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# International Sale and Force Majeure

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# INTRODUCTION

An international sale, unlike the domestic one, is affirmed through an exchange between the ownership of a good and the payment of a price between geographically distinct States.

Every international sale is absorbed in an international context where juridical and geopolitical factors exercise a considerable influence. There are, therefore, new additional variables with respect to an internal contractual relationship.

Defining international sales contracts, knowing how to understand, draft and use the most important contractual clauses is central and vitally important so that operators carry out a conscious and sensible negotiation in the context of an international sale.

Globalization and the needs of companies to internationalize are two important factors that fuel the phenomenon and lead to the conclusion of countless international sales contracts. Due to its frequency, sometimes it happens to be inside a sale without realizing it and without having full awareness of what the consequences could be.

In the face of this, the purpose of my thesis is to initially shed light on the practice of international contracts, identifying the major contracts in the field of international sales, dwelling on the differences between Civil law and Common law Countries and then deepening the problem of the applicable law to international contracts. A question that occurs systematically since the law governing the agreement will determine whether a valid contract actually exists, how it will be interpreted and the remedies for termination in the face of breach of contract by the seller or the buyer. The parties, therefore, have different possibilities in designating the *lex contractus*, however if they do not identify it, the rules of d.i.pr. takeover to regulate the matter. Precisely because of the diversity of legal systems, to ensure a single and uniform discipline in international sales, various inter-state Conventions can be applied. One of the most important, related to the international sale, is the Vienna Convention on the international sale of movable property (CISG), even if its impartiality threatens the harmony of the uniform international law of sale because it totally delegates to the national jurisdiction the interpretation of its regulation.

The principle of party autonomy is, therefore, central and this is where my reflection on the second part of the thesis, which focuses on the force majeure clauses in international contracts, is articulated. This principle is significant as it is the basis of the contractual practice on the matter.

One of the difficulties that parties encounter in concluding an international contract is the possibility that unforeseeable events occur and do not allow them to carry out their contractual obligations.

Due to globalization this problem is increasing. Sudden changes related to political and geo-economic variables, wars, natural disasters, or other external shocks can lead to lasting consequences such as a limitation of imports and exports, a fluctuation in prices or other events that can undermine the contractual foundations.

The *pacta sunt servanda* paradigm established the responsibility of this modification of circumstances on the party on which it falls. However, the principle of the *nulla est impossibility* of the obligation was admitted, consequently, the causes of force majeure has been perceived an exoneration in every legal system.

It is in the interest of the parties to insert the force majeure clause in an international contract and adapt it to their needs related to their context. Sometimes in fact, it can be a real list that clearly and exhaustively defines the clause.

Looking more specifically, the Institution of force majeure is recognized by almost every Nation with some different nuances, particularly between Common law and Civil law Countries, due to their historical, cultural, and legal context.

If on one hand in Civil law Countries force majeure is most of time expressly governed by law, on the other hand Common law lawyers tend to make a list of specific occurrences which entitle as force majeure events.

At the international level, there are legislative texts in which the Institution of force majeure is largely delineated. As will be seen in this thesis, the force majeure clauses most used in contracts are those of the International Chamber of Commerce that issued the ICC Force Majeure Clause 2003 (ICC Clause) and the solution proposed by the CISG.

Referring to the CISG, Art.79 of the Convention does not explicitly mention the words "force majeure" thus creating a *sui generis case* and neutrality.

The Convention recognizes three major characteristics that must be demonstrated for the force majeure clause to be precisely applied: the extraneousness of the instance of the obliger's sphere of control, the ambiguity of the event at the moment of stipulation of the contract and the insuperability of the fact and its outcome. Other important specifications

emphasize by Art. 79 are, for example, the exemption from liability if the impediment is due to a third party and the duty to promptly notify the other party of the failure of the performance.

In case law, there are several cases that have seen the application of the Convention and the reference to Art. 79 to invoke force majeure in the face of unforeseeable events due to a change in goods prices, climate changes and other events that undermined the validity of the contract. As will be seen in the analysis of some cases presented, the discretion of each individual Court has determined the legitimacy of the practicable of the force majeure.

As far as the ICC clause is concerned, it is the most internationally used as the parties prefer to refer to this clause, instead of writing their own clause of force majeure. It is one of the most complete clauses as in addition to indicating the requisites necessary to invoke it, which are similar to those of the CISG, it offers a detailed list of events whose occurrence requires the application of the clause.

The advantage of a force majeure clause is that it allows the parties to model at their own pleasure a risk sharing that derives from unknown and uncontrollable events. This allows them to select a resolution that works best for their situation. Suspension or termination are the most common relieves, but also compensation or negotiation provisions are frequent.

Therefore, the force majeure clause allows the parties to shape the sharing of risk to their liking. An exposure that has been understood the most in this last year in the face of the Covid-19 pandemic, which can be qualified precisely, thanks to the actions of each Country and the declaration of the WHO, as an event of force majeure.

The various directives that States have issued to counter the spread of the virus have hindered not only the world economy but also the complete conclusion of international contracts. However, as will be seen in some case studies such as, for example, *JN Contemporary Art, LLC v. Phillips Auctioneers LLC*, the pandemic did not move the solid foundations of contract law. On the contrary, this has brought the attention of the negotiators to drafting more and more specific force majeure clauses since this provision must be considered thorough and carefully drafted.

# CHAPTER I

# THE MAIN CONTRACTS IN INTERNATIONAL SALE

ABSTRACT:1. Definition of contract. – 2. Contract formation. – 3. Dispute resolution. – 4. Contracts in Common law and Civil law Countries. – 5. General provisions of contracts in both systems. – 6. Type of international contracts. – 7. International Sales of goods contract. – 8. Distribution contract. – 9. International agency contract.

The internationalization of the business activity develops according to some phases that proceed from the sporadic export of goods to the establishment of foreign direct investments.
The economic operation of exporting goods is legally broken down into variously combined contracts whose fulcrum rests on the international sales contract.

In the practice of international trade, in fact, it is very common to find a parties in contract from countries other than the one in which the company or professional firm is based. Furthermore, it is possible that a certain business must be executed in a foreign state, because, for example, this is where the property to be sold or the company for which services are being carried out are based.

After an initial general analysis of the notion of contract and a further deepened in the Common law and Civil law Countries, the attention will focus on the three main international sales contracts.

## 1.1.1 DEFINITION OF CONTRACT

A contract is a "*voluntary, deliberate, legally binding and enforceable agreement creating mutual obligations between two or more parties*".[1]

[1] R. CAVALIERI – V. SALVATORE, *An introduction to international contract law*, Giappichelli, Milano, 2018; Italian Civil Code art.1321

When we refer to the term "party", it is not easy to give a single and exhaustive definition as it is very expansive and includes both natural and legal persons.
When parties enter a contract, usually concluded in written form but also verbally or implicitly, they essentially assume obligations such as a performance for the other party in exchange for a benefit, which is sometimes not fair.
A contractual relationship is evidenced, therefore, when there is an agreement in which the parties have intentionally assumed liabilities about each other. This process begins with an offer, follow by the acceptance of the offer, a valid consideration and a mutual intent to be bound. If all these ingredients are not valid, a court will not find that a contract exists.[2]
Moreover, the validity of the contract is also determined by the legal capacity of the parties who must be of age, of sound mind and must not have used drugs or alcohol. Otherwise, due to these factors or other behaviors such as fraud, the contract can be declared null and void.

Although the contract is the main instrument through which the economy and wealth move worldwide, it is very difficult to find a universally accepted definition of an international contract, as well as the existence of a single court to turn to in the matter.[3]
As a first approximation, it is possible to state that the contracts are international and therefore differ from internal contracts, when they are not destined to run out within a single state system. In fact, a contract is international when it has certain links with more than one State.[4]
The distinctive element of the internationality of the contract is the choice of law between at least two different states. Conversely, if a contract has all the elements linked to a single State, in this case it cannot be classified as international.[5]
Therefore, the detection of internationality is an activity that always involve rigorous case-by-case investigation.

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[2] C. MACMILLAN – R. STONES, *Elements of the law of contract, University of London Press*, London, 2004
[3] R. CAVALIERI – V. SALVATORE, *An introduction to international contract law*, Giappichelli, Milano, 2018
[4] Hague Conference on Private International Law, *Principles on Choice of Law in International Commercial Contracts,* The Hague, The Netherlands, 2015
[5] As said in R. CAVALIERI - V. SALVATORE, *An introduction to international contract law, Giappichelli*: "In this regard, it must also be noted that when one or more significant elements of a contract are connected with different territorial units within the same national State such fact does not constitute internationality of the contract."

International contracts are characterized, from a formal point of view, by the coexistence of one or more elements of extraneousness. These extraneous details are frequently the following:

1. the nationality of the parties;
2. the place of business of each of the parties;
3. the place where the incorporation procedure was completed; (for legal persons)
4. the place of conclusion of the contract;
5. the place of execution of the contract;
6. the place of situation of the good object of the contract;
7. the currency of payment;
8. the place of payment. [6]

When there is an international contract there are three fundamental problems[7]: that of knowing which judge in the event of a dispute will decide the conflict. That problem can be resolved by the parties by choosing, through the competent court or to agree that any disputes are determined by international arbitrators. Secondly, that of the language to refer to, in order to understand the meaning of the clauses, resolved by stipulating a specific clause required business language that is English and to a lesser extent French and Spanish. Thirdly, above all, that of the identification of the contract law the so-called *lex contractus*. To determine the applicable law to an international contract, each Country has specific rules of private law, called conflict rules. This will be seen in the next chapter.

To better investigate the internationality of the contract, it is also possible to refer to the Conventions so long as each international Convention has its own scope of application and therefore its own notion of "internationality" valid in contractual matters, a concept that must be investigated in advance for the purposes of applying the rules contained therein.[8]

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[6] F. GALGANO - F. MARRELLA, Diritto del commercio internazionale, terza edizione, CEDAM, 2011; R. CAVALIERI – V. SALVATORE, *An introduction to international contract law*, Giappichelli, Milano, 2018

[7] M.E. GREENBERG, *International contracts: problems of drafting and interpreting, and the need for Uniform Judicial approaches*, 5 B.U: Int'l L.J.363, 1987

[8] For example, the Vienna Convention on the International Sale of Movable Property (CVIM) art.1 or Rome Convention 1980 art.3,3 or Hague Convention 1955.

To facilitate the drafting of international contracts, specific contractual models have been prepared by NGOs with an economic-transnational vocation and by intergovernmental bodies.[9]

### 1.1.2 CONTRACT FORMATION

Since international contracts are formed between parties located in different places in the world through an exchange of declarations, it is good to deepen the subject and specify some fundamental steps in the formation of an international contract.

The formation of the contractual agreement and, therefore, the conclusion of the contract, implies a procedure, that is a sequence of human behaviors, which must conform to the model established by the rules[10]. For a contract to be formed, the parties begin to negotiate through negotiations that are generally divided by the experts into 3 stages: knowledge of the contract, negotiation and conclusion of the negotiation.
After a series of exchanges of emails, faxes or letters, one of the parties acquires the first information on the other party and on the characteristics of the goods and services it markets[11]. It follows the presentation of the conditions under which the counterparty is willing to enter the contract, conditions that provide for a series of option advantages.
The negotiation phase subsequently sees the parties agreeing on the convenience of the offer and after there is the conclusion of the contract in which they reach an agreement.
Therefore, the contract most often, as in the Italian case, is concluded when the person making the proposal is aware of the acceptance of the counterpart or through a conclusive behavior[12]. On the contrary, in England, the conclusion of the contract takes place in the place and at the time in which the acceptance is delivered to the post office.

[9] M.J.BONEL, *The law governing international commercial contracts and the actual role of the UNIDROITP principles* , *Uniform Law Review*, Volume 23, Issue 1, March 2018, Pages 15–41
[10] V.ROPPO, *Diritto privato, linee essenziali*, quarta edizione, Giappichelli, Torino, 2016
[11] A.RAWLS, *Contract formation in an internet age*, Colum. Sci. & Tech. L. Rev., 2009
[12] Art.1326 Italian Civil Code

It must be remembered that acceptance must comply with the proposal. Sometimes a case of discrepancy may occur and consequently the acceptance will be valid as a counter-offer and therefore the contract will have to be accepted again.[13]
Despite this, it is good to keep in mind what is defined by the articles of the Vienna Convention on international sales, a matter that will be explored in the third chapter.

### 1.1.3 DISPUTE RESOLUTION

In international contracts, it is good to agree in advance on the methods of resolving disputes and identify the best solutions. This is important also in case of breach of the contract due to external and unpredictable events, like the case of force majeure.
The choice usually falls either in ordinary jurisdiction or in arbitration.
Usually, arbitration is more appropriate for disputes of a certain importance, it is composed of mixed colleges which therefore will not favor one party rather than another. Other elements that the parties can benefit from are speed, secrecy, and less formalism.[14]
Sometimes, however, it is preferable to resort to ordinary courts if it is a matter adverse to arbitration or when disputes have a limited value. This is more favorable and occurs more frequently within the European Union in which the party brings the dispute before its own judge and is then subsequently recognized by the counterpart's country.
However, the latter solution presents several problems due to the existence of different legal systems. In fact, it is important to understand the possibilities of recognizing the sentence of a Country in the Country of the counterparty.
To facilitate the recognition of sentences, reference is made to Regulation 44/2001[15] which entered into force on 1 March 2002 and the 2007 Lugano Convention which regulates relations not only between European Countries, as in the Regulation, but also with those belonging to the EFTA (European Free Trade Association): Iceland, Norway and Switzerland.

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[13] Unioncamere Lombardia, *La contrattualistica internazionale*, 2010, website https://www.so.camcom.it/files/allegati/Contrattualistica_0.pdf
[14] More about the topic in P.D. FRIEDLAND, *Arbitration clauses for international contracts*, Second edition, JurisNet, LLC, 2007
[15] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Official Journal L 012, 16/01/2001 P

This Regulation, however, requires as a rule that the action should be brought before the courts of the defendant, and this consequently makes the action before their own judges more difficult.[16] Exceptional cases are those in which it is required the fulfillment of an obligation to be performed at the plaintiff.[17]

In these conditions, becomes of primary importance the possibility of inserting in the international contract the derogation clause of the forum and therefore choosing the competent forum that will resolve the dispute.

## 1.2 CONTRACTS IN COMMON LAW AND CIVIL LAW COUNTRIES

When parties from different Countries draft an international contract, it is essential to know the two great families of law, Common law and Civil law, and some crucial aspects so that the drawn-up contract is complete and exhaustive.

Due to the diversity of the legal systems, therefore diversity of rules, customs and meaning, but also the difference in culture, economic, financial, and commercial components, great attention should be place in the realization of a commercial transaction.

When drafting an international contract, it is good to consider different aspects as they change according to the Countries where the contractual relationship takes place.

The relevant features are e.g. the choice of the applicable law, the authority to which it is intended to devolve the resolution of any disputes that may rise relating to the contract, the language, the determination of the price and other clauses like for example the one that will be examined in this thesis: the force majeure clause.

For these reasons, even if there are some legal issues which are handle in the same way in both legal families, it is preferable to carry out an intense preliminary negotiation activity that helps the parties to defining all the crucial elements and avoiding misunderstandings.

[16] Art 2 Regulation and Convention of Lugano
[17] Art.5.1 Regulation and Convention of Lugano

### 1.2.1 GENERAL PROVISIONS OF CONTRACTS IN BOTH SYSTEMS

The Common law system is a legal system constituted by the jurisprudence in which the judges create the law. The past judgments have a binding nature for future cases, therefore is a law based mainly on case law in which the precedents should be respected[18]. Thus, written law becomes secondary, but not completely irrelevant.[19]
England is the Country in which Common law evolved for the first time, around the 11th century, to be followed later by Canada, USA, Australia, New Zealand and other countries.

The Civil law system, on the other hand, comes from Roman law, as codified in the Corpus Iuris Civilis of Justinian, spread above all in Europe and it is a rigid system of codes containing general principles and rules that the courts apply and interpret. In fact, it is contained in civil code[20] described as a "*systematic, authoritative, and guiding statute of broad coverage, breathing the spirit of reform and marking a new start in the legal life of an entire nation*.".[21] It is based on the principle of the separation of power in which the courts apply the law and the legislator legislate.

The institution of the contract is regulated differently in the two legal systems. Taking into consideration different Civil law system, it is easy to find a definition of contract. In the Italian legal system, art.1321 of the civil code provides a precise interpretation defining the contract as an "*agreement of two or more parties to establish, regulate or terminate a legal patrimonial relationship between them*." This definition is replicated in similar terms in all modern civil code.[22] Therefore, in these Countries, a contract results from an agreement or consent and it is mandatory because from the moment in which the

[18] A. GAMBARO – R. SACCO, *Sistemi giuridici comparati*, UTET Giuridica, III Edizione, 2008
[19] Statutes like the Sale of Goods Act 1979 or the Uniform Commercial Code
[20] Most civil codes were adopted in the nineteenth and twentieth centuries: French Code Civil, 1804, Austrian Burgerliches Gesetzbuch, 1811, German Burgerliches Gesetzbuch, 1896, Japanese Minpo, 1896, Swiss Zivilgesetzbuch, 1907, Italian Codice Civile, 1942; C. PEJOVIC, Civil Law and Common Law: two different paths leading to the same goal, Poredbeno Pomorsko Pravo, 2001
[21] C. PEJOVIC, *Civil Law and Common Law: two different paths leading to the same goal*, VUWLawRw42, 2001
[22] Argentine Civil Code art.1137; French Civil Code art.1101; Spanish Civil Code art.1254; section 305 of the German Civil Code. There are other codes like in Swiss, Brazil, Portugal in which it is not defined the concept, but it can be find in the German Civil Code.

parties enter the agreement, they are obliged to fulfil its terms, subject to explicit performance and compensation of damages.[23]

While if we look at England, a Country of Common law, there is no real notion of contract as it is suspicious for a generalization of this institution. There is a hint in the difference between deed contracts and simple contracts. The first is a written promise or a set of promises valid for their form, the second is a contract that requires preconditions that can be found in Art. 1325[24] of our civil code. Common law jurisprudence, therefore, is less focus on definitions and place considerable efforts on promises.[25]

Another substantial difference lies in the ethical-legal principles. Civil law contracts in fact, follow the *pacta sunt servanda principle* with the limitation of *rebus sic stantibus*. This means that the circumstances and the context in which the pact was made must remain compatible. As regards the principles of Common law, there are the freedom of contract, the sanctity of contract and strict liability. Therefore, the parties can enter a contract without the intervention of a judge[26].

Another essential principle for Civil law countries, but not for Common law ones, is the good faith clause[27]. For the latter, it is relevant only if expressly introduced. Despite this, they still have obligations, two examples are not to declare falsehood and not to commit.

In the phase of contract formation, then proposal and acceptance, the two legal systems are very similar. The contract becomes valid when there is an offer, so a manifestation from a party to enter in the contract and a consequent acceptance by the other party. The systems developed a series of important rules concerning by whom, how and when an offer may be accepted. However, differences appear in the revocability of the proposal. For the Italian legal system, relevant are art.1328[28]-1329[29] of the Italian Civil Code which

[23] J. HERMIDA, *Convergence of Civil Law and Common Law contracts in the space field,*, 2009, website http://www.julianhermida.com/

[24] The requirements of the contract are: 1) the agreement of the parties; 2) the cause; 3) the object; 4) the form, when it appears that it is prescribed by law under penalty of nullity

[25] Restatement (second) of Contracts §2

[26] F. MASTROPAOLO – A. VALISA, *La formazione del contratto: confronto tra Civil Law e Common Law*, Meliusform, 2021

[27] Look art.1337 c.c

[28] The proposal can be revoked until the contract is concluded (1). However, if the acceptor has undertaken the execution in good faith before being informed of the revocation, the proposer is obliged to indemnify him for the expenses and losses suffered for the initiated execution of the contract (2).

[29] If the proposer is obliged to keep the proposal firm for a certain time, the revocation is without effect.

deal respectively with revocation and irrevocability. In English law, on the other hand, the revocation of the proposal is always envisaged until the moment when it was accepted. Therefore, in Civil law an offer may be revoked until it reaches the offeree, while in Common law an offer cannot be revoked after being accepted by the offeree.[30]

In Common law, a contract is binding when it is supported by consideration. The consideration doctrine essentially means that a contract must be approved by something of value, such as a party's promise to provide goods or services, or a promise to pay for goods or services.[31] Consideration is used therefore, to validate the promise and make it enforceable.

In Civil law Countries, however, the fundamental element without which a contract cannot exist is the cause[32]. It provides for the commitment of a party who enters the contract to fulfill contractual obligations[33]. Even if both may be considered the reason that confirm the assumed obligation, cause differs from consideration because a party commit does not necessarily have to be to get something in return, they have indeed different purposes.

Also in the form there are divergences. Since, according to Common law Countries, the principle applies is the freedom of contract, the form of the contract can be free. For Civil law systems, indeed, the contract follows limits imposed by each legal system.

The principle related to the breach of contract[34] are similar in the two families, even though there are some important differences. Generally, a breach of the contract requires the compensation of the damages it causes. Compensation is typical of Civil law Countries and is absent in Common law Countries, in which fault is not a requirement of violation. However, it is different for Civil law Countries in which the existence of guilt is a prerequisite for compensation for damage.[35]

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In the hypothesis provided for in the previous paragraph, the death or incapacity of the proposer does not invalidate the proposal, unless the nature of the deal or other circumstances exclude such effectiveness.

[30] C. PEJOVIC, *Civil Law and Common Law: two different paths leading to the same goal*, VUWLawRw42, 2001

[31] *V. supra*

[32] E.g. French Civil Code artt.1131-1132

[33] It denotes the purpose which the parties have in mind when they enter into the contract

[34] Any failure to perform one's obligations according to the terms of a contract

[35] Section 276 of the German Civil Code, section 285 of the German Civil Code, art.1147 of the French Civil Code

Nevertheless, this principle is subject to some extensive omissions which provide for rigid liability regardless of fault.[36] In Common law there is the duty to mitigate that does not allow the recovery of damages that could have been avoided with reasonable effort and without undue risk.[37]

If the execution of the delay is delayed, in Civil law systems, the general principle provides that the creditor puts the debtor in default by means of a notice, which very often specifies a reasonable time within which the debtor is required to execute its performance.[38] If the debtor fails to perform within the prescribed period, the creditor can prove the debtor's fault and consequently claim damages. In Common law systems, on the other hand, compliance is usually due without notice.

Despite all these differences between the two legal families, they tried to find a convergence in the field of international contracts by developing similar solutions and notions.

## 1.3 TYPE OF INTERNATIONAL CONTRACTS

A vast number of international contracts have been developed in both Common law and Civil law. The most widespread contract figures in international trade are[39]: international sales of goods contract, distribution contract and international agency contract.

Below they will be analyzed one by one.

[36] Sale of Goods Act 1979 section 29

[37] J.HERMIDA, *Convergence of Civil Law and Common Law contracts in the space field,* 2009, website http://www.julianhermida.com/

[38] Look e.g. Art.284 of the German Civil Code

[39] The contractual models derive from the comparison of single contracts and consequently create a particular case Despite this, it is always advisable to rely on a lawyer so that the needs of the case comply with the contractual clauses.

### 1.3.1 INTERNATIONAL SALES (of goods) CONTRACT

The international sales contract is one of the most widely used contract in international trade. It is a contract that has the general function of transferring a right of ownership of a good or a different right from one subject to another towards the consideration of a price.
In order to negotiate consciously in the context of an international sales contract, the operators must know all the essential elements of the contract and the applicable rules such as obligations of the seller and the buyer, Incoterms rules, general conditions of sale and payment conditions.

The classical model of international sales contract is composed of two parties:
part A, a "flexible" part containing a special clause, those defined as "variable", to be negotiated with the counterparty. This part of the contract must be filled every time a deal is concluded.
Part B, a "rigid" part of the general conditions containing some "structural clauses, most in line with international practice and which should not be negotiated or modified by the parties or insert contradictory solutions", meaning that any changes to this part of the contract should be valuated together with an expert.[40]
These two parts together constitute the full contract.
The model concerns international sales relating to products intended for resale, meaning B2B contracts. Therefore, it does not include sales to consumers, as different rules would apply. This model is about single sales and not more structured agreements. For this reason, the price revision clauses or other aspects are not considered.
Despite this, the contract can also be used in other irrelevant situations, however it will always be necessary to check the compatibility of various clauses with the concrete needs of the contractors.

Regarding the applicable law, the model refers to the Vienna Convention of 11 April 1980, CISG. This contractual solution, in other words, is a way to avoid the parties trying to impose their own national law, making the conclusion of the contract difficult if not impossible. Nevertheless, other options are also accepted, such as the choice of the

[40] Curia Mercatorum, *Modelli di contratto per l'estero*, Volume 19, 2019

national law of one of the two parties or of a neutral third state. [41] This will be study deeper in the next chapter.

The parties can introduce in the contract some particular clauses. In part A they can define a series of aspects that vary from contract to contract such as the products, the price, the delivery date.

Point A-6, for example underline that despite the widespread practice of using the Ex-Works clause in domestic contracts in Italy, the same clause is not suitable for international sales contracts and can give rise to operational problems.[42]

Singular clauses of surrender are the Incoterms (International Commercial Terms). They specify the respective obligations of the seller and the buyer in an international contract for the sale of movable things.[43] They are clauses consisting of only 3 letters and each has its own universal meaning for the sale of goods for buyers and sellers around the world. To deepen this topic, we refer to the official publication of the International Chamber of Commerce.[44]

The parties must identify with the absolute care the mechanism for resolving their possible disputes which are international commercial disputes. As underline previously, from the latter point of view, recourse to arbitration certainly appears preferable to the choice of ordinary jurisdiction.

Nevertheless, in some cases it may be more effective to select a forum and then designate a national judge as competent authority.

It is important to keep in mind this type of international contract as it would be the subject of the third chapter when the focus of the thesis will be more about the international sale and the force majeure clause.

[41] Curia Mercatorum, *Modelli di contratto per l'estero*, Volume 19, 2019

[42] F. MARRELLA - P. MAROTTA, *Codice doganale dell'Unione europea commentato*, Milano, Giuffré, 2019

[43] The first edition of the Incoterms dates back to 1936 and specified the meaning of 11 abbreviations, in 1953 the second edition of the Incoterms was adopted, which were then periodically updated every almost ten years, reaching the 2010 edition and now 2020

[44] Incoterms 2020 is available on ICC's new e-commerce platform ICC Knowledge 2 Go in both print and digital formats. The 2020 edition is available in no fewer than 29 languages.

### 1.3.2 DISTRIBUTION CONTRACT

Another interesting alternative for the exporter is that of resorting to the sales dealer or distributor, in charge of handling distribution of the exporter's products as a buyer-reseller.

The distribution contract, or sale concession, is the contract by which one party accepts the obligation to promote the resale of the other party's products by entering individual purchase contracts[45].

Italian jurisprudence tends to qualify the distribution contract as a "framework" contract where the grantor and the concessionaire conclude a series of sales contracts. On the other hand, the general jurisprudence qualifies it as a mixed contract as it consists of a sales contract and a mandatary contract.

