

LOCKDOWN IN INTERNATIONAL TRADE A NORMATIVE JURISDICTION BASED ON UNITED NATIONS CONVENTION ON CONTRACTS FOR INTERNATIONAL SALE OF GOODS (CISG) 1980

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Abstract-This research aims to explain the relationship between the rules in the CISG 1980 and the lockdown in relation to international trade during the Covid-19 pandemic. Then also find solutions for parties who experience problems when conducting international trade transactions during the lockdown. The research found that there are no special rules in the CISG that regulate international trade during a pandemic. Besides that, the pandemic cannot be used as an absolute reason for filing an exception. Re-negotiation on the basis of pandemic is a step that the parties can take before bringing it to a dispute resolution forum. It is recommended that CISG issue legal instruments such as legal guides that provide directions to carrying out international sale of goods during this Covid-19 pandemic and the parties should include force majeure or hardship clauses based on matters agreed upon by the parties.

Keywords: CISG; Covid-19 pandemic; lockdown.

INTRODUCTION

The first instance of unexplained pneumonia was reported in Wuhan, Hubei Province, in December 2019. The sample under study shows the etiology of the new coronavirus. The disease was initially known as 2019 novel coronavirus (2019-nCoV), but on February 11, 2020, WHO declared a new name for it: Coronavirus Disease (COVID-19), which is caused by the Severe Acute Respiratory Syndrome Coronavirus-2 (SARS-CoV-2). This virus can be passed from person to person and has spread throughout China and over 190 nations.¹ Based on data obtained from the official website of the World Health Organization (WHO) as of September 20, 2020, there have been more than 30.6 million cases of which 950,000 have died. From 14 to 20 September 2020 alone, nearly 2 million new cases were reported to

¹ Departemen Ilmu Penyakit Dalam, Universitas Indonesia, "Coronavirus Diseases : Tinjauan Literatur Terkini", *Jurnal Penyakit Dalam Indonesia* Vol. 7 No. 1, Maret 2020

WHO, which is an increase of 6% compared to the previous week. During this period, the reported death rate decreased by 10%, namely 36,764 cases.

One of the ways to prevent the transmission of Covid-19 carried out by countries around the world is by issuing policies related to preventing the transmission of Covid-19, the lockdown policy which has recently become a favorite choice for several countries for example, the United States, China, India, Russia, Italy and the other countries.²

The definition of lockdown based on the Cambridge Dictionary, lockdown means a situation where people are not allowed to freely enter, exit, or roam around certain buildings or areas due to danger.³ This lockdown policy is a policy that limits every space in the life of a country to every layer of its society, in terms of international trade starting from the production process to exportimport to be disrupted due to the implementation of this policy. In the production process, factories must be closed and workers must stay at home during this policy as well as in the export-import process, such as in the United States, which experienced a 26% decline at the Port of Los Angeles port during March 2020.⁴

In international sale of goods, the United Nations itself has issued rules in the form of a convention, namely the United Nations Convention Contracts for the Sale of Goods (CISG) which is universal and aims to unify the law in the field of international trade in goods in order to overcome the problem of legal differences between the countries of the parties involved in international trade.

Lockdown policies that disrupt international trade are things that are beyond the control of parties conducting trade between countries so that they can become exceptions or exceptions in international trade, such as if there is a delay in the

² Tim Detikcom, "*Daftar Negara yang Lockdown Karena Corona*",
<<https://news.detik.com/berita/d4956298/daftar-negara-yang-lockdown-karena-corona/2>>,
[accessed on 30/09/2020]

³ Cambridge Dictionary, "Lockdown", <<https://dictionary.cambridge.org/dictionary/english/Lockdown?q=Lockdown>>,
[accessed on 09/02/2021]

⁴ "*Karena Corona, Impor Kargo Amerika Serikat Turun Pada Maret*",
<<https://internasional.kontan.co.id/news/karena-corona-impor-kargo-amerika-serikat-turun-pada-maret>>,
[accessed on 04/09/2020]

transportation of goods due to the closure of export-import ports or the closure of factories. producers so that they stop the production rate, it is necessary to do further research on how the rules in the CISG address this situation.

The problem identification is as follows:

1. What is the relationship between the rules in the CISG convention and Lockdown in relation to international trade during the Covid-19 pandemic?
2. What solutions can be taken by the parties affected by the implementation of the lockdown? The objectives of this research are:
 1. Explain the relationship of the rules in the CISG convention and lockdown in relation to international trade during the Covid-19 pandemic.
 2. Find solutions that can be taken by the parties affected by the implementation of the lockdown.

