the usage to be applicable, the CISG requires that the parties must have had knowledge about this usage.<sup>173</sup> If the knowledge requirement is fulfilled, the contracting parties can opt out the CISG when the parties rely on usages consisting of rules without a link CISG.<sup>174</sup>

In addition, the opting out could be done via modifying the clause to choose ‘the law of a contracting state insofar as it differs from the law of the national law of another Contracting State’, but this method can be disputed, and the interpretation could vary from court to another.<sup>175</sup> Attention must be given, as well, to a reference included in Article 6 CISG, in which it provides Article 12 CISG some force to change the applicability of Article 6, thus referencing to possibilities to opt out the CISG. The Article 12 is prominently challenging by its wording. The underlying idea of the Article is that a contracting state is allowed to provide a mandatory order where it permits binding expressions of intent to be formed in writing exclusively. Due to the mentioned, despite the starting point of CISG being expressions of will are allowed also in other forms than in writing, when a state has given that the only accepted expression of intent is in writing, the contracting parties are not allowed to exempt from such obligation.<sup>176</sup>

In conclusion, the CISG or parts of it can be opt out in many different forms: via a explicit impression, by choice of law of a non-contracting state or a specific national statute of a contracting state, or by commonly used usage with no link to CISG. Therefore, whether opting out is in the interest of contracting parties, attention should be given in the mode of expression and to the provisions of the contracting

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<sup>171</sup> Petri Rikkilä, ‘Sopimuksen syntyminen puhelinmyynnissä, näyttötaakka ja reklamaatiovelvollisuus’ *Oikeustieto* 2012/6 (2012) P13

<sup>172</sup> Minni Leskinen, ‘Kiinalainen välimiesmenettely ja lainvalinta.’ (2012) 6.1 Helsinki Law Review <<https://journal.fi/helsinkilawreview/article/view/74342>> accessed 14 April 2021 P98

<sup>173</sup> Philip Hellwege, ‘Understanding usage in international contract law harmonization’ (2018) Volume 66, Issue 1 The American Journal of Comparative Law <<https://doi.org/10.1093/ajcl/avy008>> accessed 2 May 2021 P130

<sup>174</sup> Girard (n 159) P34

<sup>175</sup> *ibid* P35

<sup>176</sup> *ibid*

states of the CISG considering legally valid forms of expressions of contractual will. In conclusion, it is recommendable to form opting out terms into a contract in an obvious and precise way by drafting them in the contract. Despite the Article 6 CISG being directly linked to Article 12 CISG, for more secure and stable basis for the contract that serves the predictability and proper fruition of the matters agreed upon in a contract, it is recommendable to create a contract in writing on general basis.

### **4.3 Practical guidance for opting out the CISG**

#### **4.3.1 Introduction**

As a starting point, considerations about what kind of an opt out clause should be constructed for the agreement, the contracting parties should always be aware of whether the party is from a CISG ratified country or not. Depending on the result, the parties should then consider whether they will to exclude the CISG in its entirety or a part of it, *e.g.* Article 79. The following scenarios are imaginary and used exclusively to demonstrate possible model clauses. The clauses are created on the basis of the findings of this thesis and with professional input of Rauli Viippola, a lawyer specialized in corporate and contract law.<sup>177</sup>

The model clauses shall be drafted upon each possible opt-out opportunity provided on the previous chapter, however excluding drafting on the basis of choosing the law of a contracting state insofar as it differs from the law of the national law of another Contracting State due to the unstable nature of the differences of opinion it has caused while interpreting. Thus, the aim of the model clauses is to provide drafts that are undoubtedly valid to express the intent of the parties.