In most states, excluding Belgium, this contract is not governed by legislation but has been developed by practice and governed by jurisprudence. Consequently, it has been concluded that it cannot be included in the category of international sales contracts governed by the Vienna Convention of 1980.[46] Therefore, lacking a normative of the international distribution contract, the contractual clauses arranged by the parties assume particular importance.

The distribution contract, in fact, targets to coordinate the circulation of products and not the transfer of ownership. It does not determine, as an immediate effect, the exchange of an asset for a pecuniary consideration, but it is aimed at managing the conclusion of future acts of exchange between the parties.

In this type of contract, the parties are distinct and have a fundamental role to play. The role of intermediaries is limited to promoting the contracts that must be concluded between the proposer and the end customer. The distributor, instead, buys the goods himself and then resells them to customers acting in his own name and on his own account with greater economic independence, thus bearing the risks relating to the resold goods. However, this does not exclude that he can equally carry out both the resale activity and

[45] Curia Mercatorum, *Modelli di contratto per l'estero*, Volume 19, 2019

[46] According to a first jurisprudential orientation, it can be assimilated to the administration contract; on the other hand, according to another orientation, it would present characteristics of the sale and the mandate; finally, according to a further orientation, it would qualify as a framework contract.

that of mere intermediation which sometimes turns out to be more effective and convenient because for example he will be remunerated with a percentage of the value of the deal. However, to avoid some problems, it is preferable that in such cases an ad hoc contract is stipulated for the activities that the distributor carries out as an agent or business finder.[47]

Relationships between distributor and supplier can sometimes be problematic. There may be cases where the products sold to the distributor are defective, therefore the question of the guarantee arises. In principle, this issue will not be directly governed by the distribution agreement, since it is a matter relating to the sales agreements entered into by the parties in the context of the distribution agreement.

The extension of the supplier's liability is therefore specified, by excluding any liability for damage and limiting the warranty to the replacement or repair of the products. If Italian law is applied, however, the exemption from liability for damages clause cannot include cases of willful misconduct or gross negligence, under penalty of nullity sanctioned by art. 1229 of the Italian Civil Code.[48]

To this is added, however, a new problem, which arises from the transposition of the European Directive 1999/44 / EC on the guarantees of consumer goods (subsequently amended by Directive 2011/83 / EU) which certifies that the consumer can have a two-year warranty from the date of delivery of the product. However, this right of recourse does not apply to the sale between supplier and distributor. The discipline therefore provides that the consumer can assert the defect within two years from the delivery of the consumer, while the latter can assert the right within one year from the date on which he remedied the defect.[49]

It is preferable, therefore, that the parties expressly agree on a discipline of the matter in the distribution contract.

A particularly important aspect of the sales concession agreement is that relating to payments. When the party pays for the goods after the delivery, the producer applies the financial risk of sales on a single person in a certain country. This risk increases when the

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[47] Curia Mercatorum, *Modelli di contratto per l'estero*, Volume 19, 2019

[48] Art.1229 of the Italian Civil Code. Disclaimer of liability clauses
Any agreement that excludes or limits the liability of the debtor for willful misconduct or gross negligence is void.
It is also void any preventive agreement of exemption or limitation of liability for cases in which the fact of the debtor or his auxiliaries constitutes a violation of obligations deriving from rules of public order.

[49] Art.5 Directive 1999/44/CE

turnover increases, especially because it may happen that the party suspends the payment of the goods. To overcome this problem, it is essential to agree on a bank guarantee in favor of the producer defined as a standard letter of credit to cover the credit or cover the risk of non-payment through insurance.

To avoid that a party imposes its monopoly on the market, in distribution contracts it is good to pay attention to the limits set by the antitrust legislation of the European Union[50].

The international distribution agreement includes numerous clauses.

An essential clause is the bilateral exclusivity clause which provides on one hand the obligation of the supplier to sell its products to a single distributor in order to resell them in a specific territory, on the other hand the obligation of the latter to sell them only in the assigned territory. Furthermore, similar clauses can also be unilateral, that is, placed to the advantage of only one of the parties. When it is in favor of the supplier, the distributor cannot sell competing products in the same area, while otherwise the supplier undertakes not to transfer the resale of competing products to third parties for the same area.

Another clause is the one that determines the non-compete obligation, with the aim of strengthening the trust and cooperation between the parties by mutually prohibiting competing sales in the exclusive contractual territory.

All concession contracts that may fall under European antitrust legislation should have a maximum duration of five years. Otherwise, there would be a risk that once the five years have elapsed, the contract will continue, and the party won't respect the non-compete obligation. For this reason, upon expiry, it is necessary to stipulate a new contract which may also contain a non-competition clause not exceeding five years[51].

Looking at the Italian case, this agreement must be drawn up based on the provision of art. 2596[52] of the Civil Code. If there is a violation, the distributor may incur a competitive offense in accordance with the provisions of art. 2598[53] of the Italian Civil Code.

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[50] M. BIANCHI, *International distribution contracts*, Milan, Giuffré, 2019

[51] As a tacit renewal clause is not admissible, parties must inter into a new contract if they decide to continue the relationship.

[52] Art.2596 cc: The agreement that limits competition must be proven in writing. It is valid if limited to a specific area or activity, and cannot exceed a duration of five years. If the duration of the agreement is not determined or is established for a period exceeding five years, the agreement is valid for a period of five years.

[53] Art.2598 cc: Without prejudice to the provisions concerning the protection of distinctive signs and patent rights, anyone who:
1) uses names or distinctive signs capable of producing confusion with the names or distinctive signs legitimately used by others, or slavishly imitates the products of a competitor, or performs by any other means suitable acts to create confusion with the products and business of a competitor;

In the event that a contract is concluded without the clause mentioned so far, the distributor can freely sell the products still in his possession, as long as the activity is carried out in good faith.
Another clause concerns the duration of the contract. The concessionaire will ask for a defined temporal horizon with an average duration of two to five years to better amortize the investment and be able to benefit from the results achieved in the work. In most cases this fixed-term contract is automatically renewed, unless terminated by a party.
There is also the opportunity of stipulating a permanent contract leaving the parties the possibility to withdraw it according to the procedures defined by them. There is a probability that due to a substantial breach of contract, one party decides to terminate the contract before it expires. The clause in question is the express termination clause.[54]

As regards the applicable law to the contract, reference must be made to the provisions contained in the Regulation Rome I. The parties have full autonomy in choosing the law to which to submit the negotiation relationship, therefore, to define the *lex contractus* in an express or tacit manner in accordance with what is defined in Art. 3 of the Regulation. In the absence of this choice, the distribution contract is governed by the law of the country in which the distributor has his habitual residence, as required by art. 4, par. 1.[55]
However, it is possible to apply the law of a third country if it appears that the contract has very close links with another country. Next chapter will deepen the subject.
There are rules defined as "internationally binding" in the context of a specific legal system. In particular, as regards the sales concession contract, the provisions on indemnity of the Belgian law of 1961 are internationally binding even outside the European Union there may be internationally mandatory rules to protect the distributor.[56]

2) disseminates news and appreciations on the products and activities of a competitor, capable of causing discredit, or appropriates the merits of a competitor's products or company;
3) directly or indirectly makes use of any other means that do not comply with the principles of professional correctness and are capable of damaging the company of others.
[54] J.RANDAL, *Express Termination Clauses in contracts*, Volume 73 , Issue 1, Cambridge University Press, March 2014 , pp. 113 – 141
[55] REGULATION (EC) No 593/2008 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 17 June 2008 on the law applicable to contractual obligations (Rome I)
[56] F. BORTOLOTTI, *Contratti di distribuzione*, Ipsoa, 2013; Curia Mercatorum, *Modelli di contratto per l'estero*, Volume 19, 2019

It follows that the judge of the Country of the distributor must apply the internationally binding rules of his Country instead of those of the law chosen by the parties. [57]

Even the resolution of any disputes that may arise from the distribution contract can be devolved to the knowledge of an arbitral tribunal, as an alternative to the ordinary judicial authority, to reach a resolution of the dispute in a short time. All this must be specified in an arbitration clause. However, when the concession relationship provides for an amount of modest economic value or is considered non-arbitral matter by the law of the country of the party therefore reserved exclusively for ordinary jurisdiction, arbitration is not advisable. An example country is Belgium.[58]

It is advisable to include an exemption clause of the forum, which reserves jurisdiction to the ordinary courts of the grantor's seat in accordance with the provisions of Art. 25 of the Regulation. In the absence of choice of court, the general rule that identifies the jurisdiction based on the defendant's place of domicile will apply.

Since this is a contractual matter, however, peculiar become the rules defined in art. 7, no. 1 of Regulation (EU) no. 1215/2012, according to which a person domiciled in a Member State can be sued in another Member State before the court of the place of execution of the obligation brought in court.[59]

On the other hand, as regards contracts with dealers based in non-EU countries, the opportunity to choose the court is less evident, as the jurisdiction clause risks being ineffective for the courts of the distributor's country.

The cited clauses do not exhaust the matter in question as it is variable case by case. This means that in drafting a distribution contract, as the other international contracts, it is necessary to proceed through a careful legal and commercial analysis.

[57] F. BORTOLOTTI, *Manual of international commercial law*, vol. III, International distribution. Contracts with agents, distributors and other intermediaries, Padua, 2002

[58] F. PETILLION – J. JANSSEN – D. NOESEN, *Arbitration procedures and practice in Belgium: overview*, Petillion, Belgium, Law stated as at 01 Mar 2021

[59] Curia Mercatorum, *Modelli di contratto per l'estero*, Volume 19, 2019

### 1.3.3 INTERNATIONAL AGENCY CONTRACT

Another very common contract in international trade is that of an agency in which a commercial agent promotes the sale of goods in foreign markets.
Almost every company engaged in international trade has some agents abroad who must draft this type of contract.
The contract implies the presence of a professional person, who is usually identified as an entrepreneur, on site that establish a continuous and long-term relationship of trust that, at the same time, allows him to maintain control of the customers. As a result, a lasting relationship is born without the creation of a real sales network. The aim of both parties is to increase the sales volume. In fact, the relationship is exponential since the more the proposer sells, the more the agent earns.
Depending on the legal system of each Country, the contract presents different definitions, however in each of them the contract provides for the presence of a first person called a commercial agent and a second who is the entrepreneur or principal. The former operates as an intermediary by promoting the goods and services of the latter to a client. All this does so independently and continuously in exchange for a commission. Autonomous since it is free to organize itself and does not have to be subject to constraints as an employee, continuous as it continuously promotes its sales to a stable clientele and in the pre-established territory.[60]
The agent carries out various activities: from the simple transmission of the customer's order to the representation of the principal and the subsequent stipulation of contracts in his name.
As a result of his activities, the agent is paid in the form of a commission defined as a percentage of the price of the good or service sold, or in a fixed form for each contract concluded, or by combining both solutions. If, however, the principal refuses the deal, the agent has the right to claim a title for compensation for the commission.[61]

[60] Curia Mercatorum, *Modelli di contratto per l'estero*, Volume 19, 2019
[61] Principles of European Contract Law - PECL

As in previous contracts, there is the issue of the applicable law. Since the agency is identified as a *para subordination* relationship[62], the legislators wanted to protect the figure by limiting the parties' freedom of negotiation on certain issues.

To have a reference regulatory framework that dictates a series of uniform principles, the European States on 18 December 1986 adopted the European Council Directive no. 86/653 / EEC ("Agent Directive").[63] Within the Union, therefore, the law of the individual member Country that has transposed the directive is applied in practice.

Furthermore, if a conflict arises, the judge and the arbitrator called to settle the dispute may be different from the law applied to the contract.

Italy provides for this solution both in the law of private international law, law no. 218/1995, and in the Rome I Regulation.[64]

The considerations already presented for the other previous contracts regarding the derogation of jurisdiction and choice of arbitration apply[65].

Sometimes arbitration is preferable to the choice of ordinary jurisdiction, although it can often be ineffective since the matter is the exclusive competence of the labor courts. In fact, for agents-natural persons, unlike those constituted in the form of a company, the exclusive jurisdiction of the court of the principal's office is preferable, rather than arbitration.

In any case, the parties may be able to mediate and reach an amicable solution to the dispute as soon as possible within the term of 45 days, after which they are free to proceed as contractually agreed.

Also, in this contract there can be introduced different clauses, the most common are exclusivity, commitment not to compete, obligation to inform, agent’s commission and compensation for termination.

When negotiating an international agency contract, is important to take into consideration all the available options about the preferable law to be apply for the interests of the

[62] Precisely because it has characteristics in part similar to the relationship of dependence but not completely. Hence, therefore, the particular protections that in many countries the legislator reserves to the figure of the agent.

[63] Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents

[64] Curia Mercatorum, *Modelli di contratto per l’estero*, Volume 19, 2019

[65] In Italy this institution is allowed by the rules of international procedural law (referred to in law no. 218/1995) and by the application of Regulation no. 1215/2012 (so-called Brussels I bis Regulation).

Principal or the Agent, the best jurisdiction for dispute resolution and so on, because of the difference among national regulations.

These just examined are the most common and simple contracts in international trade, however, depending on the case there may be more complex transactions that lead to the creation of contracts such as the most common license, joint venture and turnkey contracts.

# CHAPTER 2

# IDENTIFICATION OF THE APPLICABLE LAW TO INTERNATIONAL CONTRACTS

ABSTRACT: 1. Party autonomy. – 2. Law of the parties. – 3. Law of a third party. – 4. Depeçage. – 5. Negative choice of lex contractus. – 6. Implicit choice of lex contractus. – 7. Reg. Roma I. – 8. Lex mercatoria

A delicate topic that occupies a central place in the matter of international contracts concerning international sales, is that of determining the applicable law.

It should be noted immediately that, except in exceptional cases such as uniform laws or the *lex mercatoria*, there are no specific international standards applicable in international contracts stipulated between different Countries.

National regulations, therefore, represent the reference point for these issues. The possibilities of choosing the law may be different, but significant attention must be place since it can affect the contents of the contract, both those not regulated and those governed to which mandatory rules are applied.

Therefore, the parties can apply the law of one of them, of a third country outside the relationship or in the absence of a choice by the parties, the determination of the applicable law will be carried out based on the rules of private international law of the individual countries concerned.

## 2.1 PARTY AUTONOMY

"*The concept that the parties to an international contract have the freedom to choose the applicable law to their contract and the forum to which they wish to bring a dispute".*[66]

[66] J.LAW, A Dictionary of Law (9 ed.), Oxford University Press, 2018

### 2.1.1 LAW OF THE PARTIES

Where the parties enter a commercial contract, they shall have the option of freely choosing the applicable law.
This freedom of choice, present in both Common Law and Civil Law Countries, is the expression of the principle of party autonomy. This principle will remain the central assumption in European private international law in interest of contractual obligations.[67] However, the will of the parties is not entirely autonomous[68] since its legal effectiveness must be built on the modalities and limits imposed by the State law from the point of view of the court. [69]
English law recognizes this principle according to the Contracts (Applicable Law Act) of 1990 c.36 which also accepts a law that has no connection with the Country. This was applied in the case Vitafood Products v. Unus Shipping Co. (1939) according to which "*the expressed intention constitutes manifestation of good faith and there are no reasons based on cause of public order that prevent such choice.*" [70]
In the United States, the principle of autonomy of the parties is present both in the Restatement Second of Conflict of Laws and in the Uniform Commercial Code (U.C.C.). In particular, Section 187[71] of the First Act states that "*the law of the State chosen by the parties to govern their contractual rights and duties will be applied* […]".[72]
As far as the European Union is concerned, the matter was regulated first by the Rome Convention (1980) on the applicable law to contractual obligations, which dictates uniform rules at European level on conflicts of law in matters of contracts, in order to prevent the phenomenon of "shopping forum".[73] Nowadays, the reference is the Reg Rome I, that will be explain later.
Art. 3 of the Rome Convention expresses the free will of the parties in the choice of the state legal system that regulates contractual obligations. It is also emphasized that the

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[67] F. FERRARI – S. LEIBLE, *Rome I Regulation: the Law Applicable to the Contractual Obligations in Europe*, by sellier European law publishers GmbH, Munich, 2009
[68] According to the state-centered-positivist view
[69] F. GALGANO - F. MARRELLA, *Diritto del commercio internazionale*, terza edizione, CEDAM, 2011
[70] D. DESIDERIO, *Autonomia delle parti: Il problema della legge applicabile al contratto internazionale,* 2005, website www.altalex.com
[71] Rest 2d confl s 187. Law of the state chosen by the parties
[72] See also UCC §1-301
[73] D. DESIDERIO, *Autonomia delle parti: Il problema della legge applicabile al contratto internazionale,* 2005, website www.altalex.com

parties can break down the contract into several sections and subject them to several national laws, giving rise to the technique called "*depeçage*" or "*morcellement*". [74]

*Article 3 Freedom of choice*

*1. A contract shall be governed by the law chosen by the parties. The choice must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or a part only of the contract.*

*2. The parties may at any time agree to subject the contract to a law other than that which previously governed it, whether as a result of an earlier choice under this Article or of other provisions of this Convention. Any variation by the parties of the law to be applied made after the conclusion of the contract shall not prejudice its formal validity under Article 9 or adversely affect the rights of third parties.*

*3. The fact that the parties have chosen a foreign law, whether or not accompanied by the choice of a foreign tribunal, shall not, where all the other elements relevant to the situation at the time of the choice are connected with one country only, prejudice the application of rules of the law at the country which cannot be derogated from by contract, hereinafter called 'mandatory rules`.*

*4. The existence and validity of the consent of the parties as to the choice of the applicable law shall be determined in accordance with the provisions of Articles 8, 9 and 11.*

The freedom of choice of the parties is released from the possible presence of objective elements of connection with a determined or determinable state system.[75]

However, if the parties do not choose the applicable law, Art. 4 of the Convention establishes, as a subsidiary criterion, the application of the law of the Country with which the contract has the "closest connection". This connection must be built with the party who has his habitual residence or administration at the time of the conclusion of the contract.[76]

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[74] See paragraph one of Article 3 of the Rome Convention

[75] F. GALGANO - F. MARRELLA, *Diritto del commercio internazionale*, terza edizione, CEDAM, 2011

[76] See paragraph two of Article 4 of the Rome Convention

*Article 4 Applicable law in the absence of choice*

*1. To the extent that the law applicable to the contract has not been chosen in accordance with Article 3, the contract shall be governed by the law of the country with which it is most closely connected. Nevertheless, a separable part of the contract which has a closer connection with another country may by way of exception be governed by the law of that other country.*

*2. Subject to the provisions of paragraph 5 of this Article, it shall be presumed that the contract is most closely connected with the country where the party who is to effect the performance which is characteristic of the contract has, at the time of conclusion of the contract, his habitual residence, or, in the case of a body corporate or unincorporate, its central administration. However, if the contract is entered into in the course of that party's trade or profession, that country shall be the country in which the principal place of business is situated or, where under the terms of the contract the performance is to be effected through a place of business other than the principal place of business, the country in which that other place of business is situated.*

*3. Notwithstanding the provisions of paragraph 2 of this Article, to the extent that the subject matter of the contract is a right in immovable property or a right to use immovable property it shall be presumed that the contract is most closely connected with the country where the immovable property is situated.*

*4. A contract for the carriage of goods shall not be subject to the presumption in paragraph 2. In such a contract if the country in which, at the time the contract is concluded, the carrier has his principal place of business is also the country in which the place of loading or the place of discharge or the principal place of business of the consignor is situated, it shall be presumed that the contract is most closely connected with that country. In applying this paragraph single voyage charter-parties and other contracts the main purpose of which is the carriage of goods shall be treated as contracts for the carriage of goods.*

*5. Paragraph 2 shall not apply if the characteristic performance cannot be determined, and the presumptions in paragraphs 2, 3 and 4 shall be disregarded if it appears from the circumstances as a whole that the contract is more closely connected with another country.*

Until the Rome Convention 1980 on the law applicable to contractual obligations, which led to homogeneity within the EU, came into force, the national rules on the subject were very different from each other.[77]

The Convention was subsequently replaced by the Community Regulation 593/2008 (Rome I Regulation), adopted after a long debate by the European Parliament on June 17, 2008 and applicable to contracts concluded after December 17, 2009.[78]

The centrality of the principle of autonomy of the parties is set out in recital n. 11 of the Reg. Rome I: "*The parties' freedom to choose the applicable law should be one of the cornerstones of the system of conflict-of-law rules in matters of contractual obligations*". Furthermore, the Regulation makes some changes to some articles of the Convention such as, for example, art. 4, previously explained. In fact, unlike Art. 4 of the Convention, the same article of the Regulation specifically identifies the applicable law for different types of contracts. As regards the contracts previously studied, for the sales contract for example, it is the law of the seller's country of residence. In any case, the closest connection is presumed to exist with the country in which the party who has to provide the characteristic service is located. [79]

*Applicable law in the absence of choice*

*1. To the extent that the law applicable to the contract has not been chosen in accordance with Article 3 and without prejudice to Articles 5 to 8, the law governing the contract shall be determined as follows:*

*(a) a contract for the sale of goods shall be governed by the law of the country where the seller has his habitual residence;*

*(b) a contract for the provision of services shall be governed by the law of the country where the service provider has his habitual residence;*

[77] For example, for Italy, art. 25 of the preliminary provisions to the civil code referred to the law of the place where the contract was concluded.

[78] N. BOSCHIERO, *La nuova disciplina comunitaria della legge applicabile ai contratti (Roma I),* Giappichelli, Torino, 2009, con scritti di P. LAGARDE, F. MARRELLA, N. BOSCHIERO, U. VILLANI, A. BONOMI, J. FAWCETT, P. BERTOLI, P. PIRODDI, F. SEATZU, G. CONTALDI, A. BONFANTI, F. VILLATA, Z. CRESPI REGHIZZI, T. TREVES.

[79] See paragraph two of Article 4 of the Rome Regulation

*(c)a contract relating to a right in rem in immovable property or to a tenancy of immovable property shall be governed by the law of the country where the property is situated;*

*(d)notwithstanding point (c), a tenancy of immovable property concluded for temporary private use for a period of no more than six consecutive months shall be governed by the law of the country where the landlord has his habitual residence, provided that the tenant is a natural person and has his habitual residence in the same country;*

*(e)a franchise contract shall be governed by the law of the country where the franchisee has his habitual residence;*

*(f)a distribution contract shall be governed by the law of the country where the distributor has his habitual residence;*

*(g)a contract for the sale of goods by auction shall be governed by the law of the country where the auction takes place, if such a place can be determined;*

*(h)a contract concluded within a multilateral system which brings together or facilitates the bringing together of multiple third-party buying and selling interests in financial instruments, as defined by Article 4(1), point (17) of Directive 2004/39/EC, in accordance with non-discretionary rules and governed by a single law, shall be governed by that law.*

*2. Where the contract is not covered by paragraph 1 or where the elements of the contract would be covered by more than one of points (a) to (h) of paragraph 1, the contract shall be governed by the law of the country where the party required to effect the characteristic performance of the contract has his habitual residence.*

*3. Where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply.*

*4. Where the law applicable cannot be determined pursuant to paragraphs 1 or 2, the contract shall be governed by the law of the country with which it is most closely connected.*

In summary, the autonomy of the parties gives them the right to freely designate the applicable law to obligations arising from an international contract, the right to designate

the competent judge to settle any disputes arising from the contract itself and finally to resort to international commercial arbitration[80]. Consequently, the needs of international trade have created the conditions for the parties to include choice of law clauses in international contracts.

The choice can be handled either by an explicit or tacit agreement. In the first case a typical expression can be "*This Agreement shall be governed, construed, interpreted and enforced in accordance with the [substantive] laws of [France]*." [81] About the second case, it will be examined more deeply later.

Without prejudice to the importance of the Rome I Regulation in terms of contractual obligations, also in the Community Regulation 864/2007 concerning the applicable law to non-contractual obligations ("Rome II"), which entered into force on 11 January 2009 in all member states except Denmark, reference is made to the principle of party autonomy.[82]

### 2.1.2 LAW OF A THIRD PARTY

The Regulation also allows negotiators of international contracts to designate as *lex contractus* the legal system of a Third State. We can speak about information asymmetry in relation to the lex contractus[83] that puts both parties on an equal footing.
Sometimes, however, an unknown legislation is more difficult to manage, for this reason parties tend to opt for a system whose legal text and interpretation of doctrine and jurisprudence are known. Swiss law is usually the one that is applied most often.

[80] F. GALGANO - F. MARRELLA, *Diritto del commercio internazionale*, terza edizione, CEDAM, 2011
[81] R. CAVALIERI – V. SALVATORE, *An introduction to international contract law*, Giappichelli, Milano, 2018
[82] In principle, based on the criteria set out in the Regulation, the applicable law will be: a) that of the country where the damage occurs; or, b) that of the country in which both the presumed responsible and the injured party usually reside at the time the damage occurs; or c) that of the country with which the offense has manifestly closer links than the countries referred to above.
[83] F. GALGANO - F. MARRELLA, *Diritto del commercio internazionale*, terza edizione, CEDAM, 2011

*Article 2*

*Any law specified by this Regulation shall be applied whether or not it is the law of a Member State.*

Reg. Roma I, therefore, gives full contractual autonomy both by choosing the law of a contracting country and that of a third Country without setting limits on the matter.

### 2.1.3 IL DEPEÇAGE

Despite this, in the context of negotiations, it may happen that the parties are unable to agree on a single *lex contractus* and consequently decide to designate even more than two, raising the problem of *depeçage*.

The Rome Reg. I allows, as defined in Art. 3[84], to regulate only some aspects of the contract to a specific law and to subject individual aspects or certain clauses to totally different systems. Always refer to Art. 2 stating that these laws may belong to non-member States regardless of any objective link with the contract. However, this splitting of the contract must not give rise to contradictory results and place one order against the other, compromising the validity of the contract. [85] Therefore, the parties must pay particular attention to this aspect and alternatively evaluate the application of Art. 4[86] of the Rome I Reg.

[84] Reg Roma I art.3,1: A contract shall be governed by the law chosen by the parties. The choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or to part only of the contract.
[85] See Prof. Lagarde: *Le "dépeçage" dans le droit international privé des contrats*, 1975, Rivista di diritto internazionale privato e processuale, no 4, 1975.
[86] Reg. Roma I: Article 4 Applicable law in the absence of choice, see pg 28

### 2.1.4 NEGATIVE CHOICE OF LEX CONTRACTUS

Sometimes we can also speak of *exclusion iuris* and no longer of *electio iuris* when the parties make explicit in their contract the will not to apply certain state regulations.

In the stipulation of the contract, parties are not always able to agree on the law to be applied, hence the effect of the *dépeçage*. Despite this, parties often fail even to reach a shared agreement on the adoption of several legal systems. For this reason, there are numerous cases in which, to conclude the contract, parties insert choice of law clauses in negative terms and therefore excluding the application of certain legal systems. It can be defined as a "gray choice between the case of the explicit and implicit positive choice of the *lex contractus* and the absence of choice of applicable law".[87]
However, for the purposes of Reg. Rome I, before recognizing the negative choice, the interpreter must carry out a careful analysis of the case as it is sometimes possible that the parties have concluded the contract through an implicit positive choice.[88]
A problem that is not easy to solve may arise if the judge has the competence to designate the *lex contractus*. Indeed, it must pay particular attention not to opt for a law that was previously excluded by the parties. Art. 4 of the Reg Rome I acts as a reference point with its subsidiary role and dictates how the judge will have to move even if the designated legal system coincides with that's excluded by parts[89].