RESEARCH METHODS

1. Types of research

This is a normative jurisprudential study. Legal research that uses the law to construct a system of norms is known as normative legal research. Principles, norms, laws and regulations, court decisions, agreements, and doctrines are all part of the norms system in question (teachings).⁵

2. Research approach

The legislative and conceptual approaches were employed as the first approaches in this study. This statutory method entails going over all of the laws and regulations that pertain to the legal issues in question.⁶

Researchers will uncover ideas that give birth to legal conceptions, legal concepts, and legal principles that are important to the problems investigated by researching the views and doctrines, and with this concept approach, the researcher will produce legal arguments in response to legal challenges raised.⁷

⁵ Mukti Fajar ND and Yulisnto Achmad, *Dualisme Penelitian Hukum Normatif & Empiris*, Yogyakarta: Pustaka Pelajar, 2009, 23.

Data Collections Tools and Techniques

Literature studies on legal materials, both primary and secondary legal resources, as well as tertiary legal materials and/or non-legal materials, are used as data gathering strategies in normative legal research. Reading, viewing, and listening are all options for finding these legal publications, and many of them may now be found on the internet.⁷

Data Analysis

The data analysis used in this study is a prescriptive analysis which is intended to provide an argument for the results of the research that has been carried out. Argumentation is used to make prescriptions or judgments about what is right or wrong, or what should be done according to law, based on facts or legal events.⁹

RESEARCH RESULTS AND DISCUSSION 1) Lockdown Analysis as an Exception in International Trade

This international trade in goods certainly has a number of challenges for the perpetrators, especially in the legal field, the challenges encountered are the differences in the legal system adopted by the buying country and the selling country. Differences in legal systems will cause problems such as rules regarding what things can or cannot be done, what goods may or may not be sold, to the process of delivering goods in international trade and so on. However, along with this development, it is realized by the parties conducting trade as well as by countries involved in international trade, that a common law is needed to facilitate this international trade process.

Defining a lockdown as an exception in international trade is not an easy thing, to make a lockdown an arduous reason that causes an exception according to article 79 paragraph (1) must pay attention to various things, for example differences in the implementation of policies in various countries that result in different points of view on whether or not Lockdown is categorized as an exception. We can see West Australian regulations declaring a state of emergency on March 15, 2020, the West Australian government forcing anyone who has just arrived in

West Australia to do two week of self-isolation, prevents international shipping from docking and banning unimportant indoor and outdoor gatherings.⁸

Otherwise, Sweden believes there is no need to implement a large-scale lockdown during this pandemic. Since the outbreak, Sweden has mostly depended on voluntary social distancing recommendations, such as working from home whenever feasible and avoiding public transportation. There are also limits on visiting care homes and a change to table-only service in bars and restaurants, as well as a ban on gatherings of more than 50 people. The administration has often referred to the pandemic as a "marathon, not a sprint," claiming that its responses are longterm in nature.¹¹

In addition to the differences in policies in various countries, the next thing that must be considered is the occurrence of several waves of the spread of the virus itself. Taking Singapore as a model case, the opening case occurred on January 23, 2020. The Singapore government implemented a lockdown known from 7 April to 1 June 2020 as a "circuit breaker" in response to the outbreak which was previously under control. The lockdown was gradually loosened on 2 June 2020, and the outbreak showed to be under control again. Whether the same reasonable expectation test applies at different times of the epidemic is the question. Will it be realistic to suppose that a Singaporean supplier could predict the following lockdown, which would have a negative impact on the supplier's capacity to execute, if an international selling contract was signed prior to April 7, 2020? No one can forecast whether or not the next "circuit breaker" will occur in Singapore, hence it's unreasonable to assume that the Singaporean provider could predict the initial "circuit breaker". In this view, The reasonable expectation criteria outlined in Article 79(1) may preclude a party that has been harmed by the Covid-19 circumstance from seeking exemption. This increases doubts about whether Article 79 could effectively safeguard the parties from the effects of obstruction..⁹

⁸ Lok Kan So (*et.al.*), *COVID-19 in the Context of the CISG : Reconsidering the Concept of Hardship and Force Majeure*, Online First Version, 2020, 7. ¹¹ *Loc.Cit.*

⁹ *Ibid*, 9.

