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

Abstract

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

KEYWORDS

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

SŁOWA KLUCZOWE

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

1. INTRODUCTION

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

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

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

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

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

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

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

⁴ Manner, Schmitt (n 2) 79.

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

⁶ Manner, Schmitt (n 2) 80.

⁷ *ibid.*, 81.

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

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

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

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

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

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

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

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

¹² *ibid.*

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

3. INTERPRETATION OF CONTRACTUAL PROVISIONS REFERRING TO WAR AND SANCTIONS

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

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

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

¹⁴ *ibid.*

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

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

¹⁷ See Art. 8 (3) of the CISG.

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

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

¹⁸ See Art. 9 (2) of the CISG.

¹⁹ Brunner, Hurni (n 16) 98.

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

²¹ *ibid.*

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

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

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

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