*"Where the law applicable cannot be determined pursuant to paragraphs 1 or 2, the contract shall be governed by the law of the country with which it is most closely connected."*

The Reg. Rome I can therefore be read both positively and negatively concerning the principle of autonomy of the will of the parties, however focusing on the articles previously explained, jurisprudence tends to favor the positive choice.

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[87] F. GALGANO - F. MARRELLA, *Diritto del commercio internazionale*, terza edizione, CEDAM, 2011
[88] "*Nemo contra factum proprium venire potest"* is the principle by which the contrast between the negative expressed choice and the positive implicit choice can be resolved
[89] Reference to paragraphs 2,3,4 art.4 Reg. Roma I

### 2.1.5 IMPLICIT CHOICE OF LEX CONTRACTUS

In practice, the choice of law must be clearly expressed, however the Reg. Rome I also admits the possibility of an implicit choice of the *lex contractus*.[90]

Art. 3, par. 1,[91] of the Regulation indicates that the constitutive wills of an *electio iuris* do not necessarily have to be carried by verbal expressions, or by the graphic signs with which these expressions are depicted and documented, since the content of the will of the parties can be determined by an inference. Therefore, through a logical procedure, considering factual data and examining all the circumstances, the interpreter reaches a positive conclusion regarding the implicit common will of the contracting parties concerning the applicable law to the contract[92].

The illustrative report of the 1980 Rome Convention drawn up by Mario Giuliano and Paul Lagarde is relevant in this matter. It is stated that this tacit choice must be understood as a real choice, and it is good to verify that the contractors have fairly agreed on the law delegated to regulate the contract[93].

To confirm his thesis, the interpreter must collect concrete and real clues that clearly justify the choice made by the parties as to the law governing the relationship.

The relevant clues can be drawn primarily from the provisions of the contract, symptomatic of a choice of law. The contract may have been drawn up reflecting precise "national" characteristics and therefore peculiarities of a given legal system. Other times, however, the parties may have only partially or unclearly expressed the *electio iuris* to give the interpreter the starting point.[94]

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[90] Look also to the Aja Convention on 15 June 1955 and Rome Convention 1980

[91] Art.3,1 Reg. Roma I: "A contract shall be governed by the law chosen by the parties. The choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or to part only of the contract"

[92] P. FRANZINA, *The tacit choice of law applicable to a contract under the Rome I Regulation*, Università di Ferrara 2016, http://dx.doi.org/10.20318/cdt.2016.3257

[93] Consiglio dell'Unione Europea, *Relazione sulla convenzione relativa alla legge applicabile alle obbligazioni contrattuali del prof. Mario Giuliano, docente all'Università di Milano, e del prof. Paul Lagarde, docente all'Università di Parigi I*, Gazzetta ufficiale n. C 282 del 31/10/1980 pag. 0001 – 0050, 1980

[94] P. FRANZINA, The tacit choice of law applicable to a contract under the Rome I Regulation, Università di Ferrara 2016, http://dx.doi.org/10.20318/cdt.2016.3257; Consiglio dell'Unione Europea, Relazione sulla convenzione relativa alla legge applicabile alle obbligazioni contrattuali del prof. Mario Giuliano, docente all'Università di Milano, e del prof. Paul Lagarde, docente all'Università di Parigi I, Gazzetta ufficiale n. C 282 del 31/10/1980 pag. 0001 – 0050, 1980

Secondly, the interpreter can also use the circumstances of the case to prove the *electio iuris* tacitly accomplished. [95] The relevant case is the one that describes the behavior of the parties before the conclusion of the contract, on the conclusion of the contract or in the fulfillment of the obligations deriving from it. [96]

The parties, therefore, through a regulatory contract, can establish the content of the contracts they will negotiate in the future[97]. In fact, it will be possible to insert the clause already agreed previously in the relevant contract, such as that of the *electio iuris*, suggesting that both relations are subject to the same law[98].

In general, the interpreter's work is facilitated when the available clues directly concern the will of the parties, while the procedure becomes much more complex when the clues refer to other aspects not related to the identification of the applicable law.

Therefore, the interpreter must carry out a particularly thorough and careful analysis, avoiding simplifications that are also difficult to justify. [99] It must have direct contact with the concreteness of the matter and make sure, before giving a positive outcome regarding the tacit agreement on the *lex contractus*, that the clues found in the contract and the circumstances clearly lead to the outcome in question.

As defined in Reg. Rome I, the parties have the right to designate the *lex contractus*, both implicit and explicit, in three different moments: at the time of the conclusion of the contract, at a later time or to modify the positive choice expressed previously at the time of the conclusion of the contract[100].

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[95] *V. supra*

[96] "The fact that the parties, prior to the contract, have concluded another contract containing the express choice of the applicable law, may allow the judge to conclude with certainty that the second contract [which also does not have an express choice] will be governed by the same law ... in circumstances, however, that do not denote any change in the behavior of the parties " - Consiglio dell'Unione Europea, *Relazione sulla convenzione relativa alla legge applicabile alle obbligazioni contrattuali del prof. Mario Giuliano, docente all'Università di Milano, e del prof. Paul Lagarde, docente all'Università di Parigi I*, Gazzetta ufficiale n. C 282 del 31/10/1980 pag. 0001 – 0050, 1980

[97] Similar considerations could apply when there is a relationship of interdependence between different international contracts

[98] S. CORNELOUP - N. JOUBERT (dir.), *Le règlement communautaire « Rome I » et le choix de loi dans les contrats internationaux*, Revue trimestrielle de droit civil, Dalloz, 2011

[99] The Hague Principles on the Choice of Law Applicable to International Commercial Contracts, adopted by the Hague Conference on Private International Law on 19 March 2015.

[100] Ferrari, *La vendita internazionale, in Tratt. di dir. com. e dir. pub. dell'ec*. dir. da F. GALGANO, 2 ed., Padova, 2006; F. GALGANO - F. MARRELLA, *Diritto del commercio internazionale*, terza edizione, CEDAM, 2011

This is defined in Art. 3, 2 of the Reg Rome I

*Article 3*

*[…]*

*2. The parties may at any time agree to subject the contract to a law other than that which previously governed it, whether as a result of an earlier choice made under this Article or of other provisions of this Regulation. Any change in the law to be applied that is made after the conclusion of the contract shall not prejudice its formal validity under Article 11 or adversely affect the rights of third parties.*

*[…]*

## 2.2 REG. ROMA I

Until now, reference has been made several times to the Rome I Regulation, so it is good to study this Regulation more deeply.

The original name is Regulation n. 593/298, but most often it is called Rome I. It entered into force on July 24, 2008, but applies to contracts concluded from December 17, 2009 in civil and commercial matters.

*Article 28*

*Application in time*

*This Regulation shall apply to contracts concluded after 17 December 2009.*

*Article 29*

*Entry into force and application*

*This Regulation shall enter into force on the 20th day following its publication in the Official Journal of the European Union.*

*It shall apply from 17 December 2009 except for Article 26 which shall apply from 17 June 2009.*

As expressed at the end of the Regulation, it is directly binding on all Member States of the UE, including the United Kingdom, with the sole exception of Denmark, in respect of which the Rome Convention of 19 June 1980 will continue to apply until it exercises the opting in. [101]

The Reg Rome I has direct and immediate effect in the legal system of member states[102] and therefore does not provide for any act of adaptation and the primacy over domestic law is guaranteed by Community law.

Therefore, no reservations are expected and in the case of repeal or modification of it, just follow the EU law making process. [103] Consequently, in the event of a violation, the procedure for the infringement of Community law must be promoted by entrusting it to the organs of ordinary jurisdiction.

The Rome I Regulation was developed from the Rome Convention of 1980, therefore numerous provisions of the Regulation reflect those of the Convention, while others, as we have seen previously, have been modified. [104] Consequently, the interpreter in his work will have to take into consideration both tools to see in a particular way how the doctrine has operated for over ten years.

In Italian jurisprudence starting from 17 December 2009, it will be necessary to refer only to Reg. Rome I in the matter of international contracts, without prejudice to the application of the 1980 Rome Convention - both its own force and as a result of the receptive postponement made by art. 57 of Law no. 218/95 - to contracts concluded before that date. [105]

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[101] Reg.RomaI: "This Regulation shall be binding in its entirety and directly applicable in the Member States in accordance with the Treaty establishing the European Community"

[102] In fact, it is not the result of an interstate agreement, but derives from an external international source

[103] F. GALAGANO- F. MARRELLA, *Diritto del commercio internazionale*, terza edizione, CEDAM, 2011

[104] For example art.4

[105] Reference pg. 332-341 F. GALAGANO - F. MARRELLA*, Diritto del commercio internazionale*, terza edizione, CEDAM, 2011

Article 24 of the Regulation confirms all this:

*Article 24*

*Relationship with the Rome Convention*

*1. This Regulation shall replace the Rome Convention in the Member States, except as regards the territories of the Member States which fall within the territorial scope of that Convention and to which this Regulation does not apply pursuant to Article 299 of the Treaty.*

*2. In so far as this Regulation replaces the provisions of the Rome Convention, any reference to that Convention shall be understood as a reference to this Regulation.*

In addition to taking up some provisions of the Convention, the Regulation excludes the same subjects, even if with some lexical differences, adding new ones. Art. 1[106] in paragraph 2 up to letter h explains its content. As regards those introduced ex novo, see the two subsequent letters of the same article. Obligations arising from pre-contractual

[106] Art.1, 2: The following shall be excluded from the scope of this Regulation:
(a) questions involving the status or legal capacity of natural persons, without prejudice to Article 13;
(b) obligations arising out of family relationships and relationships deemed by the law applicable to such relationships to have comparable effects, including maintenance obligations;
(c) obligations arising out of matrimonial property regimes, property regimes of relationships deemed by the law applicable to such relationships to have comparable effects to marriage, and wills and succession;
(d) obligations arising under bills of exchange, cheques and promissory notes and other negotiable instruments to the extent that the obligations under such other negotiable instruments arise out of their negotiable character;
(e) arbitration agreements and agreements on the choice of court;
(f) questions governed by the law of companies and other bodies, corporate or unincorporated, such as the creation, by registration or otherwise, legal capacity, internal organisation or winding-up of companies and other bodies, corporate or unincorporated, and the personal liability of officers and members as such for the obligations of the company or body;
(g) the question whether an agent is able to bind a principal, or an organ to bind a company or other body corporate or unincorporated, in relation to a third party;
(h) the constitution of trusts and the relationship between settlors, trustees and beneficiaries;
(i) obligations arising out of dealings prior to the conclusion of a contract;
(j) insurance contracts arising out of operations carried out by organisations other than undertakings referred to in Article 2 of Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance the object of which is to provide benefits for employed or self-employed persons belonging to an undertaking or group of undertakings, or to a trade or group of trades, in the event of death or survival or of discontinuance or curtailment of activity, or of sickness related to work or accidents at work.

negotiations as they find their scope of application in the Rome II Regulation[107] and those relating to tax, customs, administrative matters and in particular insurance contracts which are specifically governed by Art. 7.

The Rome Regulations, however, are not absolute. In fact, as a matter of practice, as governed by Art. 23[108], it does not prevail over the provisions of Community law, with the sole exception of the matter of insurance contracts. The matter will in fact be governed exclusively by the Regulations and not by national regulations or contained in Community Directives.

As far as international conventions are concerned, these, if concluded between member states or third parties and "*which lay down conflict-of-law rules relating to contractual obligations*" [109], will prevail over the Regulations, with one exemption raising at the moment in which the "*conventions concern matters governed by the Regulation*".[110] Moreover, according to recital 13[111] the parties may also include an international convention in their contract, but in this case the convention is a transformation since it becomes a contractual clause and therefore loses its imperative character. An exception to the above considerations is the case in which the Interstate Convention itself provides for its application in the event of a recall in the contract by private parties.[112] Even in the case of Conventions, the case of opting out[113] and *depeçage* can occur, therefore exclusion in whole or in part of a specific agreement.

[107] Look to the Considerando n.10 of the Reg Rome I
[108] Relationship with other provisions of Community law, with the exception of Article 7, this Regulation shall not prejudice the application of provisions of Community law which, in relation to particular matters, lay down conflict-oflaw rules relating to contractual obligations
[109] See art.23 Reg Rome I
[110] See art.25 Reg Rome I
[111] Recital 13: "This regulation does not preclude parties from incorporating by reference into their contract a non-State body of law or an international convention".
[112] F. GALGANO - F. MARRELLA*, Diritto del commercio internazionale*, terza edizione, CEDAM, 2011
[113] Most famous example in art. 6 of the Vienna Convention of 11 April 1980 on the international sale of movable property

## 2.3 LEX MERCATORIA

When the parties are unable to agree on the applicable law and it is absolutely necessary to avoid the application of national laws, another option is to resort to the *lex mercatoria*, or the uses of international trade.[114]

There is a wide conception of the *lex mercatoria*[115] but it can be defined generally as a legal system constitute commercial rules and principles and general principles of law applied in commercial arbitrations in order to govern different types of transactions[116]. Therefore, it is a neutral body of law with an extra-state character, the result of the practice and decisions coming from the arbitrators.[117]
Despite this, it is not easy to apply and sometimes it is necessary to work alongside a lawyer expert in the field of international contracts since it is necessary to combine the content with an arbitration clause that entrusts the management of disputes to the arbitrators. The latter in fact carry out their work by applying the UNIDROIT principles[118], a codification of the *lex mercatoria*.
In the preamble it is possible to read:

*"They may be applied when the parties have*
*agreed that their contract be governed by general principles of law, the lex mercatoria or the like.*
*They may be applied when the parties have not chosen any law to govern their contract."*

In addition to providing the general principles, they enrich their content with more detailed rules of a transnational nature.

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[114] F. MARRELLA, *La nuova lex mercatoria, Principi Unidroit ed usi di contratti del commercio internazionale*, CEDAM, Tratt. Dir. Comm. e dir. Pub. Diretto da Galgano, Volume 30, Padova 2003
[115] B. GOLDMAN, *The applicable law: general principles of law — the lex mercatoria,* Lew J.D.M. (eds) Contemporary Problems in International Arbitration. Springer, Dordrecht, 1987
[116] S.W. SCHILL, *Lex mercatoria*, MPEPIL, June 2014
[117] D. DESIDERIO, *Autonomia delle parti: Il problema della legge applicabile al contratto internazionale,* 2005, website www.altalex.com
[118] Adopted originally in 1994 by the International Institute for the Unification of Private Law and then revised in 2004, 2010 and 2016

Despite this, the Rome Convention, as well as, in *subjecta materia*, the Reg Rome I[119], do not recognize the *lex mercatoria* and the UNIDROIT principles on international commercial contracts as positive choices of the applicable law. However, it is possible to apply it mediated and therefore through the state system previously designated by the parties.

Consequently, the judge will address the issue by identifying the legal system of the country with which the contract has a closest link and only then apply the *lex mercatoria* with the measure provided for by the designated state system[120]. The *lex mercatoria* in fact, cannot oppose the principle of the autonomy of the parties as it is one of the general principles of private international law. [121]

Therefore, exponents have recommended that the inclusion of an arbitration clause, the choice of an international tribunal or a clause hinting disputes to an international arbitration center in an international contract involve the application of the *lex mercatoria.*[122]

[119] Initially, however, in the first proposal of the Reg Rome I in Art. 3.2 it was written: "" The parties can also choose as the applicable law principles and rules of substantive law of contracts, recognized internationally or community level. However, the questions concerning the matters governed by these principles or rules and not expressly resolved by the latter will be resolved according to the general principles they are based on, or, failing that, in accordance with the applicable law in the absence of a choice under these regulations ".

[120] F. GALGANO - F. MARRELLA, *Diritto del commercio internazionale*, terza edizione, CEDAM, 2011

[121] Professor Reisman justly pointed out, "It is unfair to the parties and dangerous for the future of arbitration if arbitrators can arrogate to themselves a change of the rules once parties have selected a set of them to govern their transactions; Abul F.M. MANIRUZZAMAN, *The lex mercatoria and international contracts: a challenge for international commercial arbitration,* American University International Law Review, Volume 14 | Issue 3, article 2, 1999

[122] *V. supra*

# CHAPTER III

# CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALES OF GOODS

ABSTRACT: 1. Brief history. – 2. Contract formation according to the CISG. – 3. Seller's performance obligations. – 4. Buyer's performance obligations. - 5. Excuse for non-performance: the event of force majeure

As has been learned so far, the identification of the applicable law is essential for an international contract. This remains one of the major aspects to consider when drafting an international contract as it can make a difference and can avoid the application of different clauses. When the parties do not express nothing regarding the applicable law, the rules of d.i.pr. takeover to regulate the matter.

Therefore, in view of the diversity of the various national rules, in order to guarantee greater certainty and uniformity, the discipline of international sales is subject to numerous inter-state conventions of uniform law[123]. It is essential, in this chapter and for the central theme of the thesis, to mention the most important one: the Vienna Convention of 11 April 1980 on the international sale of movable property (CISG).

Success witnessed not only by the high number of States that adopt it[124] or by the global diffusion of the Convention, but also by the attention that the uniform legislation has aroused in state and arbitration jurisprudence.

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[123] 1. Convenzione dell'Aja del 15 giugno 1955 sulla legge applicabile alle vendite aventi carattere internazionale di oggetti mobili corporali;
2. Convenzioni dell'Aja del 1° luglio 1964 con allegate la legge uni- forme sulla formazione dei contratti di vendita internazionale (LUFC/ ULFIS) e quella sulla vendita internazionale di beni mobili corporali (LUVI/ ULIS);
3. Convenzione di New York del 14 giugno 1974 sulla prescrizione in materia di vendita internazionale di beni mobili con un protocollo del 11 aprile 1980;
4. Convenzione di Vienna del 11 aprile 1980 sulla vendita internazionale di beni mobili (1);
5. Convenzione di Ginevra del 17 febbraio 1983 sulla rappresentanza in materia di vendita internazionale di beni mobili;
6. Convenzione dell'Aja del 22 dicembre 1986 sulla legge applicabile alle vendite aventi carattere internazionale.
From F.GALGANO - F.MARRELLA, Diritto del commercio internazionale, terza edizione, Cedam, Torino, 2011

[124] The CISG has 94 States Parties (last update September, 24, 2020).

As declared in its preamble, the Convention aim to promote international trade by "*harmonizing the commercial laws among countries and considering the different social, economic and legal systems*" in this way it contributes to the "*removal of legal barriers in international trade and promote the development of international trade*".[125]

## 3.1 BRIEF HISTORY

The history of the Convention started from 1930 when the International Institute for Unification of Private Law in Rome (UNIDROIT) decided to opening the procedure to create a uniform law for international sales. It followed, after the Second World War, the approval of Uniform Law on the International Sale of Goods (ULIS) and a shorter companion Uniform Law on the Formation of Contracts for the International Sale of Goods (ULFC), in 1964, that influenced the CISG[126]. Faced with the first law, the United Nations tried to support the production of a more acceptable revised version of the ULIS. In 1966, the United Nations General Assembly, at the initiative of Hungary, established the United Nations Commission on International Trade Law (UNCITRAL).
The Commission had as its object "the promotion of the progressive harmonization and unification of international trade law through activities" such as the formation of Conventions, or standard commercial conditions, etc...
After two years, the Commission had placed international sales on its list of priorities. After a series of changes and revision of the initial text, in 1980 the United Nations held a diplomatic conference in Vienna to propose the definitive text of the CISG[127], which was then approved on 30 September 1981. The final text included 88 substantive articles plus another 13 secondary ones.[128]

The Convention, that entered into force on 1 January 1988, can be considered the first sales-law treaty to win acceptance on a worldwide scale.[129] It is essential because consists of the main rules which balance the rights of buyers and sellers in relation with contracts

[125] See the preamble of the Convention
[126] More about the topic in https://iicl.law.pace.edu/cisg/cisg section "Antecedents to the CISG"
[127] Document A/CONF.97/11/Add.1 and 2; Document A/CONF.97/13/Rev.1
[128] More in E.A. FARNSWORTH, *The Vienna Convention: History and Scope*, Int'l L., 1984; K. SONO, *International Sale of Goods: Dubrovnik Lectures 1985, chapter 1: the Vienna Sales Convention History and Perspective*, 1-17, Ocean Publications, 1986
[129] J. LOOKOFSKY, *Understanding the CISG: (Worldwide) Edition*, Fifth edition, Kluwer Law International BV, The Netherlands, 2017

for the international sale of goods. It also regulates the formation and conclusion of the international sales contract which does not require particular formalities.[130]

The Convention is automatically applicable to sales contracts between companies belonging to the acceding States (positive criterion) and whenever the applicable rules of private international law refer to the national law of an acceding State.[131] Moreover, parties should be aware that their business places are situated in diverse States.[132]

*Article 1 CISG*

*(1) This Convention applies to contracts of sale of goods between parties whose places of business are in different States:*
*(a) when the States are Contracting States; or*
*(b) when the rules of private international law lead to the application of the law of a Contracting State.*
*(2) The fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract.*
*(3) Neither the nationality of the parties nor the civil or commercial character of the parties or of the contract is to be taken into consideration in determining the application of this Convention.*

Precisely for these reasons, the Convention can be regarded as the fulcrum of the legal regulation of international sales.
It belongs to the category of law-making and self-executing treaties. This means that it is a precisely applicable federal law that is free for prompt function by the national judge.

[130] Important aspects such as the duration and validity of the contract, the effects on the ownership of the goods, the contractual fraud, the defects of the contract are not lost in examination.
[131] R.C.RANNO, *Diritto privato comparato:come è disciplinata la vendita transfrontaliera*, 10 marzo 2017, website www.leggioggi.it
[132] If a party has more than one place of business, the place which has the closest relationship to the contract and its performance is to be taken into consideration.

With the purpose of creating a uniform set of legal rules to operate in the place of the diverse domestic legal system of its contracting states, it is organized in 4 parts: part I Artt.1-13 contains the Convention's general provisions, the second part is from art.14 to art.24 and guides the formation of contracts, part III art.25-88 governs the rights and obligations of buyers and sellers and finally the last part, from art. 89 to art.101 is on the non-substantive diplomatic provisions.
In any case, the most important articles are the first six in which is declared which aspects should be taken into account when formulate the Convention's scope of application: "personal, territorial, temporal[133] and material aspects."[134]

It is important to underline that the Convention applies to international contract of sales of goods. Art.30 and art.53 are the references as they state that the seller "*must deliver the goods, hand over the documents and transfer the property in the goods" and "the buyer must pay the price and take delivery of the goods*". Moreover, the sale contains different types of goods such as "the sale of food, wheat, corn, coffee, to the sale of machines, cars, manufactured tools, to the sale of steel, books, records".[135]

The Vienna Convention was written to be as clear and simple to understand as possible. Courts and arbitral tribunals should favor a uniform application and respect both its international character and good faith in international trade.[136]

[133] Look art.99 of the CISG
[134] P. VOLKEN, *International Sale of Goods: Dubrovnik Lectures 1985*, chapter 2: the Vienna Convention scope, interpretation and Gap-filling, 19-53, Ocean Publications, 1986
[135] *V. supra*
[136] International trade center, Cross-border contracting: How to draft and negotiate international commercial contracts, ITC, Geneva, November 2008

## 3.2 CONTRACT FORMATION ACCORDING TO THE CISG

As we saw in the first chapter, the exchange of an offer and its acceptance creates a contract. Moreover, the law that regulates the formation of the contracts has been a popular area for the comparative law analysis.

According to the last studies, jurists concluded that the Convention has accomplished an "equitable" and "workable" arrangement between the two legal systems, Common law and Civil law[137].

Therefore, now, the attention should be place on the contract formation, a topic cover by the second part of the CISG where are described 4 steps to follow: the offer, the effectiveness of the offer, the acceptance and the acceptance with modification.

The offer is a privilege to the offeree to establish a contract in conformity with the terms of the offer by accepting it. Being such a genuine endorsement, it must be sufficiently definite it and must express the purpose of the offeror to be bound in case of acceptance.[138]

*Article 14*

*(1) A proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance. A proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price.*

*(2) A proposal other than one addressed to one or more specific persons is to be considered merely as an invitation to make offers, unless the contrary is clearly indicated by the person making the proposal.*

According to this article an effective offer must be a proposal addressed to a specific person, it must indicate an intention to be bound in case of acceptance and finally it must be sufficiently definite by determining in a clear way the goods and implicitly

[137] K. SONO, *International Sale of Goods: Dubrovnik Lectures 1985*, chapter 4: Formation of international contracts under the Vienna Convention: a shift above the comparative law, 111-131, Ocean Publications, 1986

[138] K. SONO, *International Sale of Goods: Dubrovnik Lectures 1985*, chapter 4: Formation of international contracts under the Vienna Convention: a shift above the comparative law, 111-131, Ocean Publications, 1986

or explicitly also the quantity and the price, this last can be calculated later. Therefore, a proposal which lack these prerequisites, would not be considered sufficiently definite and the person proposing it is still engaged in negotiation.

When the offer reaches the offeree, it becomes effective.

*Article 15*

*(1) An offer becomes effective when it reaches the offeree.*

*(2) An offer, even if it is irrevocable, may be withdrawn if the withdrawal reaches the offeree before or at the same time as the offer.*

As defined in paragraph two of art.15, the offer can also be withdrawn "*if this withdrawal reaches the recipient before or at the same time as the offer*". All this also applies to the acceptance which can be withdrawn under the same conditions.[139] Nevertheless, if the offer is irrevocable under circumstances, it is clear that it cannot be revoke[140]. Anyway, even if it is irrevocable, an offer is dissolved under art.17 when a rejection by the offeree reaches the offeror.

The third phase is the acceptance that is defined by art.18 as *"A statement made by or other conduct of the offeree indicating assent to an offer is an acceptance. Silence or inactivity does not in itself amount to acceptance […]".* But if the silence is linked to some factors that indicate that the silence can constitute an assent, we can speak about acceptance. Parties can also define it explicitly in advance or following behaviors such as negotiation.
Moreover *"an acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror […]".* This must be made within the time that has been fixed or within a reasonable time, therefore the offeree has the risk of loss or delay in transmission.

[139] See at.22 of the CISG
[140] See art.16 of the CISG

Acceptance can also be made by carrying out an act such as sending the goods or paying without notice. Therefore, the proposer will be aware of the acceptance only through the act of conferment.

Finally, the acceptance must be conformed to the offer.

