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EXEMPTION FROM LIABILITY UNDER ARTICLE 79 OF THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS: GENERAL CHARACTERISTICS AND CONDITIONS OF APPLICATION

Horobets I.M.,

Master of Laws, Junior Researcher

ORCID: 0009-0004-7353-9477

Horobets I.M. Exemption from liability under Article 79 of the United Nations Convention on Contracts for the International Sale of Goods: general characteristics and conditions of application.

The article examines the issue of the exemption from liability under Article 79 of the United Nations Convention on Contracts for the International Sale of Goods. This provision is crucial in international trade, as it outlines conditions under which a party may be exempted from liability for non-performance due to «impediments beyond his control». The study is particularly relevant in light of the 2022 Russian invasion of Ukraine, which disrupted many international contracts.

The article discusses the multifaceted nature of «impediments» that may qualify for exemption, including natural disasters, political upheavals, and unforeseen legal restrictions. It emphasizes that for an exemption to be valid, the impediment must be beyond the party's control, unforeseeable, unavoidable, and directly causing the non-performance.

Key judicial decisions are reviewed, including the case of *Scafom International BV v. Lorraine Tubes S.A.S.*, where the court defined the notion of «impediment» as changed circumstances that have made a party's performance a matter of economic hardship or have increased the burden of performance of the contract in a disproportionate manner. Another case, the «*Vine Wax*» case, highlights the importance of the causal link between the impediment and the failure to perform.

The article also addresses the challenges in proving unforeseeability, often assessed using the «reasonable person» standard. This standard considers whether a «reasonable person» from a point of view of the defaulting party could have foreseen the initial or subsequent existence of an impediment.

In conclusion, the article suggests that while Article 79 provides a reliable framework for exemption from liability for a party, its application

requires careful consideration of contractual obligations, trade practices, and the specific circumstances surrounding the impediment. It advocates for clearer guidelines and consistent judicial interpretations to aid in the uniform application of Article 79 across different legal systems.

Key words: exemption from liability, impediment, non-performance, unforeseeability, unavoidability, causation.

Горобець І.М. Звільнення від відповідальності за статтею 79 Конвенції ООН про договори міжнародної купівлі-продажу товарів: загальна характеристика та умови застосування.

У статті розглядається питання звільнення від відповідальності за статтею 79 Конвенції ООН про договори міжнародної купівлі-продажу товарів. Це положення є ключовим у міжнародній торгівлі, оскільки визначає умови, за яких сторона може бути звільнена від відповідальності за невиконання зобов'язань через «перешкоди поза її контролем». Дослідження є особливо актуальним у світлі російського вторгнення в Україну у 2022 році, яке призвело до невиконання багатьох міжнародних договорів.

У статті обговорюється різноплановий характер «перешкод», які можуть бути підставою для звільнення від відповідальності, включаючи стихійні лиха, політичні потрясіння та непередбачувані законодавчі обмеження. Наголошується, що для того, аби звільнення від відповідальності було правомірним, перешкода має бути поза контролем сторони, непередбачуваною, невідворотною і безпосередньо призводити до невиконання зобов'язань.

Розглянуто ключові судові рішення, зокрема справу «*Scafom International BV проти Lorraine Tubes S.A.S.*», де суд визначив поняття «перешкода» як зміну обставин, що спричинили для сторони економічні труднощі або непропорційно збільшили тягар виконання договору. Інша справа, «*Vine Wax*», підкреслює важливість

причинно-наслідкового зв'язку між перешкодою та невиконанням зобов'язань.

У статті також розглядаються проблеми доведення непередбачуваності, яка часто оцінюється за допомогою стандарту «розумної особи». Цей стандарт передбачає, чи могла «розумна особа» з точки зору сторони, яка не виконала зобов'язання, передбачити існування перешкоди на початковому етапі або в подальшому.

Насамкінець, в статті зазначається, що хоча стаття 79 забезпечує надійну основу для звільнення сторони від відповідальності, її застосування вимагає ретельного аналізу договірних зобов'язань, торговельної практики та конкретних обставин, пов'язаних з перешкодою. У статті висловлюється думка про необхідність розробки більш чітких керівних принципів і послідовного судового тлумачення, що сприятиме однаково застосуванню статті 79 у різних правових системах.

Ключові слова: звільнення від відповідальності, перешкода, невиконання, непередбачуваність, невідворотність, причинно-наслідковий зв'язок.

Problem statement. In 2022, when the full-scale invasion of Ukraine by Russia began, many international contracts were suspended / terminated due to the fact that the parties were unable to continue to perform the contract, and therefore, in most cases, they referred to the provisions of international legal acts, in particular, to Article 79 of the United Nations Convention on Contracts for the International Sale of Goods (hereinafter – the «CISG»), which provides for the exemption of a party from responsibility in the event of an «impediment beyond its control»; in this case – war. And indeed, according to this and similar provisions, the party that failed to perform its obligations was exempted from paying damages in favor of the other party. However, circumstances that are an «*impediment beyond one's control*» do not always allow a party to be exempted from liability as certain conditions for the application of Article 79 must be met.