### **4.4 Example clauses and a practical guide to opt out the CISG or a part of it**

#### **4.4.1 Introduction**

As indicated in previous chapters of this thesis, automotive industry has disseminated its supply chains extensively in global level, and therefore serves as

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<sup>177</sup> A discussion considering the model clauses with Rauli Viippola, a practicing lawyer at Talenom Oyj.

good basis for the discussions of this chapter as well. For considering what kind of a clause should be constructed for the agreement, the contracting parties should always be aware of whether the other parties of the contract is from a CISG ratified country or not, and depending on the result, consider whether they want to exclude the whole CISG or a part of it. The following scenarios are imaginary and used exclusively to demonstrate possible model clauses. The clauses are created based on the information given along this thesis and with professional input of Rauli Viippola, a lawyer specialized in corporate and contract law.<sup>178</sup> Other references are provided in footnotes, as in usual.

The model clauses shall be drafted upon possible opt-out opportunities provided on the previous chapter, however excluding the possibility to choose the law of a contracting state insofar as it differs from the law of the national law of another contracting state, due to the unstable nature arising from the differences of opinion it has caused when interpreting. Thus, the aim of the model clauses is to provide drafts that are undoubtedly valid expressions of the intent of the parties.

#### **4.4.2 Example clauses**

Automotive manufacturer (A) whose place of business is in Finland, and a car segment manufacturer (B) located in Japan have decided to conclude a supply contract for B to deliver necessary car segments to A. The parties are aware, that as CISG governs the manner of exclusion, the expression of opting out should include a reference to Article 6.<sup>179</sup>

Whether the parties would consider that the exclusion of the CISG in its entirety would be sufficient for their purposes, the following clause could be used to sufficiently express the mutual will of the parties:

‘Pursuant to Article 6 of the United Nations Convention on Contracts for the International Sale of Goods (CISG), the CISG shall be hereby excluded expressly and in its entirety.’<sup>180</sup>

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<sup>178</sup> Discussion considering the model clauses for opting out the CISG or a part of it, provided in Chapter 4.3.2, with Rauli Viippola, a practicing lawyer and head of legal of Talenom Oyj, specialized in corporate and commercial law.

<sup>179</sup> Girard (n 169) P32

<sup>180</sup> *ibid*

In a situation, where the specific exclusion of the Article 79(1) is in in the interest of the parties, the clause could be worded as following:

‘Exclusion right pursuant to Article 6 of the United Nations Convention on Contracts for the International Sale of Goods (CISG) shall be hereby used to expressly exclude the provisions of Article 79(1) of the CISG.’

Whether the parties decide to use an expressly specified domestic statute or code from either of the countries, the CISG shall be excluded or by a reference to the law of such state that has not ratified the convention.<sup>181</sup> If the parties decide to use a specific domestic code, *e.g.* Finnish Trade Act (Kauppalaki) (1987/355), the expression in such clause could be the following:

‘Exclusion right pursuant to Article 6 of the United Nations Convention on Contracts for the International Sale of Goods (CISG) shall be applied to exclude the CISG. The purpose is to exclusively apply the provisions of Finnish Trade Act (1987/355) to this Agreement.’

When creating the clause in accordance with what has been provided above, it is vital to keep in mind, that in order to provide an effective exclusion of the CISG, it has to certainly be a specific domestic statute or code which the parties invoke, hence a general reference covering comprehensively to a national law cannot be considered to be sufficient.<sup>182</sup> Therefore under no circumstances should the parties consider a considerably vague clause such as:

‘The law of Finland / Japan shall be applied to this contract.’

to be sufficient to opt out the CISG. In such circumstances, the CISG would still apply due to both countries being CISG ratified countries.

The requirement of Article 6 CISG does not always have to include direct wording to be valid when certain conditions are fulfilled.

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<sup>181</sup> Peter Schlechtriem, ‘Requirements of Application and Sphere of Applicability of the CISG’ (2005) 36 *Victoria U. Wellington L. Rev.* 36 <<https://doi.org/10.26686/vuwlr.v36i4.5625>> accessed 5 May 2021 P784

<sup>182</sup> *Surface protective film case* 25 November 1998 VIII ZR 259/97 Bundesgerichtshof [Federal Supreme Court]

CISG could be opt out with referring to a common usage with no link to CISG or by referring to the law of non-contracting state. Even a rather simple expression shall be considered sufficient to exclude the CISG.<sup>183</sup>

Opting out the CISG via a reference to a law of non-contracting state could be drafted as following:

‘This contract shall be construed and governed by the laws of the United Kingdom.’