There can be the case in which a party accept the offer, but the acceptance contains some modifications like limitations, additions, or others. In this case it is a rejection, or it can constitute a counter-offer. Therefore, before accepting or rejecting the offer, clarifications about the terms are required. If the offeror does not object, the recipient's consent will be considered as an acceptance and the new changes will become the new terms of the contract.[141]

Even if the acceptance arrives to the offeror after the expiry of the period of the approval, it can be considered an acknowledgment. Therefore, as states in art.21 "*A late acceptance is nevertheless effective as an acceptance if without delay the offeror orally so informs the offeree or dispatches a notice to that effect […]".*

Typical of the CISG is the fact that the contract can also be concluded not in writing, therefore it is not subject to any formal obligation.[142] Different modalities are allowed such as an exchange of e-mails, or the oral modality, sometimes there may be a real contract.

Concluding a contract is not always so easy, it may rise different problems like for example the "battle of the form". It happens when a contract has been performed, but then the parties discover that there are differences between the contract that each party's lawyer has draft. Consequently, the CISG may delay the formation of the contract through the "mirror image" rule, meaning that the offer must be accepted with no modifications, or by using the "last shot" principle to make the offeree's terms control the transaction.[143]

[141] See art.19 of the CISG

[142] See artt.11,12,13,96 of the CISG

[143] J.HELLNER, *International Sale of Goods: Dubrovnik Lectures 1985*, chapter 10: The Vienna Convention and standard form contracts, 335-363, Ocean Publications, 1986

## 3.3 SELLER'S PERFORMANCE OBLIGATIONS

Part III of the CISG exposes the primary performance obligations of the seller and the buyer.
Art.30 of the CISG sets out the crucial seller's obligations.

*"The seller must deliver the goods, hand over any documents relating to them and transfer the property in the goods, as required by the contract and this Convention."*

The seller must give the buyer the aids of taking custody of the goods as confirmed by the contract as to quantity, quality, description, freedom from third party claims, and any documents related to the goods and to bring to the buyer the property in the goods.[144]
Therefore, the seller is obliged to respect the agreements foreseen by the contract itself or contained in the commercial practice. Hence, in the absence of clear contractual definitions, it replaces the discipline of the Convention.
The first obligation concerns the delivery of the goods, where the parties can provide for the insertion of a "price-delivery-term" as defined in the Incoterms to facilitate everything. [145] The other related obligation is the delivery of the reference documents. [146]
If the parties have agreed on a place of delivery, Art. 31[147] provides that the delivery will take place in that place. However, the CISG recognizes other solutions if the place is not specified as for example in shipment contracts that do not provide for any particular place of delivery, therefore this will take place at the first carrier that will meet. In a contract in which the goods are already present or will have to be manufactured in a place known at the time of the conclusion of the contract, the general rule provides for an *iuris tantum*

[144] Not the passing of title. Moreover, the passing of ownership is regulated by domestic law.
[145] L.MASTROMETTO, *La vendita internazionale*, Giappichelli, 2013
[146] See art.34 CISG
[147] Art.31 CISG: If the seller is not bound to deliver the goods at any other particular place, his obligation to deliver consists:
(a) if the contract of sale involves carriage of the goods - in handing the goods over to the first carrier for transmission to the buyer;
(b) if, in cases not within the preceding subparagraph, the contract related to specific goods, or unidentified goods to be drawn from a specific stock or to be manufactured or produced, and at the time of the conclusion of the contract the parties knew that the goods were at, or were to be manufactured or produced at, a particular place - in placing the goods at the buyer's disposal at that place;
(c) in other cases - in placing the goods at the buyer's disposal at the place where the seller had his place of business at the time of the conclusion of the contract.

presumption and the seller's obligation is fulfilled since the goods are at the disposal of the buyer in that particular place. [148] Finally, there is also the possibility pursuant to letters c of the article, that the seller dispatches the goods to the buyer at its headquarters where the contract was stipulated.

Art. 33[149], on the other hand, regulates the delivery time. Delivery must take place on the date set in the contract, a date expressed directly or unambiguously determinable. Sometimes, a period is also expressed within which the delivery must take place. The discipline is applied even if there is no presumed date or period, but the parties have agreed that this occurs for example when the buyer requests it. Finally, at point c, it is clarified that in all cases that do not fall within those explained above, the delivery must take place within a reasonable time from the conclusion of the contract.[150]

Another obligation of the seller is to deliver the goods in accordance with the parties' contractual agreement regarding quality, quantity, and description as well as their packaging. According to art.35[151], the buyer must prove if there is no conformity since the goods do not have the characteristics assumed by the parties in the stipulation of the contract. If the goods are unsuitable for use by the buyer, they do not have the quality of the samples previously presented by the seller or are not packaged in the correct and

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[148] *V.supra*, Cass. Sez. Un. 5 ottobre 2009 n.21191 in riv. Dir. Int. priv. e proc., 2010

[149] Art. 33 CISG The seller must deliver the goods:
(a) if a date is fixed by or determinable from the contract, on that date;
(b) if a period of time is fixed by or determinable from the contract, at any time within that period unless circumstances indicate that the buyer is to choose a date; or
(c) in any other case, within a reasonable time after the conclusion of the contract.

[150] L.MASTROMETTO, *La vendita internazionale*, Giappichelli, 2013; R. FOLSOM – M. GORDON – J. SPANOGLE – M. VAN ALSTINE, *International Business Transactions in a Nutshell*, New edizione, West Academic, 2016

[151] Art. 35 CISG: (1) The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract.
(2) Except where the parties have agreed otherwise, the goods do not conform with the contract unless they:
(a) are fit for the purposes for which goods of the same description would ordinarily be used;
(b) are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement;
(c) possess the qualities of goods which the seller has held out to the buyer as a sample or model;
(d) are contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods.
(3) The seller is not liable under subparagraphs (a) to (d) of the preceding paragraph for any lack of conformity of the goods if at the time of the conclusion of the contract the buyer knew or could not have been unaware of such lack of conformity.

suitable way to ensure the suitability of the goods. The goods must therefore comply with all those standards required by legal systems (public law standard). The relevant moment for the assessment of a non-conformity is when the risk of loss passes to the buyer. In fact, it must prove that the defect was really present and was not caused by third parties, by its use or even by the lack of inspection of the goods.[152] If there is a non-conformity, the seller has the right to solve the problem before or after delivery according to articles 48 and 37 of the CISG.

The last obligation under art. 41[153] provides that the seller delivers the goods without any rights of others or claims by third parties. The article applies when the seller is deprived of possession of the goods, but without reference to any industrial rights or related to intellectual property since this discipline falls under art. 42[154] of the CISG. The burden of proof relating to this infringement rests with the seller.[155]

### 3.4 BUYER'S PERFORMANCE OBLIGATIONS

The obligations of the buyer in summary consists in taking the goods and paying for it. The obligations are clarified in artt. 53-60 of the CISG.

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[152] L.MASTROMETTO, *La vendita internazionale*, Giappichelli, 2013

[153] Art.41 CISG: The seller must deliver goods which are free from any right or claim of a third party, unless the buyer agreed to take the goods subject to that right or claim. However, if such right or claim is based on industrial property or other intellectual property, the seller's obligation is governed by article 42.

[154] Art.42 CISG: (1) The seller must deliver goods which are free from any right or claim of a third party based on industrial property or other intellectual property, of which at the time of the conclusion of the contract the seller knew or could not have been unaware, provided that the right or claim is based on industrial property or other intellectual property:
(a) under the law of the State where the goods will be resold or otherwise used, if it was contemplated by the parties at the time of the conclusion of the contract that the goods would be resold or otherwise used in that State; or
(b) in any other case, under the law of the State where the buyer has his place of business.
(2) The obligation of the seller under the preceding paragraph does not extend to cases where:
(a) at the time of the conclusion of the contract the buyer knew or could not have been unaware of the right or claim; or
(b) the right or claim results from the seller's compliance with technical drawings, designs, formulae or other such specifications furnished by the buyer.

[155] L.MASTROMETTO, *La vendita internazionale*, Giappichelli, 2013

Art. 53[156] states that the buyer's obligation to pay boots beyond the abstraction of debt. This obligation includes all steps and any additional costs to ensure that payment is made.[157]

If the parties have not agreed otherwise in their contract, the sale is assumed in cash and payment may be a necessary condition for the conclusion of the sale and therefore the delivery of the goods and related documents. Payment is due when the seller makes the goods and documents available to the buyer in accordance with the Convention and the contract.[158]

Art.55[159] governs the subject if the price to be paid has not been specified so that the contract can continue to be valid. In fact, faced with an omission of the price, it is assumed that the parties have agreed on the price at the time of the conclusion of the contract.[160]

As for the place of payment, it is where the buyer takes possession of the goods and documents. The buyer must do what is necessary for the payment to be successful by also observing the formalities that each Country requires to authorize the transaction, under penalty of breach of the contract even before the payment deadline[161]. Obviously, the buyer has every right to inspect the goods[162] and withhold payment.[163] Through the seller's testimony, the presence of invoices or agreements between the parties, the proof of delivery is tangible.

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[156] Art.53 CISG: The buyer must pay the price for the goods and take delivery of them as required by the contract and this Convention.

[157] H.D. GABRIEL, The buyer's performance under the CISG: articles 53-60 trends in the decisions, website https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/gabriel.pdf last visited 27/09/2021

[158] R. FOLSOM – M. GORDON – J. SPANOGLE – M. VAN ALSTINE, *International Business Transactions in a Nutshell*, New edizione, West Academic, 2016

[159] Art.55 CISG: Where a contract has been validly concluded but does not expressly or implicitly fix or make provision for determining the price, the parties are considered, in the absence of any indication to the contrary, to have impliedly made reference to the price generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned.

[160] H.D. GABRIEL, The buyer's performance under the CISG: articles 53-60 trends in the decisions, website https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/gabriel.pdf last visited 27/09/2021

[161] See art.54: CISG The buyer's obligation to pay the price includes taking such steps and complying with such formalities as may be required under the contract or any laws and regulations to enable payment to be made.

[162] See art.38 CISG

[163] *V.supra*

In case in which the parties haven't agreed on the place of payment, art.57[164] designates the place that commonly is at the seller's place of business.

The other obligation of the buyer is to accept the delivery, which means taking physical possession of the goods from the seller in the place and on the stipulated date.[165] The responsibility provides for the duty of cooperation, that is, to do everything possible to allow the seller to make the delivery.

Pursuant to articles 38[166] and 39[167] about buyer's obligation upon delivery, the buyer is obliged to inspect the goods in a short time and communicate any defects within a reasonable time. The buyer must provide proof of the non-compliance and that this existed before the passage of the risk. If all this does not occur, the party will lose its right to assert the lack of conformity. [168]

Under the CISG, both the seller and the buyer have mutual responsibilities towards concluding sales contracts. Depending on the type of transaction, usually the parties must perform their obligations jointly.

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[164] Art.57 CISG: (1) If the buyer is not bound to pay the price at any other particular place, he must pay it to the seller:
(a) at the seller's place of business; or
(b) if the payment is to be made against the handing over of the goods or of documents, at the place where the handing over takes place.
(2) The seller must bear any increases in the expenses incidental to payment which is caused by a change in his place of business subsequent to the conclusion of the contract.

[165] Art.60 CISG: The buyer's obligation to take delivery consists:
(a) in doing all the acts which could reasonably be expected of him in order to enable the seller to make delivery; and
(b) in taking over the goods.

[166] Art.38 CISG: (1) The buyer must examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances.
(2) If the contract involves carriage of the goods, examination may be deferred until after the goods have arrived at their destination.
(3) If the goods are redirected in transit or redispatched by the buyer without a reasonable opportunity for examination by him and at the time of the conclusion of the contract the seller knew or ought to have known of the possibility of such redirection or redispatch, examination may be deferred until after the goods have arrived at the new destination.

[167] Art.39 CISG: (1) The buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it.
(2) In any event, the buyer loses the right to rely on a lack of conformity of the goods if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to the buyer, unless this time-limit is inconsistent with a contractual period of guarantee.

[168] Teacher, Law, *Rights and Obligations of the Seller and Buyer*, November 2013, web site: https://www.lawteacher.net/free-law-essays/commercial-law/rights-and-obligations-law-essays.php?vref=1 last visited 27/09/2021

## 3.5 EXCUSES FOR NON- PERFORMANCE

After presented the basic performance obligations of the seller and the buyer.
I will, therefore, focus on the exemption of the parties' liability for not having performed the contract in international sale due to external events that prevent the parties in doing their duty, like for example the event of force majeure.

In many cases, events occur and make a party's performance of a contract very difficult, even impossible. One of the most debated provision of the CISG is art.79 which recognize an exemption from liability for non-performance for both the seller and the buyer.
It deals with two situations: force majeure and dirty hands. The first one, that is the subject of the thesis, and it will be examine in depth in the next chapter, is when somethings happen beyond the control of the parties, and the second one is in case a party cannot complain about other party's breach if its action or inaction caused the breach.
At the same time, it can be likely to be the most occasionally applied provision since approximately all standard contracts of a general nature contain well-defined force majeure clauses with complete lists.[169]

Under art.79 a party asserting an exemption must prove 3 elements:

1- The failure to perform was due to an external impediment beyond the party's control;
2- The event could not reasonably be expected to have taken the impediment it accounts at the time of the conclusion of the contract;
3- It could not reasonably have avoided or overcome the impediments or its consequences.[170]

Therefore, each party is liable to the other for the non-fulfillment of its obligations unless it proves that "*the non-fulfillment was due to an impediment arising from circumstances*

[169] J. HELLNER, *International Sale of Goods: Dubrovnik Lectures 1985*, chapter 10: The Vienna Convention and standard form contracts, 335-363, Ocean Publications, 1986
[170] R.FOLSOM – M.GORDON – J.SPANOGLE - M. VAN ALSTINE, *International Business Transactions in a Nutshell*, West Academic; New edizione, 2016

*beyond its sphere of control, and that it was not reasonably required to provide when the contract is concluded or to avoid or overcome its consequences* " as states in art.79.[171]

In any case the article makes clear that any covered obstacle only brings an immunity from liability from damages collected by the other party. It does not bereave the other party of many other rights or remedies such as avoidance of the contract for fundamental breach.

Art.81 is fundamental as it declare that the termination of the contract "*releases both parties from their obligations under it, subject to any damages which may be due. Avoidance does not affect any provision of the contract for the settlement of disputes or any other provision of the contract governing the rights and obligations of the parties consequent upon the avoidance of the contract*."

In this case, the seller is obliged to re-establish the price paid with interest to the buyer from the day of payment, while the buyer must give the seller the equivalent of any advantage derived from the goods or part of them " *if he must make restitution of the goods or part of them; or if it is impossible for him to make restitution of all or part of the goods or to make restitution of all or part of the goods substantially in the condition in which he received them, but he has nevertheless declared the contract avoided or required the seller to deliver substitute goods.*" [172]

The various remedies that parties can put in place for the breach of the contract are explained respectively in art. 45-52 for the buyer and art. 61-65 for the seller. In any case, before completing their performance, the parties have the right to suspend it in view of a case of non-performance as explained in Art. 71 of the CISG.

A decisive criterion to favor from the force majeure exemption is that the party declares to the other party within a modest period of time. Otherwise, the other party must compensate the damages insofar as they could have been avoided if the additional deadline had been respected. [173]

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[171] F. GALGANO - F. MARRELLA, *Diritto del commercio internazionale*, terza edizione, Cedam, Torino, 2011

[172] See art.84 CISG

[173] International trade center, *Cross-border contracting: How to draft and negotiate international commercial contracts*, ITC, Geneva, November 2008

As we have seen, therefore, an international sale follows a complex procedure that goes from the stipulation of the contract to the choice of the applicable law and the insertion of specific clauses.

The inclusion of the clauses becomes fundamental above all because sometimes the conclusion of an international sale can be hindered by various unforeseen events.

Against this, States have decided to introduce special clauses of force majeure to mitigate the effects and not to find themselves unprepared.

There is a lot to say about the CISG, but my intent is to focus on the force majeure clauses as will be seen in the next chapter, where also the application of art.79 of the Convention will be expanded.

# CHAPTER IV

# FORCE MAJEURE CLAUSES IN INTERNATIONAL CONTRACTS

ABSTRACT: 1. Definition of Force Majeure. – 2. Force Majeure in Common Law and Civil law countries. – 3. Force Majeure in Civil Law. – 4. Force Majeure in Common Law. – 5. Force Majeure in the international order. – 6. The solution offers by the CISG. – 7. Art.79 CISG in case law. – 8. The solution offers by ICC clause. – 9. Consequences of Force Majeure. – 10. The most common relieves. – 11. Covid-19 related to Force Majeure. – 12. Covid-19: global adaptation of force majeure clauses. - 13. Case Studies of Force Majeure clauses related to Covid-19

## 4.1 DEFINITION OF FORCE MAJEURE

Unpredictable change of circumstances is one of the most relevant problem that parties, in particular those who have sign long or longer-term complex contracts, may deal with in international trade.

Due to globalization, which commits the involvement of an increasing number of countries in production and supply, these problems have doubled. Sudden changes in the main political and geo-economic variables on the international scene, natural disasters, wars or other shocks can affect the very basis of the agreement. These events can lead to countless consequences such as high production costs in a contracting country, limit imports and exports, substantial price fluctuations that were not foreseeable at the time of the conclusion of the international contract. All this makes the seller's performance unduly burdensome by devaluing the performance of the contract for the buyer. Therefore, severe disputes can arise.

Unlike what happens in an internal sale, every international sale is absorbed in an international context, and it is strongly influenced by a precise legal and geopolitical background that must be known and investigated by each interpreter in examining the technical-legal solutions of the contract.[174]

[174]Reference to F. MARRELLA, *Forza maggiore e vendita internazionale di beni mobili in un contesto di pandemia*, currently being published in Rivista di diritto internazionale privato e processuale, n.3, 2021

The paradigm of *pacta sunt servanda*[175] places the burden of such a change of circumstances upon the party on which it falls. However, since the old Roman days, the principle of *impossibilium nulla est obligation*[176], or there is no obligation to perform impossible things, has been recognized. Since these days, force majeure, impossibility, or something similar have become grounds for exemption in every legal system.[177]
However, there are some questions that are still open and debated like if small changes in the surrounding economic conditions may exempt the debtor from liability under the contract.

To better understand the concept of force majeure in international contracts, attention must be paid to the principle of autonomy of the parties. This principle is fundamental because, as seen in the second chapter, it gives the parties the faculty to designate the applicable law to the obligations deriving from an international contract, to define the competent judge to settle disputes arising from the contract and to resort to international commercial arbitration.[178]
After having designated the applicable law, therefore, the competent legal system[179] and the various steps that derive from it to stipulate the contract, at the time of negotiation, the parties can refer to internationally uniform contractual models and clauses.
One of the most prevalent clauses is precisely that of force majeure. This clause requires attention as it is only granted in exceptional cases. In fact, it must be adapted by the contracting parties in a tailor-made manner to their own needs, to the economic conditions and to the geopolitical and therefore legal context.
It is in the interest of the parties to include specific clauses in international contracts that divide the responsibilities arising from circumstances of force majeure between them, since in the absence of this, the CISG will increase the uncertainty of the applicable law.

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[175] The famous maxim, attributed to Ulpiano: the essential obligation of the Contracting States to an agreement to fulfill the commitments they have assumed with the stipulation of the same. This Art. 1372 Codice Civile - Efficacia del contratto
[176] The famous maxim is from the jurist Celsus: an obligation concerning impossible things is null This Art. 1346 of the Civil Code - Requirements
[177] I. SCHWENZER, *Force Majeur and Hardship in international sales contracts*, Victoria University of Wellington Law Review 709, 2008
[178] Reference to F. MARRELLA, *Forza maggiore e vendita internazionale di beni mobili in un contesto di pandemia*, currently being published in Rivista di diritto internazionale privato e processuale, n.3, 2021
[179] If the parties have not elected the applicable law, the d.i.pr. of the lex foro, will indicate the lex contractus

In specifying this clause, the parties may also introduce a non-exhaustive and therefore mandatory list of the events that the parties agree to presume to be force majeure. However, there may be very rare cases in which an international contract does not contain a force majeure clause. In this case, the rules of the competent legal system will come into force.[180]

## 4.2 FORCE MAJEURE IN COMMON LAW AND CIVIL LAW COUNTRIES

In the first chapter, we have already seen the difference in matters of international contracts between Common law and Civil law Countries. Now this difference is taken up again with a further deepening concerning the force majeure clause, the central theme of the thesis.

In general, the Force Majeure Institute, or other similar institute, is recognized in almost every country even if there are nuances or significant difference between the concept due to historical and cultural context of each State.

As noted in the doctrine, "*there are substantial differences among national laws as to the nature of events that qualify, whether or not extreme impracticability is sufficient, and the nature of relief among other things*".[181]

While on one hand civil law lawyers most of time reject the general definition of force majeure, by specifying the conditions for an event to be certified as force majeure such as unforeseeable, an event out of the parties' control, on the other hand common law lawyers tend to make a list of specific circumstances which qualify as force majeure events.

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[180] From the point of view of the Italian legal system, the CISG applies to an international sale contract of movable property from 1 January 1988, if the conditions are met. Since these are international norms of uniform material law, they prevail over the corresponding norms of Italian sales law. As regards matters not covered by the CISG, again from the point of view of the Italian legal system, the law applicable to them must be identified through the Hague Convention of 15 June 1995. Otherwise, the Roma I regulation and law no. .218 / 1995 relating to the Italian system of d.i.pr. In arg. F. MARRELLA, *Forza maggiore e vendita internazionale di beni mobili in un contesto di pandemia*, currently being published in Rivista di diritto internazionale privato e processuale, n.3, 2021, F. GALGANO - F. MARRELLA, *Diritto del commercio internazionale*, terza edizione, CEDAM, 2011

[181] F. MARRELLA, *Forza maggiore e vendita internazionale di beni mobili in un contesto di pandemia*, in corso di pubblicazione nella Rivista di diritto internazionale privato e processuale, n.3, 2021; D.RIVKIN, *Lex Mercatoria and Force Majeure, transnational rules in international commercial arbitration*, Paris, 1993

### 4.2.1 FORCE MAJEURE IN CIVIL LAW

In Civil law jurisdictions predominates codification and the doctrine of force majeure typically is enshrined in statute. They also often codify the standard, as well as certain defenses. That must be satisfied for a party to invoke the doctrine.[182]

The theory of impossibility occurring during the fulfillment of contractual obligations is known in Civil law Countries as it invokes from *the Digesto of Giustiniano*.

There are not many Civil law systems that expressly say what is to be understood by the term force majeure. In some, it is expressly mentioned by the legislator but not defined, in others, it is not expressly used, preferring to regulate the matter through other more general institutions.

In Italy, for example, an explicit definition of the concept is absent and therefore is up to the jurisprudence the determination of the criticalities and limits of the institution in question.[183]

A particular case is Argentina which combines both solutions to artt. 1730 ss. of the Argentine Codigo Civil y commercial.[184]

Some interesting examples are the following.[185]

France

In France the formula of the Napoleonic Code and its jurisprudence have proved hostile to fulfill a contractual obligation due to force majeure. Consequently, it has been processed the l'Avant-Project Francais de Réforme du Droit des Obligations et de la Prescriptions, that tries to complete some open questions of the civil code.

Thanks to this evolution, there has been a partial easing of the requirements for invoking force majeure. In art.1218[186] of the civil code specifies the requirement of no control. This

[182] La. C.C. art. 1873, Revision Comments—1984; Civil Code of Quebec, Art. 1470

[183] See artt.1218, 1256, 1258, 1456 ss. Cod. civ.

[184] Art.1730: Caso fortuito. Fuerza mayor; art.1731: Hecho de un tarcero; art.1732: Imposibilidad de cumplimiento.

[185] See https://cms.law/en/int/expert-guides/cms-expert-guide-to-force-majeure; https://www.mglobale.it/contrattualistica/tutte-le-news/il-principio-di-forza-maggiore-la-disciplina-nazionale-e-internazionale-a-confronto.kl; F. MARRELLA, *Forza maggiore e vendita internazionale di beni mobili in un contesto di pandemia*, in corso di pubblicazione nella Rivista di diritto internazionale privato e processuale, n.3, 2021; Studio Legale De Capoa e Associati, Clausola di Forza Maggiore: accezione nei Paesi Extra-UE maggiormente significativi nei rapporti commerciali con le imprese italiane e raccomandazioni operative

[186]Modifié par Ordonnance n°2016-131 du 10 février 2016 - art. 2

means that the event must be such as to offer no possibility for the debtor to influence its course and this event cannot derive from the debtor's behavior. Moreover, the event of force majeure must be unpredictable at the time of drafting the contract. The third and last requirement is that the event must have effects that cannot be avoidable. Therefore, the response must be produced despite the efforts of the debtor.

Compared to the past, the position of French law has less rigor in this matter as it allows the subject who invokes it, to justify his breach of contract by exempting him from liability. However, some progresses are yet to be made.[187]

Germany

Germany is very similar to Italy as it does not have a force majeure discipline in its civil code, Burgerliches Gesetzbuch.

Il y a force majeure en matière contractuelle lorsqu'un événement échappant au contrôle du débiteur, qui ne pouvait être raisonnablement prévu lors de la conclusion du contrat et dont les effets ne peuvent être évités par des mesures appropriées, empêche l'exécution de son obligation par le débiteur.

Si l'empêchement est temporaire, l'exécution de l'obligation est suspendue à moins que le retard qui en résulterait ne justifie la résolution du contrat. Si l'empêchement est définitif, le contrat est résolu de plein droit et les parties sont libérées de leurs obligations dans les conditions prévues aux articles 1351 et 1351-1.

[187] *V. Note 184*

Relevant for the case are the art.275[188] which is about the objective contractual impossibility, and the art.313[189] which approaches the concept of Hardship.

When an event is external and cannot be avoided even with the maximum prudence reasonably expected, then force majeure subsists.

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[188] Ausschluss der Leistungspflicht
(1) Der Anspruch auf Leistung ist ausgeschlossen, soweit diese für den Schuldner oder für jedermann unmöglich ist.
(2) 1Der Schuldner kann die Leistung verweigern, soweit diese einen Aufwand erfordert, der unter Beachtung des Inhalts des Schuldverhältnisses und der Gebote von Treu und Glauben in einem groben Missverhältnis zu dem Leistungsinteresse des Gläubigers steht. 2Bei der Bestimmung der dem Schuldner zuzumutenden Anstrengungen ist auch zu berücksichtigen, ob der Schuldner das Leistungshindernis zu vertreten hat.
(3) Der Schuldner kann die Leistung ferner verweigern, wenn er die Leistung persönlich zu erbringen hat und sie ihm unter Abwägung des seiner Leistung entgegenstehenden Hindernisses mit dem Leistungsinteresse des Gläubigers nicht zugemutet werden kann.
(4) Die Rechte des Gläubigers bestimmen sich nach den §§ 280, 283 bis 285, 311a und 326.
188 Störung der Geschäftsgrundlage
(1) Haben sich Umstände, die zur Grundlage des Vertrags geworden sind, nach Vertragsschluss schwerwiegend verändert und hätten die Parteien den Vertrag nicht oder mit anderem Inhalt geschlossen, wenn sie diese Veränderung vorausgesehen hätten, so kann Anpassung des Vertrags verlangt werden, soweit einem Teil unter Berücksichtigung aller Umstände des Einzelfalls, insbesondere der vertraglichen oder gesetzlichen Risikoverteilung, das Festhalten am unveränderten Vertrag nicht zugemutet werden kann.
(2) Einer Veränderung der Umstände steht es gleich, wenn wesentliche Vorstellungen, die zur Grundlage des Vertrags geworden sind, sich als falsch herausstellen.
(3) 1Ist eine Anpassung des Vertrags nicht möglich oder einem Teil nicht zumutbar, so kann der benachteiligte Teil vom Vertrag zurücktreten. 2An die Stelle des Rücktrittsrechts tritt für Dauerschuldverhältnisse das Recht zur Kündigung.