Perhaps the CISG Advisory Council's own experience demonstrates how difficult it is to verify hardship based on Article 79. The CISG Advisory Council examined ten instances from seven States Parties in order to produce an opinion and establish criteria for determining hardship, as indicated by the authors. Only in one of the ten cases did the court find that the hardship had been proved in conformity with Article 79. *Lorraine Tubes S.A.S. v Scafom International BV* was the case. A seller from France and a customer from the Netherlands were involved in this case. The selling of steel tubes was the subject of the deal. There were no price adjustment clauses in the contract. The value of steel had increased up to 70% before the shipment. The purchaser attempted to renegotiate the terms of the contract. The buyer rejected, insisting instead on contract fulfillment at the agreed-upon amount. The buyer was compelled to re-negotiate the agreement with the seller after a Belgian court determined that the unanticipated price increase constituted hardship under Article 79.¹⁰

While this case seems to show that a 70% price increase is enough to verify hardship, the German tribunal in case 1 U 167/95 took a different approach. A seller from Germany and a buyer from the United Kingdom were involved in the case. The purchaser agreed to pay US\$9.70 per kilogram for 18,000 kg molybdenum iron from the vendor. A force majeure clause was included in the contract, which might protect the seller from duty if certain force majeure circumstances occurred. Later, the seller informed the purchaser that the iron molybdenum was priced higher by the suppliers, and that they could only deliver the lesser grade consignment. The customer agreed to the alteration after some discussion. The purchaser had to locate a replacement for the stock of iron molybdenum at a value of US\$30 per kilogram after the shipment was delayed for nearly three months. The purchaser demanded compensation from the vendor. The buyer was entitled to damages, according to the court.¹¹

These contradictory decisions demonstrated that there is no objective standard for applying

¹⁰ *Ibid*, 6.

¹¹ *Loc. Cit*

Article 79. Other factors may be introduced by judges in different nations. Judges from other jurisdictions may establish their own interpretations or assign different weights to each criterion, making it difficult to deduce any reason for the result taken in each case.¹²

In relation to the implementation of the lockdown during the Covid-19 pandemic, hardship arises when a country tightens the export-import process, causing delays in the delivery of goods. In international trade, this situation is called late delivery. In general, late delivery is not a violation of the agreement. The buyer can ask for compensation if the delay results in a loss.¹³

In general, the reason for delay cannot be a reason for breach of contract, but there are some further circumstances that can make delay a breach of contract. These circumstances are circumstances where the parties have agreed that the delivery time in this agreement is important, For example, when the parties agree that the goods must be supplied on time, as quickly as feasible, or if the goods delivered are required immediately. In this case, a delay of almost a week after the agreed date could be a fundamental breach. This also applies to seasonal goods, because these goods will not be useful to the buyer in the event of a delay.¹⁴

When considering the COVID-19 case, the impediments of applying Article 79 become more apparent. Various governments have taken various measures to try to control the transmission of the virus during this time of worldwide pandemic. While some governments have opted to minimize the epidemic, the majority of developed countries have chosen to enforce a strict lockdown in order to avoid further outbreaks.¹⁵ For example, in a contract among a manufacturer in Australia and a customer in Thailand for the sale of disposable face masks, limitations imposed by the Australian Federal Government would prevent the purchaser from

¹² *Ibid*, 6.7.

¹³ Ulrich Magnus, "The Remedy of Avoidance of Contract Under CISG-General Remarks and Special Cases", 25:423 *Journal of Law and Commerce* N423-436 (2005)

¹⁴ *Loc. Cit*

¹⁵ Lok Kan So, *Op.Cit*, 7. ¹⁹ *Ibid*, 7.8.

fulfilling the contract. In a circumstance like this, it's reasonable to assume that the seller will be able to prove hardship under Article 79. Similarly, if a producer of disposable face masks requires minimum 100 people to function, it might run into problems due to limitations on the number of workers who may congregate in one place.¹⁹

The establishment of the contract at the appropriate time is also critical. If the parties signed the contract before the pandemic, the party that was harmed could argue that the pandemic was not reasonably anticipated. The portion that is more difficult is when the contract was signed after the outbreak of the epidemic. It is conceivable that the parties to such a contract will be taken to predict or reasonably anticipate that the pandemic may impair their contract's performance. In this