In the given situation, the CISG is opt out. When drafting a clause concerning usage, which could be *e.g.* a unique form of providing exemptions of contractual liability, the drafting could be for example:

‘Internationally accepted usages of the automotive industry which the contracting parties have accepted and agreed as a part of this contract by their actions, shall be applied and respected at any legal dispute arising from this agreement.’

## **4.5 Summary and conclusions**

Contracting parties may wish to opt out the CISG for various reasons, which is enabled via Article 6 CISG. Similarly to drafting any contractual clause, a successful invocation of Article 6 CISG requires preoccupation. Typically to the CISG in general, the wording of the Article 6 CISG consists of considerably broad form of phrasing, and therefore providing a successful and clear statement concerning the parties mutual will to exclude the CISG requires the parties to follow precisely specific rules which are not apparent from the wording of the Article.

Various possible methods have been found to be sufficient to exclude the CISG or a part of it efficiently. The flexibility of the CISG shows from the interpretation of Article 8 CISG and Article 12 CISG, which provide broader possibilities to opt out. In addition to the provided model clauses that could be considered as adequate expression of the will of the parties, some other methods of expressing such will exist but are unstable by its interpretation. As the automotive industry is dependent

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<sup>183</sup> *American Biophysics Corp. v. Dubois Marine Specialties* US DC Rhode Island, (2006) CISG-Online 1176 P6



on working supply chains, which are naturally based on contracts, the importance of focusing on the *ex ante* -phrase of the contractual relationship important. In conclusion, expressing the will of the parties to opt out the CISG, in its entirety or only partly, should be done via drafting such will to a written contract.

## **5. Discussion and conclusions**

In the light of the findings of this thesis, the contracting party/seller/supplier can invoke the provisions of Article 79(1) and (2) CISG to justify his/her contractual non-performance due to changed circumstances caused by Covid-19 pandemic. Although the Article 79(1) CISG is considerably similar to the traditional understanding of a *force majeure*, the Article does not mention *force majeure*, which is understandable due to the varying and unsettled nature of the concept. The strict requirement for invoking Article 79(1) and (2) CISG is, that the contracting party wanting the exemption must have faced an impediment beyond control, and according to the findings presented in this thesis, the outcomes of a pandemic fulfil the criteria.

It has been disputed whether economic issues constitute an impediment beyond control, but as there are no court decision available, it can be only estimated, that according to the literal meaning of impediment beyond control under Article 79(1) and (2), economic issues could, at least in theory, be used to invoke the provisions of the Article.

Strict requirement for the invocation of Article 79(1) and (2) is, that the contracting party, referring to supplier/seller in this case, is able to provably show that the impediment has occurred in a way that there would have been no possibility to swerve the impediment, and that there were absolutely no possibilities for the supplier/seller to complete his/her contractual obligation agreed upon in a contract. A party wishing to have the exemption is subject to considerably heavy burden of proof. To provide a statement about the subject in the most exhaustive form as

possible, the party subject to contractual non-performance is obliged to sufficiently demonstrate, that there would have been no possibility to perform due to the changed circumstance.

In the context of Covid-19 considerations, various methods for proving such impediment exist, *e.g.* providing force majeure -certificates to the contracting party. Albeit the requirement for showing sufficient proof comes with strong responsibility for the supplier/seller, there are still certain limitations on the burden for the seller. However, the concrete consideration about what is sufficient and requires a court decision, and in conclusion, only way to assure certain protection under Article 79(1) or (2) is to provide as assertive evidence as possible.

The requirement of showing impediment beyond control follows to considerations on whether the contracting parties have had the possibility to take the situation causing the impediment under consideration when concluding the contract between the parties. Contracts created before the Covid-19 pandemic spreading worldwide knowledge, the Article 79(1) or (2) shall be applicable, but if the contract has been concluded when the Covid-19 has been declared as pandemic, Article 79(1) nor (2) cannot be invoked on the grounds for Covid-19, as the pandemic does not constitute an impediment beyond control anymore at the point.