[188] Article 401. The Grounds of Responsibility for the Violation of the Obligation: 3. Unless otherwise stipulated by the law or by the contract, the person, who has failed to discharge, or has discharged in an improper way, the obligation, while performing the business activity, shall bear responsibility, unless he proves that the proper discharge has been impossible because of a force-majeure, i.e., because of the extraordinary circumstances, which it was impossible to avert under the given conditions. To such kind of circumstances shall not be referred, in particular, the violations of obligations on the part of the debtor's counter-agents, or the absence on the market of commodities, indispensable for the discharge, or the absence of the necessary means at the debtor's disposal.

[189] Störung der Geschäftsgrundlage
(1) Haben sich Umstände, die zur Grundlage des Vertrags geworden sind, nach Vertragsschluss schwerwiegend verändert und hätten die Parteien den Vertrag nicht oder mit anderem Inhalt geschlossen, wenn sie diese Veränderung vorausgesehen hätten, so kann Anpassung des Vertrags verlangt werden, soweit einem Teil unter Berücksichtigung aller Umstände des Einzelfalls, insbesondere der vertraglichen oder gesetzlichen Risikoverteilung, das Festhalten am unveränderten Vertrag nicht zugemutet werden kann.
(2) Einer Veränderung der Umstände steht es gleich, wenn wesentliche Vorstellungen, die zur Grundlage des Vertrags geworden sind, sich als falsch herausstellen.
(3) 1Ist eine Anpassung des Vertrags nicht möglich oder einem Teil nicht zumutbar, so kann der benachteiligte Teil vom Vertrag zurücktreten. 2An die Stelle des Rücktrittsrechts tritt für Dauerschuldverhältnisse das Recht zur Kündigung.

Thus, German law has a different position from French law, previously explained. However, it is important to remember that it is always good for the parties to know the different solutions, to avoid bitter surprises. Despite this, the discipline of force majeure can be suspended. This allows the parties a different allocation of risks and obligations thanks to singular contractual clauses.

Russia

In the Russian Civil Code, in art.401,3[190], force majeure is defined as an extraordinary circumstance, impossible to predict.

The article states that, unless otherwise provided by the law or the contract, a party enlisted in a business activity is accountable for the breach unless and until it has justified that the proper performance was made impossible by a force majeure event.

Moreover, the law, thanks to the Supreme Court of Russia, makes a list of different circumstances that do not constitute force majeure: "*breach of contractual obligations by subcontractors of the contracting party; shortage of necessary goods in the market; shortage of necessary funds*".[191]

From the study of this institution, it emerges with all evidence that epidemiological events can also be included.

If the parties disagree on the interpretation, a dispute may arise. The competence to resolve the dispute lies with the courts or arbitration tribunals.

[190] Article 401. The Grounds of Responsibility for the Violation of the Obligation: 3. Unless otherwise stipulated by the law or by the contract, the person, who has failed to discharge, or has discharged in an improper way, the obligation, while performing the business activity, shall bear responsibility, unless he proves that the proper discharge has been impossible because of a force-majeure, i.e., because of the extraordinary circumstances, which it was impossible to avert under the given conditions. To such kind of circumstances shall not be referred, in particular, the violations of obligations on the part of the debtor's counter-agents, or the absence on the market of commodities, indispensable for the discharge, or the absence of the necessary means at the debtor's disposal.

[191] https://cms.law/en/int/expert-guides/cms-expert-guide-to-force-majeure

China

According to the contract law[192] of this country and as defined in art.117,2[193] a situation of force majeure is described as such when it is an "*objective, unpredictable, inevitable and insurmountable circumstance*".

This is a very limited definition so to fill this legislative gap, very often, the judicial precedent or the interpretation of the judge is used. As happened with the current Covid-19 epidemic since already in 2003, the SARS epidemic, for example, allowed the Chinese courts and arbitration bodies to consider this type of epidemic as a cause of force majeure. Nevertheless, more recently, stipulations on force majeure are afforded in the PRC Civil Code[194], entered into effect on 1 January 2021. Art. 180 states that if force majeure causes the obligation to default, civil liability is not assumed, art.194 define the suspension of the limitation period for six months if the right of appeal is restricted due to force majeure or art.563 allows the parties to conclude a contract if its purpose is impossible to carry out due to force majeure.[195]

In any case, the consequences of force majeure and the exemption of liability depend on the specific circumstances of the case and, therefore, each situation must be analyzed independently.

US State of Louisiana

This is an interesting case as it is the only US State that has adopted a civil law system.

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[192] Contract Law of the people's republic of China, Adopted at the Second Session of the Ninth National People's Congress on March 15, 1999 and promulgated by Order No. 15 of the President of the People's Republic of China on March 15, 1999

[193] Article 117. If a contract cannot be fulfilled due to force majeure, the obligations may be exempted in whole or in part depending on the impact of the force majeure, unless laws provide otherwise. If the force majeure occurs after a delayed fulfillment, the obligations of the party concerned may not be exempted. Force majeure as used herein means objective situations which cannot be foreseen, avoided or overcome.

[194] Civil Code of the People's Republic of China, Adopted at the Third Session of the Thirteenth National People's Congress on May 28, 2020

[195] See https://cms.law/en/int/expert-guides/cms-expert-guide-to-force-majeure; https://www.mglobale.it/contrattualistica/tutte-le-news/il-principio-di-forza-maggiore-la-disciplina-nazionale-e-internazionale-a-confronto.kl; F. MARRELLA, *Forza maggiore e vendita internazionale di beni mobili in un contesto di pandemia*, in corso di pubblicazione nella Rivista di diritto internazionale privato e processuale, n.3, 2021; Studio Legale De Capoa e Associati, Clausola di Forza Maggiore: accezione nei Paesi Extra-UE maggiormente significativi nei rapporti commerciali con le imprese italiane e raccomandazioni operative

As force majeure is a legal principle that exists independently of a contract's terms, the doctrine is apply by the courts regardless of whether the contract comprises a force majeure clause.

However, it is possible that sometimes the contract fails to define a force majeure, or its definition does not cover the event in question. Louisiana Courts generally narrow the application of the doctrine when the performance is actually impossible. [196]

The Louisiana Civil Code calls these obstacles "fortuitous events". As defined by articles 1873[197]-1878[198] of the Code, the debtor is not responsible when the non-fulfillment derives from an event not foreseeable at the time of the drafting of the contract.

### 4.2.2 FORCE MAJEURE IN COMMON LAW

In Common law systems there are no legislative provisions that expressly regulate the cause of force majeure. In order to protect themselves, therefore, the States must insert a specific clause within the contract. In fact, because of the absence of a normative regulation of the institute, it will be more complex to define responsibilities and consequences if not previously determined by agreement.

United Kingdom

The term force majeure has no perceived meaning in English law. As a result, use of this term alone in an arrangement, with no accompanying interpretation, is unlikely to be active. Therefore, there is not a definitive guidance and the performance may be affected differently between different counterparties.

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[196] *V. supra*

[197] Section 2: impossibility of performance Art. 1873. Obligor not liable when failure caused by fortuitous event. An obligor is not liable for his failure to perform when it is caused by a fortuitous event that makes performance impossible. An obligor is, however, liable for his failure to perform when he has assumed the risk of such a fortuitous event. An obligor is liable also when the fortuitous event occurred after he has been put in default. An obligor is likewise liable when the fortuitous event that caused his failure to perform has been preceded by his fault, without which the failure would not have occurred. Acts 1984, No. 331, §1, eff. Jan. 1, 1985.

[198] Art. 1878. Fortuitous event after obligor performed in part If a contract is dissolved because of a fortuitous event that occurred after an obligor has performed in part, the obligee is bound but only to the extent that he was enriched by the obligor's partial performance.Acts 1984, No. 331, §1, eff. Jan. 1, 1985.

As there is no codified system of rules applicable to contractual matters, in England the "doctrine of frustration" was based on the existence of an implied condition.[199]

Subsequently, this doctrine changed and from the solution to a problem of subjective interpretation of the contract, it oriented itself towards the analysis of the contractual imbalance.[200]

In the event of a dispute as to the scope of the clause, English Courts will apply the usual principles of contractual interpretation: they examine first the actual interpretation of the clause and then the pertinent details of the circumstances impacting performance.

USA

The US legal system has codified the matter through Article 2-615[201] of the Uniform Commercial Code where the institution of impracticability is introduced with respect to supervening events affecting sellers' performances. It arranges that a seller's failure to perform a contract in whole or in part is not a breach of contract "*if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption an which the contract was made.*" [202]

Consequently, the figure of the supervening impossibility is excluded from the figure of the supervening onerousness and therefore the solutions vary according to the dominant jurisprudence of the different States in which the footprint is applied.

For example, Tennessee has introduced the definition of the term in question into internal law and considers events of force majeure the only "Acts of God" excluding all situations

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[199] G. CRISCUOLI, *Il contratto nel diritto inglese*, 2 ed., Padova, Cedam, 2001

[200] F. MARRELLA, *Forza maggiore e vendita internazionale di beni mobili in un contesto di pandemia*, in corso di pubblicazione nella Rivista di diritto internazionale privato e processuale

[201] § 2-615. Excuse by Failure of Presupposed Conditions.
Except so far as a seller may have assumed a greater obligation and subject to the preceding section on substituted performance:(a) Delay in delivery or non-delivery in whole or in part by a seller who complies with paragraphs (b) and (c) is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.
(b) Where the causes mentioned in paragraph (a) affect only a part of the seller's capacity to perform, he must allocate production and deliveries among his customers but may at his option include regular customers not then under contract as well as his own requirements for further manufacture. He may so allocate in any manner which is fair and reasonable.
(c) The seller must notify the buyer seasonably that there will be delay or non-delivery and, when allocation is required under paragraph (b), of the estimated quota thus made available for the buyer.

[202] U.C.C., Official Comment 3

depended on the will of man. Therefore, it makes a list: acts of God, hurricanes, earthquakes and other natural disasters, epidemics, terrorism, government acts, embargoes, labor strikes and lock-outs, and other events beyond the control of the parties.[203]

If it is a question of impracticability[204], the US judge, in addition to ordering the termination of the contract, can intervene to adapt it.

More deepening, the US Uniform Commercial Code governs the sale of goods of many states across the United States. In UCC § 2-615 – Excuse for Failure of Presupposed Conditions defined a rule that is often changed by express provisions, e.g. a force majeure clause. It declares that delay in performance in whole or in part is not a breach of the seller's duty if his performance has become commercially impracticable due to unforeseen supervening circumstances that were not expected by the parties at the time of contracting.

Except so far as a seller may have assumed a greater obligation and subject to section 1302.72[205] of the Revised Code on substituted performance:

*(A) Delay in delivery or non-delivery in whole or in part by a seller who complies with divisions (B) and (C) of this section is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.*

*(B) Where the causes mentioned in division (A) of this section affect only a part of the seller's capacity to perform, he must allocate production and deliveries among his customers but may at his option include regular customers not then under contract as*

[203] General Contract Clauses: Force Majeure (TN) by Practical Law Commercial Transactions, Tennessee

[204] Excuses performance where performance is unduly burdensome for a supplier of goods or services and the supplier is not at fault and has not assumed absolute responsibility for performance.

[205] 2006 Ohio Revised Code - 1302.72. (UCC 2-614) Substituted performance.

*well as his own requirements for further manufacture. He may so allocate in any manner which is fair and reasonable.*

*(C) The seller must notify the buyer seasonably that there will be delay or non-delivery and, when allocation is required under division (B) of this section, of the estimated quota thus made available for the buyer.*

Therefore, under this article, a seller is exempt from performance if that act has become infeasible due to abrupt circumstances not considered by the parties at the time of the contract.
The criteria that must be respect are the fact that the seller must not have assumed the risk of the unknow contingency, if it will be possible to deliver a portion of the materials, the seller is obliged to do that and moreover if there is a delay or a non-delivery, the seller must seasonably declare it to the buyer.
Art.2, Section 615 is also composed of official comments: number 4 provides a list of events that exempt the party from contractual liability as an increased of the costs of some material is due to an unforeseen event: "*a severe shortage of raw materials or supplies due to a contingency such as war, embargo, local crop failure , unexpected closure of main sources of supply or similar, which cause a significant increase in costs or completely prevent the seller from securing the supplies necessary for his performance*".[206]

At the international level, the clause of force majeure, find relevance in different regulatory texts.
Nevertheless, at the national level, the traditional approach to drafting force majeure clauses tends to be different in Civil law and Common law jurisdictions.
In conclusion, in common law systems, the parties have a great interest in regulating their own force majeure clause. In civil law Countries, on the other hand, greater reliance is placed on the rules of the *lex contractus*.

A particular case is given by the Shari'a in Islamic civil law. The binding force of a contractual promise, known as *quwwat al-qanun,* is viewed with less sanctity than in the common law and civil law systems described above.

[206] Comments number 4 UCC § 2-615

As it is a religious system, Islamic law is particularly concerned with the issues of individual conscience, motive, aspiration, good conscience and good faith. The external event, therefore, is considered as "act of God", identified both in a "celestial fact" and in a "fact of man which is impossible to resist". According to this, the rain that destroys a crop or an imperative order from the Authority can be considered event of force majeure.[207]

When unforeseen events occur, a creditor must not take advantage of the misfortune that afflicts his debtor as these events were not part of their agreement. Therefore, from a Muslim point of view, hold the payer of the performance in circumstances in which he had never imagined, would be inconceivable and unfair.[208]

The ground of the Force Majeure lies in the principle of fair balancing of the rights and obligations of the contracting parties. Consequently, its application is an example of the reference to the principles of fairness, justice and sacredness that must always characterize a Muslim contract.

However, recently, numerous Islamic Countries are trying to provide for a gradual westernization of the concept in question.[209]

## 4.3 FORCE MAJEURE IN THE INTERNATIONAL ORDER

At international level, there are legislative texts in which the Institution of force majeure is widely outlined. Nevertheless, as in commercial and international practice, there are clauses that are more complete than others.

[207] Studio Legale De Capoa e Associati, *Clausola di Forza Maggiore: accezione nei Paesi Extra-UE maggiormente significativi nei rapporti commerciali con le imprese italiane e raccomandazioni operative*, website www.fondazioneforensebolognese.it/upload_manuali/2020/decapoa.pdf

[208] RIVKIN, R. DAVID, *Lex Mercatoria and Force majeure*, in: Gaillard (ed.), Transnational Rules in International Commercial Arbitration (ICC Publ Nr. 480,4), Paris 1993, at 161 et seq.

[209] A focus can be made in Iran in which the Institution of Force Majeure fully exists in the legal system conforms to the interpretation of international legal systems but differs from that of other orders based on the Shari'ah.

### 4.3.1 THE SOLUTION OFFERS BY THE CISG

The United Nations Convention on Contracts for the International Sale of Goods (CISG) at art. 79.1 does not explicitly mention the words "force majeure" or "supervening impossibility", thus creating a *sui generis* case by avoiding reviving national traditions that are different from each other and do not allow to find an acceptable normative summary.[210] It relieves a party from paying damages only if the breach of the contract was due to an impediment beyond its control.[211]
This article is neutral probably because during the preparation of the CISG, it was not clear if economic issues should give rise to an exemption. A Norwegian delegation proposed to release the debtor from its obligation if there had been a radical change in the underlying circumstances, but it was rejected.[212]

As explained in the previous chapter, the CISG identifies three main characteristics that must be present for the force majeure clause to be concretely applied: first, the extraneousness of the instance of the obliger's sphere of control, secondly the ambiguity of the event at the time of stipulation of the contract and finally the occurrence of the impeding fact or its outcome[213]. By demonstrating the existence of these 3 elements, the defaulting debtor is normally deemed to have no responsibility towards the credit.
The CISG applies if the seller and the buyer have their place of business in the territory of different contracting States unless the parties have excluded it by exercising an opting out defined in art. 6[214] of the agreement. It will also apply even if the parties have not

[210] F. MARRELLA, *Forza maggiore e vendita internazionale di beni mobili in un contesto di pandemia*, in corso di pubblicazione nella Rivista di diritto internazionale privato e processuale
[211] I. SCHWENZER, *Force Majeur and Hardship in international sales contracts*, Victoria University of Wellington Law Review 709, 2008; C. BRUNNER, *Force Majeure and Hardship Under General Contract Principles: Exemption of Non-Performance in International Arbitration,* Kluwer Law International, The Hague, 2009
[212] J. HONNOLD, *Documentary History of the Uniform Law for International Sales: The studies, deliberations and decisions that led to the 1980 United Nations Convention with introductions and explanations*, Kluwer Law and Taxation Publishers, Deventer, Netherlands, 1989; I. SCHWENZER, *Force Majeur and Hardship in international sales contracts*, Victoria University of Wellington Law Review 709, 2008
[213] Moot Alumni Association, *The Vindobona Journal of international commercial law and arbitration*, LUMSA, 2012 16 VJ (2), 145-183
[214] Art.6 CISG: The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions.

designated the lex contractus, to the extent that, as a result the provisions of the d.i.pr., the law of a contracting State of the CISG applies.

*Article 79 CISG*

*(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.*

This article represents a compromise between Civil law and Common law Countries[215] as one party is exempt from liability only if the non-execution is due to an imprisonment that could not be expected. Moreover, a part must prove that the obstacle is independent of his will and had not been taken into consideration at the time of the conclusion of the contract or after the conclusion of the contract.[216]

But, if the events could have been considered by the aggrieved party, it is possible that this party asserts on integrate a specific contract clause to carry out the problem. Furthermore, the aggrieved party can overcome the impediment, even if it could not be

[215] We have seen this previously

[216] Paragraph 1 of art.79

foreseen at the time of the conclusion of the contract if this overpower is both possible and reasonable.
If its non-fulfilment was due to the default of a third party, the defaulting party of the sale must prove that the third party is exempt from its liability.[217]
According to the CISG, the debtor is exonerated from the obligation to pay damages and the party who does not execute the contract must notify the other party of the impediment and of the resulting consequences within a certain time, otherwise the defaulting party will pay the costs.[218]

After a depth analysis of this article, it can be said that the CISG completely delegates to national jurisdiction the specification of its rules through its own jurisprudence, even if all this neutrality leads to the uncertainty of the uniform international law of sale.[219] Therefore, in the interpretation of Art. 79 it is pertinent to take into consideration the practice of each State and the jurisprudence of domestic judges.

To overcome this interpretative problem of the CISG, some scholars consider it appropriate to examine Art. 7.1.7 of the Unidroit Principles. [220] Principles which enunciate general rules on international commercial contracts, to be used when the parties have expressly provided for it in the contract or, in an interpretative-integrative way as an expression of the *lex mercatoria*.

*Article 7.1.7 Unidroit Principles*

**(***1) Non-performance by a party is excused if that party proves that the non-performance was due to an impediment beyond its control and that it 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.*

[217] Paragraph 2 of art.79
[218] Paragraph 4 of at.79
[219] F. FERRARI, Autonomous Interpretation versus Homeward Trend versus Outward Trend in CISG case law, Uniform Law Review, Volume 22, Issue 1, March 2017, Pages 244–257
[220] Even if it was concluded that the Unidroit principles can be invoked to confirm the existence of some general principles on which the CISG is based, but they do not always constitute general principles of law

*(2) When the impediment is only temporary, the excuse shall have effect for such period as is reasonable having regard to the effect of the impediment on the performance of the contract.*
*(3) The party who fails to perform must give notice to the other party of the impediment and its effect on its 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, it is liable for damages resulting from such non-receipt.*
*(4) Nothing in this article prevents a party from exercising a right to terminate the contract or to withhold performance or request interest on money due.*

If the defaulting party proves that the breach was due to an obstacle deriving from events outside his sphere of control and it was not reasonably appropriate to foresee at the time of the conclusion of the contract or to overwhelm the difficulty itself, the party is exonerated from that liability. This exemption from liability is limited to the time frame that appears reasonable if the impediment is temporary.
The defaulter is always obliged to communicate the other party the impediment and the effects of the latter on the ability to comply.
If the party does not receive the notice within a reasonable time, the defaulting party is accountable for damages deriving from non-receipt.
Finally, the parties have the right to terminate the contract, to suspend the performance or to request interest on the sums of money.

The Principles of European Contract Law have similar provisions on 'Excuse Due to an Impediment'. In fact, Art. 8.108 is drafted in similar terms to UNIDROIT Principles 7.1.7. [221]

*Article 8.108 of the Principles of European Contract Law*

*(1) A party's non-performance is excused if he proves that it is due to an impediment beyond his control and that he could not reasonably have been expected to take the*

[221] D. ROBERTSON, *Symposium Paper: Long-Term Relational Contracts and the UNIDROIT Principles of International Commercial Contracts*, Australian International Law Journal, 2010

*impediment into account at the time of the conclusion of the contract, or to have avoided or overcome the impediment or its consequences.*
*(2) Where the impediment is only temporary the excuse provided by this article has effect for the period during which the impediment exists. However, if the delay amounts to a fundamental non-performance, the obligee may treat it as such.*
*(3) The non-performing party must ensure that notice of the impediment and of its effect on his ability to perform is received by the other party within a reasonable time after the non-performing party knew or ought to have known of these circumstances. The other party is entitled to damages for any loss resulting from the non-receipt of such notice.*

This article refers to similar obligations and conditions of the previous articles.

### 4.3.2 ARTICLE 79 CISG IN CASE LAW

As seen so far, the requirement for invoking force majeure is that the parties "*must prove that the obstacle is independent of their will [...]*" and that the event must be unpredictable, so the parties could not reasonably avoid it.
Considerable decisions have shown that a precise application of the Art.79 must focus on the evaluation of the risks that a party requesting took on when closing the contract.
There are several cases where the application of Art.79 of the CISG can be included. I will present some of them below to highlight how the parties invoke the force majeure clause in the face of unforeseeable events that have prohibited them from fully fulfilling their obligations.
In the situations, it will be seen that sometimes the force majeure clause is well founded, other times it will be denied because the judges failed to demonstrate whether the impediment prerequisite had been met.[222]
Most of time, Art.79 of the CISG, has been evoked in face of a price change, a climate change, an intervention of a third party, or events such a revision in national legislation or a fire.

[222] UNCITRAL, Digest of case law on the United Nations Convention on contracts for the international sale of goods, 2016 Edition, United Nations, November 2016

Art.79 CISG paragraph 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. […]"*

CASE AR 1849/94

Claims related to a change in the financial aspects of a contract are more and more frequent.

In 1995 the Rechtbank van Koophandel Court, Hasselt in Belgium ruled in favor of a Chilean seller, also citing the force majeure clause but denying its presence.
After concluding a sales contract on 37 tones of frozen raspberries between a Chilean company and a Belgian buyer, the latter asks the contract broker for a delay and to negotiate with the seller a lower price than the one agreed, charging a serious drop in the world market price for the purchased goods. However, the seller did not accept this proposal and has initiated the action for compensation for the damage.

*"In haar fax van 12/02/93, gericht aan de makelaar, blijft aanlegster op haar eerder ingenomen standpunt staan. Zij kan zich niet akkoord verklaren met een prijsvermindering en verkiest schadeloos te worden gesteld voor de door haar geleden schade, die als volgt wordt begroot."*[223]

Since the contract between the two parties was expressly governed by the CISG[224], according to art. 53 CISG the buyer is obliged to pay the purchase price and take delivery of the goods, under penalty of damages. Furthermore, when Chile ratified the aforementioned Convention, it declared that any modification of the contract must be made exclusively in writing. In this case this did not happen.

[223] Translation: "In her fax of 12/02/93, addressed to the broker, the builder maintains her position taken earlier. It cannot agree to a price reduction and prefers to be compensated for the damage it has suffered, which is estimated as follows […]"; http://www.unilex.info/cisg/case/263 last visited 28/09/2021

[224] In original language: "Partijen zijn het er over eens dat de koop wordt beheerst door het verdrag van de Verenigde Naties in zake internationale koopovereenkomsten betreffende roerende zaken, gesloten te Wenen op 11/04/1980 (Weens koopverdrag - W.K.)." AR 1849/94

In addition to this, Art. 79, the subject of our study, is invoked against the drop in prices that did not allow the defendant to fulfill their obligations.

"*Verweerster beroept zich eveneens op art. 79 W.K. dat bepaalt dat een partij niet aansprakelijk is voor een tekortkoming in de nakoming van één van haar verplichtingen indien zij aantoont dat de tekortkoming werd veroorzaakt door een verhindering die buiten haar macht lag en dat van haar redelijkerwijs niet kon worden verwacht dat zij bij het sluiten van de overeenkomst met die verhindering rekening zou hebben gehouden en dat zij deze of de gevolgen ervan zou hebben vermeden of te boven zou zijn gekomen."*[225]

The Court found that the party's non-performance was not due to an event of force majeure since "*price fluctuations are predictable events in international trade and far from making it impossible to performance, determine an economic loss well included in the normal risk of commercial activities* "[226].

A a result of this, the seller could terminate the contract and he was granted not only the compensation for damages, but also the reimbursement of the costs incurred for the storage of the goods not delivered.

Following this, the Court determined *ex aequo et bono* the amount of the loss of profit, considering the probability of the sale of the cover by the seller at a price fairly lower than that contractually agreed.[227]

[225] Translation: "The defendant also invokes art. 79 CISG which provides that a party is not liable for a failure to perform any of its obligations if it demonstrates that the failure was caused by an impediment beyond its control and that it could not reasonably are expected to have taken this impediment into account when concluding the contract and to have avoided or overcome it or its consequences"; http://www.unilex.info/cisg/case/263 last visited 28/09/2021

[226] In original language: "Verweerster kan zich dan ook niet op de bepalingen van art. 79 W.K. beroepen." AR 1849/94; http://www.unilex.info/cisg/case/263 last visited 28/09/2021

[227] Source: Prof. H. Van Houtte and Dr. P. Wautelet, Katholieke Universiteit Leuven, Belgium, http://www.unilex.info/cisg/case/263

CASE 1302[228]

This case is very similar to the one presented above as parties invoke the force majeure clause in the face of a price change of the goods.

The Polish seller, in 2004 in the face of an imminent grow in the price of the goods after the conclusion of the contract, refuses to deliver the coke fuel to the German buyer at the agreed amount. Consequently, the buyer brought the dispute before the Court invoking the damages resulting from the breach of the contract. The seller claimed: "*that it could not have predicted the extent of the price increase and thus could have not foreseen the loss, nor its extent, which resulted from the breach of contract*."[229]

The Court of Appeal, in front of these proves, ruled in favor of the seller. However, the case went to the Supreme Court, which overturned the decision taken by the Court.