The purpose of the article. For the purpose of exemption of a party from liability for failure to perform contractual obligations under Article 79 of the CISG, it is important to reveal the concept of exemption from liability in the context of «impediment», as it provided by the CISG, taking into account the current situation that has developed in the sphere of purchase and sale in Ukraine, and, in this regard, making proposals for improving the understanding and interpretation of the above categories, respectively up to the present state of development of the system of trade relations in the world.

State of scientific development. A study of the concept of «*exemption from liability*» under Article 79 of the CISG and the conditions for its application has been undertaken by scholars such as T. Oral, L.A. DiMatteo, J. Miettinen, G.M. Bauer, I. Schwenzer, P. Schlechtriem and others.

Main material. International trade plays a crucial role in the modern globalized economy, facilitating the exchange of goods and services across borders. The CISG serves as a cornerstone instrument governing the legal aspects of these commercial relationships [1]. One of the critical aspects of the CISG is its provisions concerning the exemption from liability of the parties for non-performance of obligations. Article 79 of the CISG, in particular, outlines the conditions under which a non-performing party may be exempted from liability for damages if the failure to perform was caused by an «*impediment*».

Article 79 of the CISG consists of five parts, which set out the specifics of the application of such a concept as «*exemption from liability*», namely:

- The first part determines the requirements that must be met to exempt from liability;
- The second part provides for a list of grounds for exemption of the non-performing party due to the actions or non-actions of a third party;
- The third and fourth paragraphs state that the desired effect of a claim of impediment is suspension, but not avoidance, by determining the time during which this Article may apply;
- The fifth part of the Article states that the exemption only protects the claiming party from liability for damages, therefore, the non-claiming party still retains the rights to avoid the contract and to demand specific performance or substituted performance.

In order to understand whether a contracting party may invoke the application of Article 79 in its contractual relations, it is essential to clarify what the «*exemption*» is and the conditions under which it may be applied.

The party may be exempted under Article 79 if the failure to perform is due to (a) an impediment, which is beyond control, (b) unforeseeable, and (c) unavoidable in the sense that the party could not reasonably be expected to avoid or overcome the impediment or its consequences, and that the impediment must be (d) the cause of the failure to perform.

a) Impediment beyond control

The application of Article 79 depends on the existence of an impediment. For the party to be exempted from liability under Article 79, such an impediment must be an objective circumstance, that is, be outside the party's control. In determining whether or not such an impediment

was beyond a party's control, attention should be paid to the distribution of obligations in the contract, as well as international customary law and trade practice established between the parties [2, p. 646].

There is no definition of "impediment" in the CISG. Following the case law, in *Scafom International BV v. Lorraine Tubes S.A.S.* case the court indicated that the "impediment" referred to in Article 79 (1) CISG may include changed circumstances that have made a party's performance a matter of economic hardship, even if performance has not been rendered literally impossible. The Court asserted that, in order to qualify as an "impediment", the change of circumstances that were not reasonably foreseeable at the time of the conclusion of the contract and performing the contract must increase the burden of performance of the contract in a disproportionate manner [3, p. 11].

In another decision the Court held that the impediment must be "an unmanageable risk or a totally exceptional event, such as force majeure, economic impossibility or excessive onerousness" [4, p. 6]. However, Article 79 does not refer to force majeure, impossibility, frustration, hardship, impracticability or other similar terms that come from other legal systems.

Therefore, in view of the above, acts of God such as earthquake, drought, flood, avalanche; political and social events, such as wars, revolutions, coups; legal impediments such as embargoes, bans on imports and exports, restrictions on foreign currency transactions and other impediments such as theft of goods in transit or sabotage may fall under the concept of «impediment».

b) Unforeseeability

The definition of the term "unforeseeability" in Article 79 is formulated as an impediment that the defaulting party "could not reasonably be expected to have taken (...) into account at the time of the conclusion of the contract."

Remarkably, the words «foreseen», «foreseeable» or «foreseeability» do not appear in the context of the «*exemption from liability*»; however, many courts refer to the foreseeability of an event in Article 79. Most potential impediments to performance, such as bad weather or transportation delays, as well as events such as war, hostilities, embargoes, and terrorism, are "increasingly foreseeable" in modern commercial environment" [5, p. 298].

Jenni Miettinen set an example that although the fires fall under the category of unforeseeable circumstances in the sense of Article 79 (1) CISG, but, in fact, such fires are foreseeable because the parties regularly take out insurance policies against them [6, p. 10]. Therefore, such vague foreseeability could not exclude a party from

exemption and that's why the requirement of foreseeability is considered as one of the most difficult requirements to prove under Article 79.