circumstance, neither party will be able to depend on Article 79 to absolve them of their damages liability. An arbitration case decided by the China International Economic and Trade Commission (CIETAC) on March 5, 2005 supports this claim. The lawsuit concerned a contract signed on June 20, 2003. During this time, an epidemic of Severe Acute Respiratory Syndrome (SARS) was reported, defined as a 'viral respiratory infection caused by a coronavirus.' A total of 8,098 persons were infected and 774 died as a result of this outbreak. While the SARS infection rate was far lower than what we are seeing currently with Covid-19, the fatality rate from the SARS outbreak was roughly 15%. Returning to the facts of the case before the CIETAC, the contract in this case was for the sale of 445 tons of L-lysine and involved a seller from China and a customer from the Netherlands. Because the supplier only provided 289 tons, the purchaser cancelled the order that had not been supplied and demanded the difference in price between the first agreement and the market price, plus interest. Article 79 was invoked by the vendor, who claimed that canceled delivery caused by the SARS outbreak. As a result, it should not be held responsible for the cost difference. The seller was found to be responsible for damages by the tribunal. It rejected to be relevant for Article 79 in this case because the contract was signed two months after the SARS outbreak began, and the seller should have been reasonably expected to consider the epidemic when the agreement was signed.¹⁶

These measures obstruct and negatively damage international trade of goods, either directly or indirectly. Six members of board crew from the cattle vessel Al Kuwait, for example, were determined to have caught the coronavirus on May 26, 2020. They were taken to a quarantine hotel, when the other 42 members of the board crew were required to remain undergo health examinations and stay on

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board. The conveyance of 56,000 sheep worth \$12 million was significantly delayed as a result of this.²¹

The Australian government announced a ban on the exportation of the sheep from 1 June 2020 to 14 September 2020 in March 2020 to avoid sheep from dying on ships owing to hot weather and high temperatures. Could the purchaser depend on Article 79 to liberate it from responsibility in this condition, regarding there was an agreement for the sale of sheep between a seller from Australia and a shipment of the sheep was significantly delayed caused by the quarantine and the exportation forbid, and the purchaser determine to claim damages?¹⁷

To begin with, as previously stated, Article 79(1) only allows the exception to be invoked by the party who can fulfill the reasonable expectation test. The contract's timing becomes critical. If the contract was signed before the epidemic, it's quite unlikely that the seller was thinking about the pandemic and the exportation forbid at the time. Any contract signed after the plague, on the other hand, creates more problematic questions. If the agreement was signed in February 2020, the seller may have been deemed to be aware of the pandemic, despite the fact that the number of infected cases in Australia at the time was very low. Because the exportation forbid was only enacted in March 2020, the vendor was not possible to have anticipated the situation. Any rational expectation of an export ban would apply only to contracts signed after March 2020.¹⁸ The CISG Advisory Council also established some broad criteria to determine whether the increasing difficulty in performance constitutes such hardship:

- (a) whether either party assumed the risk of a change in circumstances;
- (b) whether or not the contract is speculative;
- (c) whether or if there have been past market volatility, and if so, to what amount;

¹⁷ *Ibid*, 9.10.

- (d) the contract's period;
- (e) whether the goods were obtained from the seller's own supplier;
- (f) whether either party has taken steps to protect themselves from market fluctuations.²⁴

Based on the above criteria, we can do the analysis one by one. Starting from the first whether either party assumed the risk of a change in circumstances. This isn't likely to apply to the situation under discussion. Because the present condition was not in the parties' minds at that time, it is exceedingly improbable that the parties may properly apportion the risks either by agreement or conduct if the contested contract was formed before the commencement of the pandemic. If the challenged contract was designed after the pandemic, it is quite possible that the parties were required to consider the epidemic, making it difficult for either party to depends on Article 79.¹⁹

The second factor to consider is whether or not the contract is speculative. 'If the agreement is highly unpredictable, a party may be believed to have estimated the threat involved in the transaction,' according to the CISG Advisory Council. The CISG Advisory Council cited the abovementioned iron molybdenum instance in stating that, because the contract was highly speculative, the seller could not depends on Article 79 to free it from obligation for compensation. As a result, in that case, the burden of proof for establishing hardship was severe.²⁰ For at least two reasons, this criterion is difficult to adopt in the condition of the case under discussion. To begin with, there is no absolute criterion for determining whether a transaction is an exception. In the case of Al Kuwait, there is no definitive answer as to whether or not a sheep-sale deal can be considered as an exception. On the surface, it does not appear to be. The second reason, and perhaps more significantly, there is no absolute measure by which to determine whether the criterion (used to

¹⁹ *Ibid*, 10.