The Supreme Court accentuated that the *"foreseeability of loss under Article 74[230] CISG cannot be equated with the impediment beyond control, which releases the party in breach from the liability, as long as it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of contract.*"[231].

From the sentence in original language: "*W okolicznościach rozpoznawanej sprawy zabrakło zatem zbadania i oceny, czy gwałtowny wzrost cen koksu i skala tego wzrostu mogą być potraktowane jako przesłanka zwalniająca pozwaną z odpowiedzialności na podstawie art. 79 ust. 1 konwencji. W piśmiennictwie przyjmuje się jednak, że nawet przeszkody nie do pokonania nie zwalniają dłużnika z odpowiedzialności, jeśli musiał się z nimi racjonalnie liczyć przy zawieraniu umowy jako wydarzeniami, których możliwość*

[228] Poland: Supreme Court, V CSK 91/11, T.K.M.E. GmbH (German buyer) v. P.K. S.A. (Polish seller) 8 February 2012, Original in Polish Published in Polish: www.sn.pl

[229] From the abstract made by Maciej Zachariasiewicz, https://documents-dds-ny.un.org/doc/UNDOC/GEN/V13/871/88/PDF/V1387188.pdf?OpenElement last visited 28/09/2021

[230] Art.74 CISG: Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract.

[231] From the abstract made by Maciej Zachariasiewicz, https://documents-dds-ny.un.org/doc/UNDOC/GEN/V13/871/88/PDF/V1387188.pdf?OpenElement last visited 28/09/2021

*wystąpienia zarysowuje się perspektywicznie w okresie mającego nastąpić niebawem wykonywania umowy*."[232]

Also in this case a change in price was not considered as an event of force majeure.

CASE No. 03 C 1154

An interesting case that invokes art.79 of the CISG in front an event of force majeure due to climate change is the one that involves the U.S. Distric Court, Northern District of Illinois, East. Div. in 2004.

After the conclusion of the contract between a German seller and a US buyer which provided for the delivery of 15,000-18,000 tons of Russian railways, the buyer evoked breach of contract and fraud due to the non-delivery of the goods by the German seller. The latter invoked the force majeure clause justifying its non-fulfillment based on the unexpected blockade of the port of St. Petersburg at the time of delivery which did not allow ships to transit normally.

*"Forberich asserts that its failure to perform should be excused because it was prevented from shipping the rail by the fact that the St. Petersburg port unexpectedly froze over on approximately December 1, 2002. (D.E. 22 at 4-5.)"[233]*

*"On January 10, 2003, Mr. Forberich sent Mr. Owczarzak a letter stating that Forberich could not ship the rails because "[s]ince the last 3 weeks the port is as well as frozen and nothing is possible." (D.E.19, Ex. 8)."[234]*

[232] Wyrok z dnia 8 lutego 2012 r., V CSK 91/11
Translation: "Therefore, in the circumstances of the case, it was not possible to examine and assess whether the sharp increase in coke prices and the scale of this increase could be treated as a premise exempting the defendant from liability pursuant to Art. 79 sec. 1 of the convention. However, the literature assumes that even insurmountable obstacles do not release the debtor from liability if he had to rationally take them into account when concluding the contract as events whose possibility of occurrence is outlined in the future in the period of the contract to be performed soon."

[233] From the full text: United States District Court, Northern District, Illinois, Eastern Division Raw Materials Inc. v. Manfred Forberich GmbH & Co., KG, No. 03 C 1154 July 6, 2004, http://www.unilex.info/cisg/case/987 last visited 28/09/2021

[234] *V.supra*

Since the contract did not incorporate any explicit provision of force majeure, the Court examined Art. 79 of the CISG also using as a guide the jurisprudence and Art. § 2-615 of the UCC.

According to art.79, previously explained, "*a party is not liable for failure to perform any of his obligations if he proves that 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 its consequences."*[235]

The Court applied a three-step test: "(1) if an impediment occurred, (2) if the impediment made enforcement impracticable, and (3) if the impediment was foreseeable."[236] Regarding the last conditions the UCC underline that *"[i]f the risk of the occurrence of the contingency was unforeseeable, the seller cannot be said to have assumed the risk. If the risk of the occurrence of the contingency was foreseeable, that risk is tacitly assigned to the seller."*

The seller has presented several pieces of evidence showing that the frozen port prevented it from fulfilling this obligation. In particular, Mr. Forberich testified that the ice interfered with the expeditions "not only in mid-December, but as early as the end of November"[237]. In fact, it would have been able to meet the deadline of 31 December 2002 for delivery to the United States by rail shipment in the last week of November or in the first days of December, but he was prevented from doing so precisely because of the frozen port. To support his thesis, he also presented evidence that the severity of the winter in 2002 and the early start of the harbor freeze and its aftermath were anything but ordinary events.[238] He also testified that these are "unexpected weather conditions".[239]

*"Mr. Forberich testified that although ice breakers are normally used to allow for shipping, the winter of 2002 was the worst winter in St. Petersburg in almost sixty years*

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[235] Art.79 CISG

[236] In the full text of the sentence: "Under § 2-615 of the UCC, "three conditions must be satisfied before performance is excused: (1) a contingency has occurred; (2) the contingency has made performance impracticable; and (3) the nonoccurrence of that contingency was a basic assumption upon which the contract was made." Waldinger Corp. v. CRS Group Engineers, Inc., 775 F.2d 781, 786 (7th Cir.1985)", http://www.unilex.info/cisg/case/987 last visited 28/09/2021

[237] DE 21, Ex. F, at 106

[238] From the full text: United States District Court, Northern District, Illinois, Eastern Division Raw Materials Inc. v. Manfred Forberich GmbH & Co., KG, No. 03 C 1154 July 6, 2004, http://www.unilex.info/cisg/case/987 last visited 28/09/2021

[239] Id. A 77

*and that ice interfered with shipping at the end of November and that even the icebreakers were stuck in the ice. (D.E. 21, Ex. F, at 106.) He also testified that these were "unexpected weather conditions." (Id. at 77.)"* [240]

Because of these questions of fact, the Court ruled in favor of the seller, declaring that his force majeure could be practicable.

CASE 1085[241]

Another case involving the invocation of the force majeure clause following climate change is the following.

Two parties have entered a contract for the sale of a processed food product. After agreeing the quantity and the price, a dispute arose that did not allow the seller to fulfill his contractual obligations. The cause was the drought which led to the decrease procurement of the necessary raw materials.

Against this, the buyer did not complete the payment, also complaining of poor quality of the goods.

The arbitrator, applying the Convention, deemed the invocation of the force majeure clause by the seller to be legitimate.

The admissibility of the clause was consolidated thanks also to the certificate that the local Chamber of Commerce had delivered to the buyer. This certificate attested to the presence of climatic conditions beyond the control of every single person that did not allow the buyer to fulfill his contractual obligations. The force majeure clause included in the contract explicitly provided that the case had to be proven through this certificate.

*"In support of this opinion, it was noted that the seller had provided the buyer with a certificate from its local Chamber of Commerce stating that climatic conditions beyond the seller's control prevented it from fulfilling its obligations under the contract. The*

[240] From the full text: United States District Court, Northern District, Illinois, Eastern Division Raw Materials Inc. v. Manfred Forberich GmbH & Co., KG, No. 03 C 1154 July 6, 2004, http://www.unilex.info/cisg/case/987 last visited 28/09/2021

[241] Court of Arbitration of the International Chamber of Commerce Arbitration Case No. 8790 2000, Available in English: http://cisgw3.law.pace.edu/cases/008790i1.html last visited 28/09/2021

*contractual force majeure clause specifically provided that evidence of force majeure would be brought through such certificates."*[242]

Consequently, the buyer was not exempt from paying the 90 tons delivered and the force majeure has been recognized.

CASE 1492[243]

Another case that provides for the application of Art. 79 due to natural changes and price volatility is the following.

The dispute involves an international contract for the sale of pine nuts between a Spanish seller and a Belgian buyer.

Due to a peronospera of conifers, production was reduced and consequently, according to the law of supply and demand, prices increased dramatically.

Faced with the invocation of the force majeure clause by the seller, the buyer objected as this event was not unforeseen or unforeseeable pursuant to Art. 79 since in that period the market had experienced a strong directly related price volatility to the harvest and the quality of the pine nuts.

The Court of first instance ruled in favor of the seller, but the Provincial High Court ruled otherwise. In fact, the producer could preserve himself from the exposures of the market by introducing supply and price conditions appropriate to these circumstances and characteristics of the market.

In addition, the Court proved that the seller was still able to fulfill his obligations by asking to renegotiate the price.

The Court overturned the judgment of the Court of First Instance and managed the seller to grant the buyer with the pine nuts not yet supplied, denying the force majeure clause.

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[242] From the abstract made by Lorraine Isabelle de Germiny, https://documents-dds-ny.un.org/doc/UNDOC/GEN/V11/844/35/PDF/V1184435.pdf?OpenElement last visited 28/09/2021

[243] Spain: Valladolid Provincial High Court (Section 1)›Dry Top N.V v. Sociedad Cooperativa Piñón-Sol CYL, 6 April 2015, Original in Spanish Complete text: http://www.cisgspanish.com/wp-content/uploads/2015/08/SAP- Valladolid-6-abril-2015.pdf last visited 28/09/2021

*"[…] El recurso como argumento esencial de su desacuerdo con la sentencia expone que los motivos aducidos por la entidad demandada para no cumplir no son suficientes para exonerarle de su responsabilidad en los términos del art. 79 de la Convención de las Naciones Unidas sobre los contratos de compraventa internacional de mercaderías hecho en Viena el 11 de abril de 1980, pues según las pruebas practicadas no hubo imposibilidad material de entregar la mercancía contratada en 30.000 Kg de piñón en el contrato de 2 de septiembre de 2011 aceptado el 27 de octubre del mismo año. […]"*[244]

*"[…] El Juzgador a quo considera que fue imprevisible e inevitable en el momento de celebración del contrato una plaga en las coníferas que redujo su producción con incremento de los precios y que no cabía razonablemente esperar. La Sala no puede compartir el criterio de la sentencia apelada y en uso de las facultades de plena revisión que presenta la naturaleza del recurso apelación llega a conclusiones distintas para resolver que lo sucedido no era imprevisible ni inevitable para la demandada como resulta de sus propias alegaciones al contestar tanto a la demanda como a las reclamaciones extrajudiciales de la actora que figuran en su carta de 5 de noviembre de 2012 (folios 34 y 35 de las actuaciones); ni tampoco ha existido imposibilidad material de cumplir por lo siguiente […]"*[245]

[244] Roj: SAP VA 367/2015 - ECLI:ES:APVA:2015:367; No de Recurso: 204/2014, https://www.uncitral.org/docs/clout/ESP/ESP_060415_FT.pdf# last visited 28/09/2021
Translation: "[…] The appeal as an essential argument for its disagreement with the judgment states that the reasons given by the defendant for not complying are not sufficient to exonerate it from its responsibility under the terms of art. 79 of the United Nations Convention on contracts for the international sale of goods made in Vienna on April 11, 1980, because according to the tests carried out there was no material impossibility of delivering the contracted goods in 30,000 Kg of pinion in the contract of 2 September 2011 accepted on October 27 of the same year. […]"

[245] Roj: SAP VA 367/2015 - ECLI:ES:APVA:2015:367; No de Recurso: 204/2014, https://www.uncitral.org/docs/clout/ESP/ESP_060415_FT.pdf# last visited 28/09/2021
Translation: "[…] The Judge considers that a plague in the conifers was unpredictable and unavoidable at the time of conclusion of the contract that reduced their production with an increase in prices and that it could not be reasonably expected. The Chamber cannot share the criterion of the sentence appealed and in use of the powers of full review presented by the nature of the appeal, it reaches different conclusions to decide that what happened was not unforeseeable or inevitable for the defendant as it results from its own allegations. When answering both the lawsuit and the plaintiff's extrajudicial claims that appear in her letter of November 5, 2012; nor has there been a material impossibility of complying with the following […] "

Art.79 CISG paragraph 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. […]"*

CASE 469[246]

A Chinese company sued a Russian organization for failing to comply with contractual obligations. In the face of the non-payment of the goods from the Russian buyer, it asked the court to be exonerated from its liability since the non-fulfillment was the cause of a third party: the buyer's bank went bankrupt.

However, in the face of the evidence, the Court found that the purchaser's claim to exempt him from his liability was unfounded since the bankruptcy of the bank is not a reason for exemption.

Consequently, the buyer was required to pay the price of the goods received with interest. [247]

*"The tribunal considered unfounded the buyer's claim that it should be released from liability for non- performance of the contract, on the basis of article 79 CISG since a bank's bankruptcy is not among the grounds for release from liability indicated in the article".[248]*

[246] Case 469: Russian Federation: Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry Arbitral award in case No. 269/1997, 6 October 1998, Original in Russian, Published in Russian: Arbitrazhnaya praktika za 1998 god, ed. M. G. Rozenberg (Moscow, Statut), 1999, p. 176

[247] Artt.53 and 62 CISG

[248] From the abstract made by Alexander Komarov, https://documents-dds-ny.un.org/doc/UNDOC/GEN/V03/864/17/PDF/V0386417.pdf?OpenElement last visited 28/09/2021

CASE 142

Another case involving the application of the CISG to an international contract and the citation of the force majeure clause, but which denies the exemption, is the one that took place in Russia in 1995, involving the Tribunal of Int'I Commercial Arbitration at the Russian Federation Chamber of Commerce.

Due to the bank's failure to indicate the amount to be paid for the goods under the contract, a Russian buyer failed to make payment to a German seller. The buyer therefore asked the Court to exempt him from his liability by invoking the clause of force majeure as he was unable to have resources in foreign currency.

As explained previously, in the conclusion of the contract the parties can draw up a very specific force majeure clause, listing all the reasons for exemption.

At the time of the conclusion of the contract, the two parties presented an exhaustive list of circumstances of force majeure, but the lack of foreign currency on the part of the buyer was not contained in the list. The Court, consequently, sentenced the buyer to pay for the goods and did not release him from liability for the breach of contractual obligations.[249]

CASE 861[250]

This is another case that refers to paragraph two of Art. 79 of the CISG.

Against a third party, the bank, the buyer has not fulfilled his contractual obligation to pay for the goods as the third party refused to issue the letter of credit. Invoking the cause of force majeure as all this was deemed beyond his control and therefore not responsible. The Court, however, found a precedent in the bank's action. The financial institution, in fact, refused to proceed with the issuance of the letter of credit in the face of numerous failed commercial transactions of the buyer. Since the bank's action could not be

[249] Abstract: CLOUT Case 142, in A/CN.9/SER.C/ABSTRACT/10, 16 August 1996, reproduced with kind permission of the Secretary, United Nations Publications Board}}

[250] People's Republic of China: China International Economic and Trade Arbitration Commission [CIETAC]
29 September 1997, Original in Chinese , Published in English: http://cisgw3.law.pace.edu/cases/970929cl.htm last visited 28/09/2021

considered an unforeseeable event, the invocation of the force majeure clause could not be founded.
The case ended with compensation for damages pursuant to art. 22 Law of the People's Republic of China on Economic Contracts of Foreign Interest and Art. 77 CISG.

Case 272[251]
An impediment can be caused also by a failure to act by a third-party supplier on whom the seller had placed trust. According to the CISG the seller bears the acquisition risk, unless otherwise agreed.

Following the sale of vine wax for the treatment of vine stocks by a German seller to an Austrian buyer, the latter appeals to the Court for a lack of conformity of the goods due to the damage of some plants after the treatment with wax.
The seller denied responsibility by blaming the supplier who had delivered him a faulty production, arguing that this impediment was beyond his control. He therefore invokes Art. 79, paragraph 1 and 2.
The Court held that the defective goods could constitute an impediment, but according to Art. 79, this impediment had to be demonstrated by the seller, stressing that it was beyond his control, that it was not foreseeable at the time of the conclusion of the contract and that the consequences could not be avoided or overcome.

"*Daß der Schaden nicht voraussehbar war, muß hingegen der Schuldner beweisen (Staudinger/Magnus, aa0, 5 74 Rdnr. 62).*"[252]

"*Entgegen der Ansicht der Kammer scheitert eine Haftung der Beklagten nicht an Art. 79 CISG.*
*Gemäß Art. 79 CISG hat eine Partei für die Nichterfüllung einer ihrer Pflichten dann nicht einzustehen, wenn sie beweist, daß die Nichterfüllung auf einem außerhalb ihres Einflußbereichs liegenden Hinderungsgrund beruht und daß von ihr vernünftigerweise nicht erwartet werden konnte, den Hinderungsgrund bei Vertragsabschluß in Betracht zu*

[251] Germany: Oberlandesgericht Zweibrücken; 8 U 46/97 31 March 1998, Original in German
[252] VIII ZR 121/98, Translation: "On the other hand, the debtor has to prove that the damage could not have been foreseen (Staudinger / Magnus, loc. Cit., 5 74 No. 62)."

*ziehen oder den Hinderungsgrund oder seine Folgen zu vermeiden oder zu überwinden. Beruht die Nichterfüllung einer Partei auf der Nichterfüllung durch einen Dritten, dessen sie sich zur völligen oder teilweisen Vertragserfüllung bedient, so ist diese Partei von der Haftung nur befreit, wenn sie nach Absatz 1 selbst befreit ist und wenn der Dritte selbst ebenfalls nach Absatz 1 befreit wäre, sofern Absatz 1 auf ihn Anwendung fände."*[253]

However, the Court states that the supplier is not considered a third party and that even if the buyer acted only as an intermediary, it was still responsible for the lack of conformity of the goods.

*"[…]1 CISG, weil die Beklagte sich entlasten könne. Absatz 2 dieser Bestimmung komme nicht in Betracht, weil diese nur Fälle erfasse, in denen der Schuldner Dritte damit betraue, für ihn in eigener Verantwortung den Vertrag zu erfüllen. Hier seien die Dritten jedoch lediglich Zulieferer. […]"*[254]

[253] VIII ZR 121/98; Translation: "Contrary to the view of the Chamber, liability of the defendant does not fail due to Art. 79 CISG.
According to Art. 79 CISG, a party is not responsible for the non-fulfillment of one of its obligations if it proves that the non-fulfillment is due to an impediment outside its sphere of influence and that it could not reasonably be expected to consider the impediment when concluding the contract pulling or avoiding or overcoming the obstacle or its consequences. If the non-fulfillment of a party is based on the non-fulfillment by a third party, which it makes use of for the complete or partial fulfillment of the contract, this party is only released from liability if it is released according to paragraph 1 and if the third party itself is also released according to paragraph 1 if paragraph 1 were to apply to him."

[254] VIII ZR 121/98, Translation: "1 CISG, because the defendant can exonerate itself. Paragraph 2 of this provision is out of the question because it only covers cases in which the debtor entrusts third parties to perform the contract on his own responsibility. Here, however, the third parties are only suppliers."

Art.79 CISG paragraph 3

*"[...] The exemption provided by this article has effect for the period during which the impediment exists. [...]"*

CASE 1497[255]

In this case, Art. 79 of the CISG is invoked in the face of a fire that broke out at the headquarters of a Spanish buyer.

*"Añadió que, en diecisiete de marzo de dos mil ocho, la demandada comunicó a su representada, por correo electrónico, que el quince de marzo de dos mil ocho se había incendiado su fábrica, a lo que la destinataria respondía que no podía retener en su poder la mercancía."*[256]

Faced with this unpredictable event and beyond his control, the buyer refused to accept the milk products of a Belgian seller and to pay the price, as he was exempted from non-fulfillment according to Art. 79.

*"En efecto, Freigel Foodsolutions, SA consideró que dicho incendio constituía el impedimento ajeno a su voluntad al que el artículo 79 de la Convención de las Naciones Unidas sobre los contratos de compraventa internacional de mercaderías, de 11 de abril de 1980, vincula la exoneración del contratante incumplidor."*[257]

As a result, the Belgian seller was contrary to the provisions of the Spaniard and filed a first appeal for the payment of the goods, even those not delivered.

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[255] Spain: Supreme Court (Civil Chamber, Section 1) 271/2014 St. Paul N.V. v. Freigel Foodsolutions, 5 June 2014 Original in Spanish Complete text: http://www.cisgspanish.com/wp-content/uploads/2014/07/Jur_TS- Sala-de-lo-Civil-Seccion-1a-Sentencia-num.-271-2014-de-5- junio_JUR_2014_187171.html

[256] Tribunal supremo, Sentencia num. 271/2014 de 5 junio, JUR/2014/187171; Translation: "It added that, on March 17, 2008, the defendant informed her client, by email, that on March 15, 2008, her factory had burned down, to which the addressee replied that she could not retain in his power the merchandise"

[257] Tribunal supremo, Sentencia num. 271/2014 de 5 junio, JUR/2014/187171; Translation: "Indeed, Freigel Foodsolutions, SA considered that the fire constituted the impediment beyond its control to which Article 79 of the United Nations Convention on International Merchandise Sale Contracts, of April 11, 1980, binds the exoneration of the non-compliant contractor."

The buyer, recognizes his debt, was against paying the price of the shipments he did not wish to receive following the fire.

The Court of first instance applies the aforementioned provision of the Convention in favor of the buyer using the following reasoning: "*(a) it is an accredited fact, supported by documentary evidence, that a fire took place that destroyed the part of the defendant's factory in which was prepared the product for which the plaintiff supplied the cheese"; (b) that event constituted a force majeure incident; and (c) it was inadmissible for the seller to initiate the transportation of a part of the product "on the afternoon of 17 March 2008, when the incident had already been reported, and even more so for it to continue manufacturing the product for the defendant, given the extent of the incident and the impossibility of acceptance".* [258]

Meanwhile, the case was brought to the Supreme Court where the buyer again invoked Art.79 of the CISG.

The first instance ruling partially accepted the request.

*"[…] mediante sentencia que ganó firmeza, que el incendio del establecimiento de Freigel Foodsolutions, SA debía ser considerado un impedimento ajeno a la voluntad de ésta - en el sentido del artículo 79 de la Convención de las Naciones Unidas sobre los contratos de compraventa internacionalde mercaderías -, con la consecuencia de exonerar de responsabilidad a dicha compradora demandada por el incumplimiento de los contratos litigiosos - esto es, por negarse a recibir y a pagar el precio de los productos que la vendedora quería entregarle con posterioridad al incendio. […]"*[259]

Art.79 CISG paragraph 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*

[258] From the abstract made by María del Pilar Perales Viscasillas, National Correspondent, https://documents-dds-ny.un.org/doc/UNDOC/GEN/V15/063/09/PDF/V1506309.pdf?OpenElement last visited 28/09/2021

[259] Tribunal supremo, Sentencia num. 271/2014 de 5 junio, JUR/2014/187171; Translation: "[…] Through a ruling that became final, that the fire at the Freigel Foodsolutions, SA establishment should be considered an impediment beyond its control - in the sense of Article 79 of the United Nations Convention on sales contracts internacionalde merchandise -, with the consequence of exonerating the defendant buyer from liability for the breach of the disputed contracts - that is, for refusing to receive and pay the price of the products that the seller wanted to deliver after the fire. […] "

*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. […]"*

CASE 1101

This case involves a Chinese buyer who buys threading steel from a Singapore seller. Upon initial payment by letter of credit, the ship was loaded. However, the subsequent payment was delayed and both the buyer and the seller made requests for the modification of the contract. It included a replacement of the goods by no longer accepting the delivery of the previous goods as no import license had been obtained. The two parties have accused each other because the seller has not booked the ship for the delivery of the goods in a short time and the buyer has not made payments immediately, resulting in slow receipt of the goods as well.

The parties, therefore, went before the Arbitral Tribunal to settle their disputes such as compensation with interest. Since both States are contracting parties and, therefore parties to the CISG, the Court deemed it necessary to apply the Convention.

In the sentence, Art. 79 was invoked against the inability of the buyer to obtain the import license. As has been studied so far, one of the conditions necessary to invoke the force majeure clause is the timeliness in informing the other party of the impossibility: "[…] *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 […]".*[260]

In the case study this did not happen, consequently, according to the court, the buyer did not have the right to invoke this clause to justify the slowness in taking delivery of the goods. Against this, the court ruled blaming the behavior of the buyer for the non-delivery of the goods.[261]

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[260] Art.79, 4 CISG

[261] People's Republic of China: China International Economic & Trade Arbitration Commission [CIETAC]
CISG/2002/17, 4 February 2002, Original in Chinese
English translation: http://cisgw3.law.pace.edu/cases/020204c2.html
https://documents-dds-ny.un.org/doc/UNDOC/GEN/V11/858/73/PDF/V1185873.pdf?OpenElement last visited 28/09/2921

*"According to the Tribunal, the buyer had failed to notify the seller in a timely manner, and therefore it did not have the right to use the clause of force majeure in the contract to make counter arguments to excuse its slowness in taking delivery of the goods".*[262]

CASE 1405[263]

In the second chapter, the importance of choosing the *lex contractus* is highlighted. Particularly fundamental for the drafting of an international contract and for the resolution of disputes.

This application is point up in the case that I am going to expose in which it is possible to perceive the role of national law and the application of the Convention in international sales contracts.

Following the conclusion of a contract for the sale of corn between a Swiss buyer and a Ukrainian seller, on 26 July 2011, the Swiss initiated an arbitration before the International Court of Commercial Arbitration in the Ukrainian Chamber of Commerce and Industry (court) for the non-fulfillment of contractual obligations by the other party.

The *lex contractus* was Ukrainian law, not limited by any provision. However, the central issue was the applicability of the Vienna Convention. Since Ukraine is a contracting state of the CISG, according to Art. 1, the Convention is part of the law of the country and is therefore defined as the applicable law.

Furthermore, pursuant to Art. 6, the parties have the possibility to exclude the application of the Convention, but this did not occur in the contract in question.

*"The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions".*[264]

Given this premise, attention now shifts to the invocation of Art. 79 due to the seller's failure to deliver the corn. The non-compliance was caused by the change in national

[262] From the abstract made by Yun Wang, https://documents-dds ny.un.org/doc/UNDOC/GEN/V11/858/73/PDF/V1185873.pdf?OpenElement last visited 28/09/2021

[263] Ukraine: International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry, 218y/2011, 23 January 2012, Original in Russian

[264] Art.6 CISG

legislation which prevented the party from obtaining the license to export the goods. The lack of the license prohibited the export and allowed the cancellation of the contract pursuant to Art. 13 of the Gafta no. 200.[265]

Despite the invocation of Art. 79, the Court recognized that the contract contained other provisions of force majeure and pursuant to Art. 6 of the CISG, these provisions prevail over Art. 79, paragraph 1.

Against this, the Court found the circumstances of a major cause provided for both by the contract and also by the Convention to be well founded.

*"Having examined the provisions of the contract, the tribunal found that the failure to supply the second to fifth shipments of corn was due to "force majeure" circumstances as envisaged, in any case, both in the contract and Article 79 CISG."*[266]

### 4.3.3 THE SOLUTION OFFERS BY THE ICC CLAUSE[267]

The International Chamber of Commerce issued the ICC Force Majeure Clause 2003 (ICC Clause) in February 2003, which in art. 1 recalls some characteristics identified by the Vienna Convention of 1980 at art.79[268].