The foreseeability of the event at the time of contract formation necessarily entails the use of the «*reasonable person*» standard. According to the "reasonable person" standard, the impediment must be reasonably foreseeable and a "reasonable person" from a point of view of the defaulting party, in the actual circumstances at the time of the conclusion of the contract and taking into account trade practices, ought to have foreseen the initial or subsequent existence of an impediment. If the impediment was foreseeable at the time of the contract conclusion and the defaulting party made no reservations about it, then it should be understood that such a party assumed the risk that performance might be delayed or prevented by the impediment [7, p. 6].

Moreover, foreseeability should relate not only to the impediment itself but also to the time of its occurrence. Following the leading case *Tsakiroglou & Co Ltd v. Noblee Thorl GmbH* on the issue of foreseeability in the Suez Canal, the defaulting party could only be exempted if it was reasonably unforeseeable that the impediment should occur during the term of the contract. The closure of the canal was foreseeable in the more or less distant future, but foreseeability must be assessed at the time of the conclusion of the contract; therefore, the court did not exempt the applicant from liability [8].

c) Unavoidability

For the defaulting party to be exempted from liability, such a party should be reasonably unable to avoid or overcome the impediment or its consequences.

Unavoidability is closely related with the condition of the external character of the impeding event, where the focus must be on the behaviour of the defaulting party, while the basis of reference is the same as for unforeseeability, namely the «*reasonable person*» standard [7, p. 7].

The «*reasonable person*» standard plays a key role in assessing whether the consequences of the impediment could have been avoided or overcome and is therefore applied to ascertain whether the defaulting party did everything in its power to avoid or overcome the consequences of an impediment.

However, the "unavoidability" criterion, like the previous criterion considered, is also vague and often it is difficult to distinguish between what is possible and what is impossible to overcome, as arguably everything is a question of measure.

On Schwenger's opinion, if overcoming the impediment or its consequences is both possible and reasonable for the defaulting party, the impediment, which the party could not take into

account when concluding the contract, does not exempt it from liability [9, p. 1069]. As a general rule, the party can be expected to overcome an impediment to perform the contract in the agreed manner, even if this results in significantly increased costs and even losses as a result of such performance. Therefore, the defaulting party will usually consider alternative options to perform the obligation that will be the least burdensome and cause the least damage [7, p. 8]

d) Causation of non-performance

The failure to perform must be “*due to*” an impediment for a non-conforming party to qualify an exemption under Article 79 (1). It is noted that the last condition, “*due to*”, relates to the causal element, supported by the following example: if the goods were lost due to defective packaging because of a natural disaster, the party remains liable if the breach of contract is a simultaneous cause of the non-performance [9, p. 1070]. In addition, the same shall apply if the non-performance is the result of a combination of several events, at least one of which could have been foreseen or avoided by the defaulting party.

Thus, a party is exempted from liability under Article 79 if an unforeseeable and insuperable impediment is the sole reason of non-performance.

Following the established case law, in the “*Vine Wax*” case, the causal element was emphasized by the fact that the seller would have been liable for the non-conforming goods, even if he was not obliged to examine them before delivery [10].

In this case, the seller agreed to supply vine wax to the buyer so he could protect the grafts of grape vines from drying out and risk of infection. The seller purchased the wax from its supplier, who produced the wax partly from raw materials provided by a Hungarian supplier that the seller had not used in previous years. The seller sent the wax from his supplier without opening the package, the wax did not protect the vines as it should have, and the buyer sued the seller.

The intermediate appellate court found the seller liable for supplying goods that did not meet industry standards. Stating that the seller could claim exemption when delivering non-conforming goods, the Regional Appeal Court of Zweibrücken held the seller liable on the grounds that he had failed to inspect the wax before sending it to the buyer [10, p. 21].

The Federal Supreme Court of Germany confirmed the seller’s liability on various grounds and held that, unless the parties agreed otherwise (and in this case they did not), the seller undertakes the risk of acquiring conforming goods when he does not manufacture them himself [11, p. 4]. This reasoning suggests that the seller’s liability under the CISG is one of guarantee, regardless of fault, hence the irrelevance of the seller’s failure to inspect.

Conclusions. The application of Article 79 of the CISG provides a framework for exemption from liability for a party due to non-performance caused by an unforeseeable and unavoidable impediment. This mechanism is crucial for addressing situations where external factors, such as war or natural disasters, prevent the fulfillment of contractual obligations. Therefore, for a party to be exempted under Article 79 of the CISG, the impediment must be beyond its control, unforeseeable, unavoidable, and with a direct causal link to the non-performance. This ensures a balanced approach, protecting parties from unforeseen events while maintaining the integrity of international trade agreements.

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