In economic considerations, the limit of impediment beyond control and therefore contractual non-performance subject to Article 79(1) and (2) CISG, is when the market value of agreed price increases by 20 %. Reflecting it to Covid-19 and changed circumstances in automotive industry, it could be that *e.g.* due to suddenly increased demand of semiconductors, a 20% increase in the price of the agreed good/service/substance is tolerable, but when price increase exceeds the given 20%, the impediment can be considered to an impediment beyond control and thus subject to reasoned non-performance.

Despite CISG being generally applicable on the given grounds, if willing to do so, the contracting parties are allowed to opt out the provisions of Article 79 CISG, or the whole convention pursuant to be Article 6 CISG. For such exclusion to be valid, the uniform will of opting out has to be generally expressed by the parties in the contractual terms. The exclusion can be done via straightforward impression of will for excluding the CISG or some of its Articles, choice of law of a non-contracting

state, a specific national statute of a contracting state or by particular or commonly used usage with no link to CISG.

Failures of contractual performance, that are due to failure of a third party are regulated under Article 79(2) CISG. A third party is a party independently engaged to the party claiming exemption, meaning that such third party is expected to be an independent distinct person or legal entity, who is economically and functionally independent from the seller and is outside the seller's organizational structure and sphere of control and responsibility. If reflected to the automotive industry, third party non-performance could occur when a manufacturer of a certain car segment is not able to send the custom-made segment in time due to a lock down, which then results to the car manufacturer being incapable of producing the cars and sending them to car dealers who are waiting for the cars to arrive on time. In the given situation, the exemption under Article 79(2) would be justified.

However, when a third party has faced an impediment beyond control, *e.g.* due to a changed circumstance caused by Covid-19, it would as well serve as grounds for a contracting party to exempt under Article 79(2) CISG also when it comes to the failure of a third party who either enable, assist, or create the preconditions for the seller's delivery of conforming goods. The described party is not usually considered as a third party by the means of Article 79(2), but the strong concept of impediment beyond control changes the circumstances for more flexibility.

Thus, when it comes to third party causing a contractual non-performance, the force majeure exemptions under Article 79(2) can be invoked if both parties, the supplier and the distributor, are affected by the same impediment, or by the affected party showing the impossibility to avoid or overcome such impediment. In addition, it has to be noted, that the burden of proof shifts from the first non-performance to another meaning that the one who gets affected by the non-performance on a supply chain, has the obligation to show it to the next one who will suffer from such failure.

Covid-19 pandemic changed the balance of the world temporarily, but it is quite probable, that the traces of the pandemic will be visible on the world trade for a long time after getting the pandemic under control by vaccines. Among other things, the Covid-19 has been a radical reminder about importance of good, well planned contractual terms, that are modified and designed to serve the interests of

the parties. Drafting a force majeure clause with clear references to specific situations is not the only enforceable way to safeguard contracting parties from contractual liability on a situation where an impediment beyond control occurs, as international conventions, such as the CISG, has noticed the need for the possibility of such exemption.

Nevertheless, to promote and safeguard the interests of the contracting parties, the content of the contract terms concerned with force majeure situations should be taken under consideration with certain accuracy and detail. The parties should analyse risks, and in accordance with the outcome, draft them down in the force majeure- clause, keeping in mind the purpose of the contractual relationship. This is crucial to be done in order to protect the supply chain from unexpected risk when they, sooner or later, might occur.

Due to the constantly changing nature of Covid-19 and the researched subject matter being recent, the aspects discussed in this thesis require more studies and decisions from the courts or arbitral tribunals. As well, the thesis raised three new questions that needs further examining: does the Article 79 CISG cover economic challenges posed by Covid-19, what is sufficient proof according to Article 79 CISG when it comes to manufacturing facilities forced to be shut down due to an infected employee, and is the manufacturing facility responsible for an infection of an employee, which constitutes an contractual non-performance under Article 79 CISG, if there has been a lack in disinfection products and hygiene protocols in the facility?

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