According to the last ICC Force Majeure and Hardship clauses March 2020, the purpose of force majeure clauses is to draw a "*reasonable compromise between two contradictory needs: the right of a party to be exonerated from its obligations when their fulfilment is*

[265] PROHIBITION: In case of prohibition of export, blockade or hostilities or in case of any executive or legislative act done by or on behalf of the government of the country of origin of the goods, or of the country from which the goods are to be loaded restricting export, whether partially or otherwise, any such restriction shall be deemed by both parties to apply to this contract and to the extent of such total or partial restriction to prevent fulfilment whether by shipment or by any other means whatsoever and to that extent this contract or any unfulfilled portion thereof shall be cancelled. Sellers shall advise Buyers without delay with the reasons therefor and, if required, Sellers must produce proof to justify the cancellation.

[266] From the abstract made by Anna Stepanowa, https://documents-dds-ny.un.org/doc/UNDOC/GEN/V14/055/40/PDF/V1405540.pdf?OpenElement last visited 28/09/2021

[267] To get the document go to https://iccwbo.org/publication/icc-force-majeure-and-hardship-clauses/

[268] The extraneousness of the event from the sphere of control of the obligee; the unpredictability of the event at the time of signing the contract; the insuperability of the impeding fact or its outcomes

*prevented by unforeseeable events for which it is not responsible, and the right of the other party to obtain the performance of the contract*". [269]

The real definition that it gives is*:*

*"Force Majeure means the occurrence of an event or circumstance ("Force Majeure Event") that prevents or impedes a party from performing one or more of its contractual obligations under the contract, if and to the extent that the party affected by the impediment ("the Affected Party") proves: a) that such impediment is beyond its reasonable control; and*
*b) that it could not reasonably have been foreseen at the time of the conclusion of the contract; and c) that the effects of the impediment could not reasonably have been avoided or overcome by the Affected Party."*[270]

It is also possible that a party invokes the force majeure clause for non-compliance by third parties (subcontractors), but it must prove that the latter has been subject to force majeure. This incorporates Article 79.2 of the CISG.

Furthermore, in art. 3 it indicates a list of the most common events whose occurrence involves the application of the force majeure clause:

*"a) war (whether declared or not), hostilities, invasion, act of foreign enemies, extensive military mobilization;*
*b) civil war, riot, rebellion and revolution, military or usurped power, insurrection, act of terrorism, sabotage or piracy;*
*c) currency and trade restriction, embargo, sanction;*
*d) act of authority whether lawful or unlawful, compliance with any law or governmental order, expropriation, seizure of works, requisition, nationalization;*
*e) plague, epidemic, natural disaster or extreme natural event;*

[269]ICC FORCE MAJEURE AND HARDSHIP CLAUSES 2020, Introductory note and commentary, https://iccwbo.org/content/uploads/sites/3/2020/07/icc-forcemajeure-introductory-note.pdf
[270] ICC FORCE MAJEURE AND HARDSHIP CLAUSES 2020, Introductory note and commentary, https://iccwbo.org/content/uploads/sites/3/2020/07/icc-forcemajeure-introductory-note.pdf

*f) explosion, fire, destruction of equipment, prolonged break-down of transport, telecommunication, information system or energy;*
*g) general labour disturbance such as boycott, strike and lock-out, go-slow, occupation of factories and premises."*

This list was due to a long work by the Working Group that restricted the listed events by delating some circumstances previously presented in the 2003 FM Clause and including new ones based on the recent global developments.[271]
The parties are allowed to modify the list and if some events are not included, they can be certified as force majeure by showing the three conditions.
The parties are free to adjust the clause by making it more prohibitory or more adaptable by always keeping in mind to benefit both parties.
In many international contracts the parties, for fear of forgetting certain events to which the performance may be subject, prefer to make a general reference to the ICC Clause, instead of writing their own clause of force majeure.

## 4.4 CONSEQUENCES OF FORCE MAJEURE

Force majeure events come to an end sooner or later. In general, the consequences of an event of force majeure can lead to different solutions at the contractual level.
In the stipulation of an international sale contract, the parties can insert a force majeure clause that allows to mitigate the consequences of the event and to find solutions following the occurrence to fulfill their contractual obligations.
As we have seen previously, some clauses can be well detailed and include an exhaustive list of events classified as force majeure, other times there is only a hint or a reference.
The question now concerns the consequences that the force majeure event has on contracts.
Sometimes parties will make provisions for the actions to carry out when the event finish, other times they won't, perhaps because the probability that the event will occur is not

[271] See the declaration of the Working Party and Chair of the CLP Commission, Ercüment Erdem, in his presentation made at the 38th Annual Conference of the ICC Institute of World Business Law on "Hardship and Force Majeure in International Commercial Contracts" (Paris 19-12-2018)

considered or at least it is difficult to set regulations for a circumstance that is unpredictable. However, it is always advisable to include the clause in the contract so that the consequences can be more accurately regulated. We have also been taught this in the face of the Covid-19 pandemic, an event that no one would ever have thought could occur. In the investigation, firstly, the various relieves of the contracts will be analyzed in general and then the focus will be on current events such as the Covid-19 pandemic.
Even if the cases are not numerous, as we are still in an emergency regime, some case studies have been presented to further underline the importance of inserting a force majeure clause to "save" the contract as sometimes an event that no one thought il would happen, it actually materialized.

### 4.4.1 THE MOST COMMON RELIEVES

The consequences of call for force majeure depend on the conditions of the contract, nevertheless the parties must make everything to limit the damage caused by the force majeure.
It is important to consider whether the relief offered by the force majeure clause is what the parties expect.
Suspension or termination are the most common, but also compensation or negotiation provisions are frequent.
Many force majeure clauses are layered and the type of relief available changes with time or at the option of the parties.
Sometimes, the effect of the clause can raise some problems, in particular when the event occurs when a party has performed. This type of problem is very common nowadays, as consequences of the Coronavirus.[272]

Most of times, like we have seen in the cases presented above, the affected party claims financial compensation from the non-affected party for costs associated with the force majeure event.

[272] See NetOne, Inc. v. Panache Destination Management, Inc., No. 20-cv-00150-DKW-WRP (D. Hawaii June 5, 2020)

If according to Art.79 of CISG the non-performance is due to an impediment that accomplish the conditions of the article, there is no obligation for the obligor to be relieved from its duty to compensate damages. Unless the parties have provided otherwise in their contract, it is possible to speak about the so called "liquidated damages".
However, it should be emphasized that there is a difference between Civil law Countries, in which the parties have the power to provide for penalties, and Common law Countries where a distinction is made between liquidated damages clauses and penalty clauses.[273]
The term means the amount of damages predetermined in the contract and which in the event of non-fulfillment one party must pay the other as compensation.[274]
There is a lot to say about this topic, but my attention will be based on the clause that we can find in an international sale contract, like in Council of the European Union General Conditions General Secretariat February 2019 – EN.[275]

If an event of force majeure is considered such, it must be understood whether this leads to a suspension of the contract for the time being or to a termination.
Suspension is a common consequence when the clause is invoked at the time of its manifestation. Suspension of the rights and obligations for the duration of the force majeure event for either or both parties. Therefore, an extension of the time to perform until the event ceases may be grant to the affected party.[276]
The suspension cannot be extended indefinitely, sometimes after a certain term, the termination or renegotiation of the contract are expected.

[273] A. Totaro, Commercio internazionale, attenzione alle clausole penali, 2015, web site https://www.euromerci.it/build-pdf/5938 last visited 29/09/2021
[274] Look to the case *Vitol SA v. Conoil Plc (2009) or* Azimut- Benetti Spa v Healey (2010)
[275] "If the contractor fails to perform its contractual obligations within the applicable time limits set out in the contract, the contracting authority may claim liquidated damages for each day of delay using the following formula:
0.3 x (V/d) where V is the price of the relevant purchase or deliverable or result or, failing that, the amount specified in the purchase order;
d is the duration specified for delivery of the relevant purchase or deliverable or result or, failing that, the duration of performance of the contract specified in the purchase order, expressed in days.
The contracting authority must formally notify the contractor of its intention to apply liquidated damages and the corresponding calculated amount.
[276] Q. HONEY– M. STEENKAMP, *Regulating the consequences of force majeure in your contract*, 20 May 2020, website www.cliffedekkerhofmeyr.com/en/index.html

For example, the Italian law at art. 1256 and art.1464 cc, allows the creditor, who no longer has an interest in the performance of the other party, to terminate the contract even if he no longer has an appreciable interest in only a partial performance.[277]

The contractor must notify immediately the other party of the suspension by including most of the times also a detailed description of the force majeure event.[278]

The parties should control how soon, after the force majeure event, the affected party is needed to proceed performance. This recovery period can be critical due to the disparate consequences that the event has caused. The interested party may not be able to promptly return to accomplish its contracts.

A clause may look something like this:

*"If any Force Majeure Event results in the failure of the affected Party in performing any of its obligations hereunder, the obligation hereunder failing to be performed shall be suspended within the duration of the Force Majeure Event, and its date of performance shall be automatically extended to the date when the Force Majeure Event ends, and the Party failing to perform its obligation shall not be subject to any penalty."* [279]

Depending on the contract, if the parties consider that the previous solution will not suffice, termination can either arise as an automatic consequence of claiming force majeure or it may give the parties discretion to terminate, normally after a specified period of time. Attention should be given to the notification provisions and termination requirements. Therefore, consider whether the affected party should be designated to keep

[277] See art.1256 cc: "The obligation is extinguished when, for a cause not attributable to the debtor (1), the performance becomes (2) impossible (3) [1218, 1463].
If the impossibility is only temporary, the debtor, as long as it persists, is not responsible for the delay in the fulfillment (4) [1219]. However, the obligation is extinguished if the impossibility persists until, in relation to the title of the obligation [1325 n. 2] or the nature of the object, the debtor can no longer be held obliged to perform the service (5) or the creditor no longer has an interest in obtaining it (6)." And art.1464: "When the performance of a party has become only partially impossible, the other party is entitled to a corresponding reduction in the performance due by it, and can also withdraw from the contract [1373] if it has no appreciable interest in partial performance [1181] (1)."
Studio legale Falbo & Manara, l'impatto del covid-19 sui contratti internazionali e la loro esecuzione, diritto del commercio internazionale, website: https://studiolegalefalbo.it/limpatto-del-covid-19-sui-contratti-internazionali-e-la-loro-esecuzione/ last visited 29/09/2021

[278] Council of the European Union General Conditions General Secretariat February 2019 – EN.

[279] KIRA STUDY, The effects of force majeure in contracts, April 2020, website https://kirasystems.com/files/guides-studies/KiraSystems-Deal_Points_Effects_of_Force_Majeure_in_Contracts.pdf last visited 29/09/2021

any prior payments, and/or whether a fraction of any costs obtained by the affected party to date should be borne by the unaffected party.[280]

An example that it is possible to find in the international sale contracts is:

*"If this Contract cannot be performed due to any force majeure event, both Parties shall cancel this Contract in good manner and shall not be liable for the breach of contract or compensation."*[281]

Under the CISG is specified the right to avoid the contract.[282] Depending on the circumstances of the individual case, the non-performance constitutes a fundamental breach. This solution is very burdensome for the seller as he will have to resell the goods on the market and transport them if the goods are already abroad. However, it is also burdensome for the buyer when the goods have already been sold or if they have already invested pending delivery.[283]

According to the CISG, the avoidance of the contract is valid only if the party has performed a fundamental breach, not a simple one. In the doctrine this remedy is an *ultima ratio remedy* as termination or suspension of the contract are better solutions.

In order to apply this relieve, the first and most important condition is the fundamental breach, according to art.25 of the CISG that declares *"A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result."*. A breach can be an unexcused and excused non-performance.[284]

A second provision is to give notice about the exercises of its right to the other party[285], moreover, respect a general time limit. Even if there is not a real definition of this as

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[280] Q. HONEY – M. STEENKAMP, *Regulating the consequences of force majeure in your contract*, 20 May 2020, website www.cliffedekkerhofmeyr.com/en/index.html

[281] KIRA STUDY, The effects of force majeure in contracts, April 2020, website https://kirasystems.com/files/guides-studies/KiraSystems-Deal_Points_Effects_of_Force_Majeure_in_Contracts.pdf last visited 29/09/2021

[282] See art.79(5) CISG

[283] U. MAGNUS, The remedy of avoidance of contract under CISG – general remarks and special cases, Hamburg, website https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/magnus.pdf last visited 29/09/2021

[284] B.A. AHMED – H.M.HUSSEIN, *Avoidance of contracts as a remedy under CISG and SGA: comparative analysis*, Journal of Law, Policy and Globalization, Vol.61, 2017

[285] At.26 CISG: A declaration of avoidance of the contract is effective only if made by notice to the other party.

Courts have been hesitant to recognize a late delivery as a breach, the time limit applies in particular if the seller has already delivered the goods or if the buyer has already paid. Finally, it arranges the restitution of the goods[286], worth the loss of exercising the avoidance remedy.[287]
The consequences provided by the CISG of this mitigation are four: first it releases the parties from obligations, secondly the restitution of the goods or the price, third the abstract calculation of damages and finally a duty to preserve the goods in the interest of the other party.[288]

It is possible also to include in the clause the possibility to procure the goods and services elsewhere for the duration of the event.[289]

Another option can be to renegotiate in good faith the contract. This is a challenging alternative because of the dynamic change of the circumstances. Moreover, the parties must pay attention to the parameters of the clause to be sure that they can renegotiate the contract. Nevertheless, it is a relief that suit in a good way both the parties.
The renegotiation consists of an *addendum* or a written agreement *ex novo*, where particular attention is paid to the duration of the contract and the obligations of each party.[290]

[286] Art.82 CISG: (1) The buyer loses the right to declare the contract avoided or to require the seller to deliver substitute goods if it is impossible for him to make restitution of the goods substantially in the condition in which he received them.
(2) The preceding paragraph does not apply:
(a) if the impossibility of making restitution of the goods or of making restitution of the goods substantially in the condition in which the buyer received them is not due to his act or omission;
(b) if the goods or part of the goods have perished or deteriorated as a result of the examination provided for in article 38; or
(c) if the goods or part of the goods have been sold in the normal course of business or have been consumed or transformed by the buyer in the course normal use before he discovered or ought to have discovered the lack of conformity.
[287] U. MAGNUS, The remedy of avoidance of contract under CISG – general remarks and special cases, Hamburg, website https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/magnus.pdf last visited 29/09/2021
[288] *V.supra;* interesting cases can be: Case n.282 and Case n. 154 in https://www.uncitral.org
[289] Q. HONEY – M. STEENKAMP, *Regulating the consequences of force majeure in your contract*, 20 May 2020, website www.cliffedekkerhofmeyr.com/en/index.html
[290] Studio legale Falbo & Manara, l'impatto del covid-19 sui contratti internazionali e la loro esecuzione, diritto del commercio internazionale, website: https://studiolegalefalbo.it/limpatto-del-covid-19-sui-contratti-internazionali-e-la-loro-esecuzione/ last visited 29/09/2021

It can happen that sometimes, the clause of force majeure becomes a question of risk allocation. Usually, it is typical in the context of M&A (margins and acquisition) transactions.
To remedy this problem, jurisprudence often resorts to the insertion of another clause, MAC, a material adverse change clause. Consequently, the purchaser can terminate the contract prior to the sale taking effect if a force majeure event brings about a change in circumstances which would materially adversely affect the business being purchased.[291]

The advantage of a force majeure clause is that it allows the parties to model at their own pleasure a risk sharing that derives from unknown and uncontrollable events. This allows them to select a resolution that works best for their situation. Following the Covid-19 pandemic, the contracting parties have introduced much more as they have entered a territory that was previously unexplored. Therefore, it is important to understand the rights and obligations of the parties and to find alternative solutions if the full execution of the contract is not possible.

## 4.5 COVID-19 RELATED TO FORCE MAJEURE

The Covid-19 pandemic can be qualified as a force majeure event that can have an impact on the fulfillment of contracts. In particular, the emergency introduced a series of government directives hindering the correct and complete termination of the international sale contract.
However, the general principle in terms of contracts remains the *pacta sunt servanda*, therefore the case of force majeure does not always lead to the actual non-attributability of the contractual breach.[292]
There have been several contracts that have suffered from this event, in particular, following a series of containment measures introduced in each State, see Italian LD 23 February 2020 n. 6 and the DPCM 11 and 22 March 2020, later merged into LD 25 March n.19.

[291] R.T. MILLER, *The Economics of Deal Risk: Allocating Risk through Mac Clauses in Business*, Villanova University Charles Widger School of Law Year, 2009
[292] N.ABRIANI – M.S. CENINI*, Impatto dell'emergenza Covid-19 sull'adempimento dei contratti,* DLA PIPER, 15 may 2020

The world economy has suffered a lot and the international supply chain has experienced significant impacts. The suspension of numerous commercial and production activities has consequently led to the termination of contracts due to supervening impossibility, giving rise to a so-called *factum principis*.[293]

All this has led the parties to ask in most cases for the revision or renegotiation of the contractual terms in good faith of numerous commercial contracts.

As we have seen so far, not all contracts have a force majeure clause, while others do and very often would typically contain a non-exhaustive list of events which the parties deem force majeure events, including "acts of God, war, riots, earthquakes, hurricanes, imposition of sanctions, lightning, pandemics, strikes, a change in law, governmental intervention etc."[294] Having a force majeure clause helps favor or extend asset when certain unforeseen contingencies arise, but a force majeure clause hardly covers outbreaks.

In general, if the Coronavirus crisis is covered by a force majeure clause, in most cases the buyer bears the economic loss. This will have to justify the execution or delay it for the emergency period. Otherwise, it may happen that the exporter could assume the economic damage for non-fulfillment.

If the clause does not specifically require for epidemics, a seller may still have the opportunity to relocate the economic damage. However, the emergency in force majeure clause may not match accurately into a particular contingency class. This could result in litigation or arbitration.[295]

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[293] "The form indicates a cause of objective impossibility (together with fortuitous events and force majeure) to perform a service, deriving from the order of the authority, from an authoritative provision. Since the intervention of the authority is beyond the debtor's sphere of control, this fact is not attributable to him, and therefore the obligation is extinguished without any negative consequences remaining for him", Broccardi.it

[294] Q. HONEY – M. STEENKAMP, *Regulating the consequences of ofrce majeure in your contract*, Cliffedekkerhofmeyr, 20 May 2020; https://www.cliffedekkerhofmeyr.com/en/news/press-releases/2020/Regulating-the-consequences-of-force-majeure-in-your-contract.html

[295] P.B.EDELBERG, *Applying Force Majeure to Delivery Failures in International Trade*, foxrothschild, 25 March 2020, https://www.foxrothschild.com/publications/applying-force-majeure-to-delivery-failures-in-international-trade

### 4.5.1 COVID-19: GLOBAL ADAPTATION OF FORCE MAJEURE CLAUSES

The Coronavirus pandemic, according to current evidence, can be considered a case of force majeure because there are many official measures undertaken by each Country.
In Austria, for example, measures have been introduced to restrict the free movement of people, capital, and goods. With § 2 Covid-19-Measures-Act it was forbidden to enter some places "*in so far as this is necessary to prevent the spread of Covid-19".*[296] This was further consolidated by the Federal Minister for Health which with an ordinance published in the Federal Law Gazette number II 98/2020, where however it reported several exceptions such as entering public outdoor places alone, with cohabitants, with their own animals always keeping a distance of one meter. [297]

*"§ 1. Zur Verhinderung der Verbreitung von COVID-19 ist das Betreten öffentlicher Orte verboten."*[298]

In Italy the government has outlined new rules and competences in emergency matters. With the Italian LD 23 February 2020 n. 6 and the DPCM 11 and 22 March 2020, later merged into LD 25 March n.19 it has declared:

*"In order to contain and combat the health risks deriving from the spread of the COVID-19 virus, in specific parts of the national territory or, if necessary, in its entirety, one or more of the measures referred to in paragraph 2 may be adopted […] 2. Pursuant to and for the purposes of paragraph 1, one or more of the following measures may be taken in accordance with the principles of adequacy and proportionality to the risk actually existing on specific parts of the national territory or on its entirety: a) restrictions on the movement of persons, including limitations on the possibility of moving away from one's residence, domicile or abode except for individual movements limited in time and space or motivated by work requirements, situations of need or urgency, health reasons or other*

[296] Judge Markus Thoma — Austrian Supreme Administrative Court, Austria, Constitutional Court, 14 July 2020, V 363/2020, web site https://www.fricore.eu/fc/content/austria-constitutional-court-14-july-2020-v-3632020 last visited 30/09/2020
[297] *V. supra*
[298] BUNDESGESETZBLATT FÜR DIE REPUBLIK ÖSTERREICH, Jahrgang 2020 Ausgegeben am 15. März 2020, 98. Verordnung: Verordnung gemäß § 2 Z 1 des COVID-19-Maßnahmengesetzes; Translation: ""§ 1. To prevent the spread of COVID-19, entering public places is prohibited."

*specific reasons; b) closure to the public of urban roads, parks, playgrounds, public villas and gardens or other public spaces; c) limitations or prohibition of estrangement and entry into municipal, provincial or regional territories, as well as with respect to the national territory; […]"*[299]

Similar measures have also been taken by other States which have restricted freedom of movement in all aspects of life, even imposing curfews. This has led to several appeals in the Courts of each individual country, see for example the case UI-83 / 20-36 of 27 August 2020 that deals with the challenge of conformity of common constraint of movement outside the community[300] or the decision No. UI-1372/2020 et al. Of the Constitutional Court of the Republic of Croatia (CCRC). [301]

Moreover, fundamental is the classification of the Coronavirus by the WHO of 11.03.2020 as a pandemic:

*"WHO has been assessing this outbreak around the clock and we are deeply concerned both by the alarming levels of spread and severity, and by the alarming levels of inaction. We have therefore made the assessment that COVID-19 can be characterized as a pandemic.*
*Pandemic is not a word to use lightly or carelessly. It is a word that, if misused, can cause unreasonable fear, or unjustified acceptance that the fight is over, leading to unnecessary suffering and death."*[302]

Therefore, the negative effects of the Coronavirus pandemic could also be classified under this headline. This theory has a historical basis since in 2003 the force majeure was

[299] DECREE-LAW No. 19 of 25 March 2020, *Urgent measures to counter the COVID-19 epidemiological emergency*, (20G00035) (Italian Official Gazette - General Series No. 79 of 25 March 2020)
[300] B. ZALAR — European Chapter of the International Association of Refugee and Migration Judges (IARMJ-Europe), Slovenia, Constitutional Court, 27 August 2020, no. U-I-83/20-36, web site: https://www.fricore.eu/fc/content/slovenia-constitutional-court-27-august-2020-no-u-i-8320-36 last visited 30/09/2021
[301] A. RAIJKO - President of the Administrative Court in Rijeka, Croatia, Croatia, Constitutional Court, 14 September 2020, No. U-I-1372/2020 et al., web site https://www.fricore.eu/fc/content/croatia-constitutional-court-14-september-2020-no-u-i-13722020-et-al last visited 30/09/2021
[302] WHO Director-General's opening remarks at the media briefing on COVID-19 - 11 March 2020

associated with the SARS event. Moreover, In China the CCPIT (China's foreign trade authority) has issued about 1600 certificates to companies that allow them to prove that they are no longer able to perform their contractual services due to circumstances beyond their control.[303]

When it comes to the issue of coronavirus and force majeure it is good to get a general picture of the possible scenarios that are or will occur.
The two most common scenarios are the stipulation of contracts before the spread of the news of the existence of the virus whose services had yet to be fulfilled, and the contracts entered after the parties should have been aware of the spread of the virus.
Another plausible option was the stipulation of contracts between a Country where the virus had already spread and a Country that was still immune. Consequently, the first, due to the virus that led to the inability to receive some components or services from suppliers, was unable to accomplish the commission.
In the first scenario, the party who believes that was no more able to fulfill the performance can invoke the case of force majeure, in the second case, however, when the news of the spread of the virus has been disclosed internationally, neither party has been able to conjure force majeure. As the event was already known or should have been known using ordinary diligence, with the consequence that, failing to achieve, the party will have to be held responsible and pay the damages.[304]
If the unforeseeable event, in this case the Covid-19 pandemic, has affected to a limited extent so as not to make the performance completely impossible, it will be possible to act with the Hardship clause, in the Countries where it is foreseen, so as to modify performance or even renegotiate the contract itself.
Sometimes, however, this event has led to the complete execution of the obligations being made impossible and, therefore, in some less frequent cases, it has also led to the dissolution or suspension of the contract, if contractually provided for.

[303] W.M. KÜHNE, *The impact of COVID-19 on international supply contracts*, DLA PIPER, 4 may 2020, https://www.dlapiper.com/it/italy/insights/publications/2020/05/the-impact-of-covid-19-on-international-supply-contracts
[304] Studio Legale De Capoa e Associati, *Clausola di Forza Maggiore: accezione nei Paesi Extra-UE maggiormente significativi nei rapporti commerciali con le imprese italiane e raccomandazioni operative*, website www.fondazioneforensebolognese.it/upload_manuali/2020/decapoa.pdf last visited 01/10/2021

Looking more specifically, the effects and the interventions of the current pandemic at the international contractual level, may depend on one hand on the law applied to the contract. In fact, there has been a trend among the States of announcing new settlements to protect weaker contractual parties.
Domestic Courts are very cautious about recognizing Covid-19 as a force majeure event. In Italy, for example, the parties are not only required to refer to the existence of the virus but also to demonstrate the impediments caused by the pandemic and therefore they cannot refer only to the existence of this event. For help them, the Ministry of Economic Development has recently announced that the Chambers of Commerce can issue declarations on the state of emergency following the Covid-19 epidemic to companies that request them.[305]

*"Preso atto dell'esigenza manifestata a codeste Camere di commercio, da parte di diverse imprese, di dover documentare mediante attestazione camerale le condizioni di forza maggiore derivanti dall'attuale fase di emergenza sanitaria da COVID-19.*
*[...]*
*Con le predette dichiarazioni le Camere di commercio potranno attestare di aver ricevuto, dall'impresa richiedente il medesimo documento, una dichiarazione in cui, facendo riferimento alle restrizioni disposte dalle Autorità di governo e allo stato di emergenza in atto, l'impresa medesima afferma di non aver potuto assolvere nei tempi agli obblighi contrattuali precedentemente assunti per motivi imprevedibili e indipendenti dalla volontà e capacità aziendale."*[306]

The Courts of France and Russia, to protect parties facing the virus frustrations, have come to similar conclusions. The French Courts required the parties to demonstrate that

[305] Circolare n. 0088612 del 25/03/2020: "Attestazioni camerali su dichiarazione delle imprese di sussistenza cause di forza maggiore per emergenza COVID-19", look also relazione cassazione n.56/2020
[306] Circolare n. 0088612 del 25/03/2020: "Attestazioni camerali su dichiarazione delle imprese di sussistenza cause di forza maggiore per emergenza COVID-19", Translation: ""Having acknowledged the need expressed to these Chambers of Commerce, by various companies, of having to document the conditions of force majeure deriving from the current health emergency phase due to COVID-19 by means of a chamber attestation.[...] With the aforementioned declarations, the Chambers of Commerce will be able to certify that they have received, from the company requesting the same document, a declaration in which, referring to the restrictions set by the Government Authorities and the state of emergency in progress, the company itself affirms that not having been able to fulfill the contractual obligations previously assumed on time for unforeseeable reasons independent of the company's will and capacity. "

the pandemic limited them and prevented them from accomplishing their contractual obligations, that they were unable to take other measures to fulfill and ultimately prove that the consequences are proportionate to the extent of the impossibility.[307]

The Netherlands for example has introduced the solution "share the pain", as neither party is at defect for the controversy produced by the pandemic. Government issued some Covid-19 measures to restrain the parties from performing its obligations under a commercial contract, this can justify the invocation of Art. 6:75 DCC[308].

