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# Coping with COVID-19 Now and in the Future – *Quo Vadis* the CISG?

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# COVID-19: Pandemic, Lockdowns, Supply Chain Issues

What if one cannot perform a supply contract when prevented by COVID-19

Three ways of reliance on:

- Doctrine of frustration, impossibility
- Force Majeure Clauses
- Article 79 of the CISG

# Reliance on Legal Doctrine

- Common Law: *Taylor v. Caldwell* (1863) 32 L.J.Q.B. 164, borrowed from Roman Law, '*impossibilium nulla est obligatio*'. Idea of 'unforeseen impossibility' Coronation cases: *Krell v. Henry* [1903] 2 KB 740. But not if it is more expensive to perform: *Davis Contractors Ltd v. Fareham Urban District Council* [1956] AC 696. *Wong Lai Ying v Chinachem Investment Co Ltd* [1980] HKLR 1, no foreseeable possibility – idea of commercial impossibility coming in. Short impossibility for long term contract not good enough: *Li Ching Wing v. Xuan Yi Xiong* [2004] 1 HKC 353. All or nothing approach.
- Civil Law: Primarily '*impossibilium nulla est obligatio*' (*force majeure*), but also '*Clausula rebus sic stantibus*' – unforeseen change of external circumstances – as seen in many modern European Civil Codes (e.g. BGB, Code Civile), economic impossibility – open to court or arbitral tribunal to adapt contract to changed external circumstances, idea of reasonable mitigation (See: Gordon Chung, *European Review of Private Law* [109-142] 2017 and PRC Civil Code 533 and Article 26 of the SPC Interpretation).

# Force Majeure Clauses

- Common law courts construe such clauses narrowly – ‘Act of God’ looked at same as ‘unforeseen impossibility’. Two cases:
- *Kel Kim Corp. v. Cent. Mkts., Inc.*, 519 N.E.2d 295, 296 n.\* (N.Y. 1987).

‘If either party to this Lease shall be delayed or prevented from the performance of any obligation through no fault of their own by reason of labor disputes, inability to procure materials, failure of utility service, restrictive governmental laws or regulations, riots, insurrection, war, adverse weather, Acts of God, **or other similar causes beyond the control of such party**, the performance of such obligation shall be excused for the period of the delay.’ [*Labour costs over ten times*]

- *Dwyer (UK Franchising) Ltd v. Fredbar Ltd* [2021] EWHC 1218

‘This Agreement will be suspended during any period that either of the parties is prevented or hindered from complying with their respective obligations under any part of this Agreement by any cause **which the Franchisor designates as force majeure** including strikes, disruption to the supply chain, political unrest, financial distress, terrorism, fuel shortages, war, civil disorder, and natural disasters.’ [Lock down due to Covid – application of *Braganza v. BP Shipping Ltd* [2015] UKSC 17.]

# Article 79 of the CISG

## *Article 79*

- (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.