Against this, the government has decided to divide the risk between the parties since no party is guilty of the incident of Covid-19 or of the directives issued by the state to calm the transmission of this virus.

An interesting case where we see the application of this concept is ECLI: NL: RBAMS: 2020: 2406 in which the court recognized the share the pain proposal.

*"3.42 […] [Claimant] emphasised a "share the pain" philosophy, relying on the Tjittes, Tjittes/Hogeterp and Schelhaas/Spanjaard articles referred to above. This philosophy focuses on the whole situation now, encompassing Tennor, [Claimant] and the target business. Its basic idea is that the parties are in it together and need to find a way out together. It stresses the parties' contractual equilibrium in the LOI and the need to restore or preserve that equilibrium in any court-ordered solution in the current circumstances.*

*[…]*

*3.48 […] the "share the pain" approach, as embraced by the Court."* [309]

[307] Article: The impact of COVID-19 on litigation across Europe, website Dentos, 26 March 2021, https://www.dentons.com/en/insights/articles/2021/march/26/the-impact-of-covid-19-on-litigation-across-europe last visited 29/09/2021

[308] Article 6:75 Legal excuse for a non-performance (force majeure): A non-performance cannot be attributed to the debtor if he is not to blame for it nor accountable for it by virtue of law, a juridical act or generally accepted principles (common opinion).

[309]ECLI: NL: RBAMS: 2020: 2406, R. JAN TJITTES, *Dutch courts on the COVID-19 crisis and the doctrines of unforeseen circumstances and force majeure in commercial contracts*, 2020, web site: https://www.barentskrans.nl/en/news/dutch-courts-on-the-covid-19-crisis-and-the-doctrines-of-unforeseen-circumstances-and-force-majeure-in-commercial-contracts/ last visited 29/09/2021

In England, on the other hand, as we have seen previously, there is no real force majeure clause and therefore in most commercial contracts the parties insert this clause and Courts will analyze it case by case.[310].

As it is possible to point, many Courts in the world have identified the pandemic as an unforeseen event, which parties could not limit nor overwhelm with the consequences that they do not fulfill their contractual obligations. However, each Court has adopted measures aimed at recovering a contractual stabilization.

On the other hand, the effects can be influenced by some Regulations. There are numerous contracts that include a force majeure clause and that suspend contractual obligations in the event of an unforeseeable event.

If a contract is regulated by the CISG, as we have seen previously, Art. 79 also recognizes epidemics among the events of force majeure. Consequently, in the face of this event, the affected party can successfully invoke the force majeure clause in the meaning of the CISG.[311]

Please note again that this article only regulates the exemption from liability for damages, but it does not provide for any possibility of definitively dissolving the contract by withdrawal or termination.[312]

ICC updated the clause of force majeure to protect contracting parties following Covid-19. In fact, the Model ICC Force Majeure Clause 2020 arranges that the plague and the epidemic are examples of supposed obstacles that trigger the use of the clause. With respect to this impediment, the party must simply demonstrate that it could not be avoided or overcome.[313]

The renew of the clause, as seen in the second part of paragraph 5, consists in the obligation to promptly notify the event qualified as force majeure following the coronavirus. This can lead to the suspension of a party's obligations "*[…] to the extent these obligations result from the obligations impeded by Force Majeure and they are suspendable."*

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[310] Article: The impact of COVID-19 on litigation across Europe, website Dentos, 26 March 2021, https://www.dentons.com/en/insights/articles/2021/march/26/the-impact-of-covid-19-on-litigation-across-europe last visited 30/09/2021

[311] W.M. KüHNE, *The impact of COVID-19 on international supply contracts*, 4 may 2020, website www.dlapiper.com/it/italy

[312] *V. supra*

[313] ICC Document: General considerations: Force majeure clauses in commercial contracts, https://iccwbo.org/content/uploads/sites/3/2020/03/2020-forcemajeure-commcontracts.pdf

In most cases, force majeure events are momentary, and the execution of the contract can be proceeded as soon as the circumstances regulating the execution desist[314].
However, if the force majeure event tends to persist for a substantial period, the contractors are no longer able to act in accordance with the stipulations of the contract. This therefore leads to the termination of the contract[315] by means of communication within a reasonable period to the counterparty, maximum term of 120 days.[316]
Promptly communicating and documenting the position of the party is a request also made by the UCC force majeure clause. In the face of the coronavirus event, if the parties had not applied a force majeure clause or if this was limited and did not expressly provide for Coronavirus-like events, the parties in the US could appeal to art. § 2-615 - "Excuse for non-fulfillment of the presupposed conditions" seen above, which determines whether the non-fulfillment by a seller of supply chain goods can be excused and act accordingly.

As for the contracts not yet stipulated, it is now possible to negotiate specific Covid-19 clauses for the management of the evolution of the pandemic which is no longer, obviously, an extraordinary and unpredictable event.[317]

We have seen, by addressing the issue of force majeure linked to the Coronavirus, how the consequences are the classic ones of the other force majeure clauses, therefore suspension or termination of the contract. However, great attention must be paid, based on what the contract is governed and the different circumstances, if the Coronavirus pandemic really represents a case of force majeure.
In any case, international sales contracts are interrupted by numerous force majeure events and Covid-19 should not be a problem and therefore shake the solid foundations of contract law. Indeed, a properly drafted force majeure clause has the power to minimize a controversial one.[318]
Despite this, following this pandemic, jurisprudence has understood how this provision must be considered in depth and carefully drafted.

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[314] Look to ICC Force Majeure Clause (Long Form) Paragraph 6: Temporary impediment
[315] Look to ICC Force Majeure Clause (Long Form) Paragraph 8: Contract Termination
[316] This was not foreseen by the previous ICC clause 2003
[317] N. ABRIANI – M.S. CENINI*, Impatto dell'emergenza Covid-19 sull'adempimento dei contratti,* DLA PIPER, 15 may 2020
[318] P.B. EDELBERG, *Applying Force Majeure to Delivery Failures in International Trade*, foxrothschild, 25 March 2020, https://www.foxrothschild.com/publications/applying-force-majeure-to-delivery-failures-in-international-trade

Surely because of this event, in international contracts, more and more terms inspired by Covid-19 will be established in the force majeure clauses. Similar examples have been seen in the past when the term "terrorism" became common after the 9/11 attack on the twin towers or the term "earthquake" after the one that occurred in Loma Prieta in 1989.[319]

### 4.5.2 CASE STUDIES OF FORCE MAJEURE CLAUSES RELATED TO COVID-19

A completed body of case law concerning the effects of Covid-19 on international contractual performance is not still available, due to the limited duration and because we are still in the pandemic period.
Nevertheless, there are few examples in which the Covid-19 pandemic is considered a "natural disaster" under the force majeure clauses.

**Case 1**: *JN Contemporary Art, LLC v. Phillips Auctioneers LLC*

Background
One of the first case that become a classic is: *JN Contemporary Art, LLC v. Phillips Auctioneers LLC*, 2020 WL 7405262 (S.D.N.Y. Dec. 16. 2020), the United States District Court for the Southern District of New York (SDNY).[320]
Following the Covid-19 pandemic and the directives issued by the New York government, the two parties disagreed and had to terminate their contract. The Court declared the possibility of this action to be true thanks to the force majeure they had included in the contract.

[319] T. MURRAY, Murray, Hogue & Lannis, *Force majeure and Coronavirus (COVID-19): Seven critical lessons from jurisprudence*, The Lexis Practice advisor Journal, June 16, 2020
[320] Case 1:20-cv-04370-DLC, Document 72, Filed 10/02/20

Analysis

JN Contemporary Art LLC (JN) and Phillips Auctioneers LLC (Phillips) have entered into several agreements for the auction of two paintings. The issue arises on the contract of the second painting as this was to be offered for sale in May 2020.

*"Like the Stingel Agreement, the Security Amendment acknowledged that the Stingel Painting was to be offered for sale "during the 20th Century & Contemporary Art–NY Auction to be held by Phillips in New York in May 2020 ('Auction')."*[321]

In the second contract it was decided to insert a force majeure clause that allowed for termination if the auction was postponed due to circumstances beyond the control of the parties, such as natural disasters.

*"Paragraph 12(a) of the Stingel Agreement set forth a termination provision (the "Termination Provision"). It stated: In the event that the auction is postponed for circumstances beyond our or your reasonable control, including, without limitation, as a result of natural disaster, fire, flood, general strike, war, armed conflict, terrorist attack or nuclear or chemical contamination, we may terminate this Agreement with immediate effect. In such event, our obligation to make payment of the Guaranteed Minimum shall be null and void and we shall have no other liability to you."*[322]

With the news of the spread of the virus, New York Governor, Andrew Cuomo, issued a series of directives banning non-essential commercial activities, such as auctioning. As a result, Phillips had to postpone the auction and on June 2020:

*"On March 14, Phillips announced a postponement of auctions. The announcement on its website was entitled "Auction Update: Temporary Closures & Postponements" stating:*
*As more of our community of staff, clients and partners becomes affected by the spread of the Coronavirus, we have decided to postpone all of our sales and events in the Americas, Europe and Asia. . . . Our upcoming 20th Century & Contemporary Art sales*

[321] Case 1:20-cv-04370-DLC Document 75, Filed 12/16/20
[322] Case 1:20-cv-04370-DLC Document 75, Filed 12/16/20

*in New York will be held the week of 22 June 2020, consolidating the New York and London sales into one week of auctions."*[323]

He notified JN of the termination of the second contract invoking the force majeure clause in the face of the Covid-19 pandemic and related government restrictions.

*"The Termination Letter provides, in relevant part:*
*As you are well aware, due to the COVID-19 pandemic, since mid-March 2020 the New York State and New York City governments placed severe restrictions upon all non-essential business activities. . . .*
*Due to these circumstances and the continuing government orders, we have been prevented from holding the Auction and have had no choice but to postpone the Auction beyond its planned May 2020 date.*
*We are hereby giving you notice with immediate effect that: (1) Phillips is invoking its right to terminate the [Stingel Agreement]; (2) Phillips' obligation to make payment of the Guaranteed Minimum to you for the Property is null and void; and (3) Phillips shall have no liability to you for such actions that [are] required under applicable governing law.*
*Our rights to act are as mutually agreed by you and us and are clearly set out in paragraph 12 of the [Stingel Agreement] . . ."*[324]

JN refused and sued Phillips in federal court, which however did not accept the request. The Court, as a country of Common Law, to classify the pandemic as a "natural disaster" has dealt with various sources such as Black's Law Dictionary[325], Case law[326]and Government orders.
In addition to this, the pandemic has led to the cessation of commercial activities, a circumstance therefore that falls within the clause that the parties have drawn up since

[323] Case 1:20-cv-04370-DLC Document 75, Filed 12/16/20
[324] Case 1:20-cv-04370-DLC Document 75, Filed 12/16/20
[325] The Dictionary defines "natural" as "[b]rought about by nature as opposed to artificial means," and "disaster" as "[a] calamity; a catastrophic emergency," NATURAL, DISASTER, Black's Law Dictionary (11th ed. 2019)
[326] For example: Pennsylvania Democratic Party v. Boockvar, 238 A.3d 345, 370 (Pa. 2020) and Friends of Danny DeVito v. Wolf, 227 A.3d 872, 889 (Pa. 2020)

they have included not only environmental events but also cases that lead to social and economic upheavals.
The Court has sustained the force majeure clause and expressed itself as follow:

*"A properly invoked Termination Provision ended Phillips' obligations to JN. Phillips was no longer required to offer the Stingel Painting at a subsequent auction or to pay JN the Guaranteed Minimum. It therefore did not breach the Stingel Agreement when it failed to auction the Stingel Painting at the Virtual Auction in July. Nor was Phillips in breach for failing to obtain JN's written consent to conduct the New York Auction on a date after May 2020. […]*
*Phillips' August 28 motion to dismiss this action is granted. The Clerk of Court is directed to close this case."*[327]

**Case 2**: *Bombay High Court in Standard Retail Pvt. Ltd. v. M / S G.S. Global Corp & Ors*

Background
Another interesting case involving the attempted termination of the contract due to the Covid-19 is that of India judgment issued by the *Bombay High Court in Standard Retail Pvt. Ltd. v. M / S G.S. Global Corp & Ors on 8 April 2020.*[328]
A company domiciled in South Korea had to supply steel products to the applicants in Bombay, but due to the numerous blocks due to the spread of the Covid-19, the parties disagreed regarding the termination of the contract as one party has not fulfilled its contractual obligations by not making the payment to the other. They therefore turned to the Court, which, invoking the force majeure clause, rejected the petitioner's appeal.

[327] Case 1:20-cv-04370-DLC Document 75, Filed 12/16/20
[328] Standard Retail Pvt. Ltd vs Gs Global Corp And 3 Ors on 8 April, 2020, IN THE HIGH COURT OF JUDICATURE AT BOMBAY ORDINARY ORIGINAL CIVIL JURISDICTION COMMERCIAL ARBITRATION PETITION (L) NO. 404 OF 2020, carbpl.404.2020.standard.retail.doc

Analysis

After the stipulation of the contract between a company domiciled in South Korea and the applicants in Bombay, the latter provided the former with a letter of credit to be issued to Wells Fargo Bank.

The contract was subject to artt. 11[329] and 12[330] of section 56 (Frustration of Contract) of the Indian Contract Act, 1872. It is possible to invoke these articles when the contract is valid and the performance of the contract has not been completed or has been partially completed, as in the case in question, and finally if the event is not controllable by the parties[331].

Therefore, according to the signatory, the contract was nullified due to the various blocks due to the virus. However, some goods had already been shipped but never reached their destination, so the buyer refused to provide payment. The petitioner appealed the Bombay High Court under Section 9 of the Arbitration and Conciliation Act to avoid Wells Frago Bank from liquidating on the letter of credit.

Since the distribution of the steel had been declared an essential service by the government and the supplier had performed the part of the shipment, the Bombay High Court rejected the application and found that the force majeure clause was only applicable to the suppliers and cannot save the buyer. Furthermore, to further support the thesis, the

[329] Art. 11. Force Majeure: In the event of an Act of God (including but not limited to floods, earthquake, typhoons, epidemics and other natural calamities), war or armed conflict or serious threat of the same, government order or regulation, labor dispute or any other similar cause beyond the control of "Seller" or any of its suppliers or sub-contractors which seriously affects the ability of "Seller" or any of its suppliers or sub-contractors to manufacture and deliver the "Goods", "Seller" may, at its sole discretion and upon written notice to "Buyer" either terminate the Contract or any portion affected thereof by such event(s), or delay performance of the Contract, in whole or in part, for a reasonable period of time. Any such delay of performance by "Seller" shall not preclude "Seller's" later right to terminate the Contract or any portion affected thereof by such event(s). In no event shall "Seller" be liable to "Buyer" or to any third party for any costs or damages arising indirectly or consequentially from such non-fulfillment of or delay in the performance of all or part of the Contract"

[330] Article 12. Governing Law & Arbitration: The Contract shall be governed by and construed in accordance with the Laws of Kerea/Singapore/London. All disputes, controversies or differences which may arise between the parties, out of or in relation to or in connection with the Contract, or for the breach thereof, shall be finally settled by arbitration in Seoul, Korea/Singapore/London in accordance with the Commercial Arbitration Rules of the respective Commercial Arbitration Board and under the Laws of Korea/Singapore/London. The award rendered by the arbitration shall be final and binding upon both parties concerned."

[331] P. S. NATHAN, *Legal principles in invoking force majeure clauses – case law analysis*, website mondaq, 01 may 2020, https://www.mondaq.com/india/litigation-contracts-and-force-majeure/926356/legal-principles-in-invoking-force-majeure-clauses-case-law-analysis

Court pointed out that the terms such as epidemic or pandemic were not included in the contract article.[332]

*"[…]b. The Force Majeure clause in the present contracts is applicable only to the Respondent No. 1 and cannot come to the aid of the Petitioners. c. The contract terms are on Cost and Freight basis (CFR) and the Respondent No. 1 has complied with its obligations and performed its part of the contracts and the goods have been already shipped from South Korea. The fact that the Petitioners would not be able to perform its obligations so far as its own purchasers are concerned and/or it would suffer damages, is not a factor which can be considered and held against the Respondent No. 1. […]"*[333]

**Case 3**: *Amotani Vermietungsgesellschaft mbh & Co. Mobilien kg v. Hoop Lobith International B.V. et al*

Background

A European Case that is the most recent regarding the force majeure and the Covid-19 is: Amotani Vermietungsgesellschaft mbh & Co. Mobilien kg v. Hoop Lobith International B.V. et al in Netherlands July 14, 2021[334].

This case concerns a service contract between a company from The Netherlands and another from Germany, but it is effective in pointing out how the force majeure clause has worked promptly, as the virus can not only affect purely sales contracts, but also those connected to it.

[332]https://indiankanoon.org/doc/; D.S.Y.Agarwal, The extent of force majeure in times of covid-19, 2021 http://upesstudentlawreview.com/2021/04/the-extent-of-force-majeure-in-times-of-covid-19/

[333] IN THE HIGH COURT OF JUDICATURE AT BOMBAY ORDINARY ORIGINAL CIVIL JURISDICTION COMMERCIAL ARBITRATION PETITION (L) NO. 404 OF 2020, carbpl.404.2020.standard.retail.doc

[334] C/05/377951 / HA ZA 20-586, https://iicl.law.pace.edu/cisg/case/netherlands-july-14-2021-rechtbank-district-court-amotani-vermietungsgesellschaft-mbh-co

Analysis

Two companies, one from The Netherlands and the other from Germany, HLD and KDRconcluded a service contract on March 8, 2019 for building and shipping a ship.
In their agreement they have included, among the various clauses, that of force majeure which reads as follows:

*"If the shipyard is unable to manufacture or deliver the ship by the delivery date specified in the previous section a) for the following reasons, the date delivery will be postponed by many working days […].*
*Involvement in war epidemics [...], any other cause of delay of any kind, [...] provided that they are reasonably considered beyond the control of the yard."*[335]

In addition, it is specified that the customer must immediately inform the other party within 5 days through a written and detailed communication as soon as he becomes aware of the force majeure event. Otherwise, the yard has no right to invoke this clause:

*"If the shipyard is prevented from manufacturing or delivering the ship by the delivery date specified under section a) above for the following reasons, the delivery date will be postponed by as many working days as the shipyard has expended as a result of one of these reasons to do so to complete or deliver the ship:*
*Involvement in war (...) epidemics (...), any other cause of delay of any kind, regardless of whether they are of the same nature as previously mentioned in this article or of any other nature, provided that they are reasonably believed are beyond the control of the shipyard.*
*The shipyard will inform the client as soon as reasonably possible in writing about any case of force majeure".*[336]

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[335] C/05/377951 / HA ZA 20-586, https://iicl.law.pace.edu/cisg/case/netherlands-july-14-2021-rechtbank-district-court-amotani-vermietungsgesellschaft-mbh-co

[336] In original language: Wenn die Werft aus den nachstehenden Gründen daran gehindert ist, das Schiff bis zu dem oben unter Abschnitt a) festgelegten Liefertermin herzustellen oder zu liefern, wird der Liefertermin um so viele Arbeitstage verschöben, wie der Werft als Folge einer dieser Gründe aufgewendet hat, um das Schiff fertigzustellen oder abzuliefern:
Verwicklung in Krieg (...) Epidemien (...), alle anderen Ursachen für Verzögerungen jeder Art, ohne Rücksicht, ob sie von gleicher Art sind, wie vorher in diesem Artikel aufgeführt, oder von anderer Art, sofern sie nach vernünftiger Anschauung außerhalb der Kontrolle der Werft liegen.
Der Werft wird den Auftraggeber, sobald wie vernünftigerweise möglich, schriftlich über jeden Fall höherer Gewalt unterrichten; C/05/377951 / HA ZA 20-586,

On 23 March 2020, HLI sent the following message to Amotani:

*"RE: 493-COVID-19 and force majeure: We hereby inform you that the Covid-19 epidemic and its consequences, including but not limited to (government) measures, delay the delivery of 493."In consideration of this, we inform you pursuant to article 6.d / e of the contract of this force majeure event. "* [337]

The parties therefore claimed force majeure due to Covid 19 in March 2020 and the Court upheld the clause.

**Case 4**: *3 sentences that the Paris Court of Appeal issued on 28 June 2020*

Background
These are 3 sentences that the Paris Court of Appeal issued on 28 June 2020 n ° 20/06676 (N ° Lexbase: A98643RR), n ° 20/06675 (N ° Lexbase: A98753R8) and n ° 20/06689 (Lexbase No .: A97463RE).
Following the pandemic, some electricity suppliers saw a drop in electricity prices asking for the suspension of the contracts with ARENH stipulated with EDF. To support this action, they invoked the force majeure clause present in the contracts. They won the case thanks to the ruling of the Court that accepted their request.

Analysis
The containment measures implemented to curb the spread of Covid-19 have led to a significant drop in electricity consumption and consequently a drop in prices on the market.
The suppliers, as bound by their contract with EDF, had to buy their volumes at the price agreed in the contract and then resell them at lower prices, recording large losses.

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https://iicl.law.pace.edu/cisg/case/netherlands-july-14-2021-rechtbank-district-court-amotani-vermietungsgesellschaft-mbh-co
337 Op 23 maart 2020 heeft HLI aan Amotani het volgende bericht: RE: 493-COVID-19 and Force majeure

Against this, they invoked the force majeure clause contained in their contracts
Article 10 of the ARENH Framework Agreement, which refers to Article 1218 of the French Civil Code, defines force majeure as "*an external, irresistible and unpredictable event, which makes it impossible to fulfill the obligations of the Parties, under economic conditions reasonable, " and allows the Parties to suspend the fulfillment of their obligations under the contract for the duration of the force majeure event."*[338]

Since the Covid-19 pandemic did not allow the parties to fulfill their contractual obligations, the Court ordered the suspension of the contract by elevating the force majeure clause.

*À" en croire la juridiction, la clause était donc claire « en ce que la définition de la force majeure, invocable par l'une ou l'autre des parties, se fait sans considération des obligations leur incombant, qu'elles soient pécuniaires, d'approvisionnement ou de fourniture".*[339]

[338] Article: *PRESSURE POINTS: FORCE MAJEURE AND COVID-19: THE PARIS COMMERCIAL COURT'S INTERIM RELIEF JUDGE (JUGE DES RÉFÉRÉS) SUSPENDS THE ELECTRICITY SUPPLIERS' OBLIGATION TO PURCHASE ELECTRICITY FROM EDF (FRANCE),* 24 June 2020, Paris, website: https://www.herbertsmithfreehills.com/latest-thinking/pressure-points-force-majeure-and-covid-19-the-paris-commercial-court's-interim last visited 30/09/2021

[339] Article: Etude: la force majeure est-elle résistante à la Covid-19?, September 2020, website: https://www.lexbase.fr/encyclopedie-juridique/60385227-etude-la-force-majeure-est-elle-resistante-a-la-covid-19-redigee-le-16-09-2020 last visited: 30/09/2021
Translation: "According to "to believe the court, the clause was therefore clear" in that the definition of force majeure, invoked by one or the other of the parties, is made without consideration of the obligations incumbent on them, whether pecuniary, procurement or supply ".

# CONCLUSION

In recent decades, due to the rapid development of globalization as well as the liberalization of investments, we have seen a greater diffusion of international trade. Exponentially, the spread of international contracts has also grown. The entrepreneur will have to make increasingly important legal choices in the drafting of an international contract, such as, in the first place, the applicable law and subsequently clearly define the obligations and rights of the parties as well as designate international arbitration or national courts to regulate the disputes that may arise.

Sometimes, in fact, due to sudden and unforeseeable events before or at the very moment of the stipulation of the contract, the parties may not be able to fulfill their contractual obligations. For this reason, the force majeure and hardship clauses are assuming an increasingly central role in international contracts.

As we have seen in the study of this thesis, the parties, thanks to the principle of autonomy in defining the *lex contractus*, will take care in drafting their own force majeure clause, adapting it to their geopolitical and economic context, or if there is a lack of discipline on the subject, the *lex contractus* will work to provide it. Most of time the Convention on Contracts for the International sale of Goods (CISG) represents a neutral law and therefore, as ratified by numerous States, it is often applied both by the parties or by the judges. Nevertheless, for its noninterference, sometimes it is of marginal application.

As analyzed in the various force majeure clauses, like the ICC clause or Art.79 of the CISG, the event to be considered as such must be unexpected, unpredictable, irresistible, and not caused by the Parties.

Therefore, the seriousness of the event must be such as to make it impossible to fulfill the obligations set out in the contract.

If this occurs, as has also been seen in the case studies presented, the party who invokes it must promptly notify the other party by providing it with some evidence. Only subsequently, the consequences of the contract will be visible, and, in most cases, it will be possible to suspend it for a certain period or terminate the contract.

If this event, however, does not occur to a truly substantial extent to make the performance of the parties totally impossible, other contractual solutions can be thought of, such as negotiation, and invoke the hardship clause, where applicable. My attention has not

focused on this last clause, but only on the force majeure one since an even more in-depth study would be needed and the content of the exposition would become too substantial since also this is a subject that requires great examination.

Furthermore, in the face of the Covid-19 pandemic, the force majeure clause has interested the debate of scholars of international law.

The Institution of force majeure is, in fact, not regulated in a uniform manner in Common law and Civil law Countries and sometimes it can also be unknown for some legal systems, moreover the directives that each State has issued to limit the spread of the virus have undermined the matter.

It is noticeable, consequently, that drawing up a force majeure clause in international contracts is a crucial and not at all obvious operation.

Therefore, in the event of new stipulations, it is understood the importance of consistently choosing the *lex contractus* and the inclusion of a complete and well-defined clause governing the event of force majeure so that this does not threaten the foundations of the contract.

In simpler and more direct terms, the case of force majeure in fact "kills" the contract, hence, it is essential to prevent this problem.

Some international force majeure clauses, such as that of the ICC, following the pandemic, have reassessed, and strengthened the clause.

Consequently, the application of standard clauses is no longer relevant and nowadays care must be taken to clearly formulate the clause and regulate cases of force majeure and its consequences.

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