²⁰ *Loc. Cit.*

determine hardship in Article 79) is commensurate to the level of consideration. In the abovementioned example involving molybdenum iron, a 300 percent rise in price was insufficient to demonstrate hardship.²¹

The CISG Advisory Council explained that when it comes to the next condition, previous market changes, "courts and arbitral tribunals interpreting Article 79(1) CISG have been particularly difficult to exempt a party impacted by price fluctuations." As a result, regular price changes in the commodities trade will rarely result in a recognition of hardship. The CISG Advisory Council also criticized the Scafom case for create a terrible precedent by permitting the seller to be released from accountability based on a low value change threshold, namely a 70 percent extra in price. Using this logic, it is claimed that if the price rise is at least 70%, the seller has a fair probability of establishing hardship. Even though the seller is facing a price change of more than 70%, it is unclear if the seller may use this standard to prove hardship because in every given scenario, there is no final answer as to how the threshold should be set.²²

The contract's duration is the fourth criterion to evaluate. The CISG Advisory Council presented an example. Assume that the parties anticipated the value of a ten-year contract at 100%, and that a hardship event occurred in the next five years of the contract. As a result, the contract's value was lowered by 30%. In such a case, the CISG Advisory Council recommended that the judge examine the last 70% anticipated value for the following five years when determining whether the parties' implementations had suffered a basic imbalance.²³

The fifth criterion is whether the products were purchased from the seller's own supplier. This point was stated by the CISG Advisory Council as follows: "Party may be exempted owing to hardship." In several cases, the purchaser may

²¹ *Ibid*, 10.11.

²² *Ibid*, 11.

have purchased the products or otherwise protect them from its provider prior to the occurrence of the hardship event. The cost may have risen significantly and unexpectedly since then, but the contract may not be speculative in nature; anyway, if the seller obtains the items before the incident of the hardship case, the seller may not hold back the shipment and resell the items to a second buyer for a higher profit'.³⁰

In other words, the timing of contract establishment, as well as the timing of shipment, is critical in determining the seller's difficulty. When this aspect is obvious and self-explanatory, it is

unlikely to apply to the majority of the COVID-19 pandemic's negative outcomes because the circumstance usually results in either a delivery delay or non-delivery.²⁴

Finally, whether either party has taken any measures to protect themselves from market movements is a non-exhaustive criterion. 'Whether any of the parties has avoided or protected against fluctuations in the market must be considered in judging the existence of hardship,' according to the CISG Advisory Opinion. As an example, if a seller has purchased hardship insurance, the number of that insurance may be used to determine whether or not the seller can cope with the impediment.²⁵ It also depends on the quantity of claims; the insurance company may take a long time to decide whether or not to approve a claim.

In the case of Royal Insurance (UK) Ltd v Sprung in the United Kingdom, one of the main worldwide insurance hubs, an insurance claim compensation was belated for over than three and a half years, and the guaranteed was eventually unable to resume its operation. As a result, payment of the claim may not occur before the conclusion of the dispute. As a result, determining hardship solely on whether or not insurance was acquired against hardship may be impracticable, as there is always the risk that the insurer will deny the claim.²⁶

Article 79, based on the foregoing reasoning, is rarely useable to the modern Covid-19 conditions. The CISG advisory council has produced an assumption on how to determine hardship, it has little relevance to the current pandemic crisis. The majority of the standard are not objectively defined. In this perspective, participants to international sale of goods transactions should try to safeguard their rights by incorporating understandable force majeure terms in their contracts, as well as other related clauses.³⁴

²⁴ *Loc. Cit*

²⁵ *Loc. Cit*

2) Contract Adjustment for Parties Affected by Lockdown

Regarding the agreement made before the pandemic occurred and was affected by the lockdown policy so that one of the parties carrying out the contract felt difficult in carrying out the contract provisions until the party claimed an exception in accordance with the provisions of article 79 paragraph (1) of the CISG, the author concludes that there are several factors that need to be considered to conclude a situation as arduous to claim an exception.

The first factor is an internal factor, namely a factor that comes from the parties themselves.

This internal factor needs to be considered to ensure that the parties have actually carried out the contents of the agreement properly and also have good intentions to carry out the contract in accordance with what is stated in the contents of the contract. The second factor is an external factor, namely a factor that is beyond the control of the parties. In particular, the main discussion is the implementation of the lockdown policy, how this lockdown policy can cause hardship that allows one party to file an exception claim. We can see the implementation of this lockdown policy from various sides, for example how far it affects the performance of the parties, whether this policy affects directly or indirectly, and whether this policy is the main factor that one party is unable to perform as promised. As in the case of Al Kuwait where the agreement was made before the implementation of the lockdown policy and the ban on animal exports in Australia, because at the time of delivery there were several crew members who were confirmed positive for the corona virus, shipping was hampered because they had to wait for the crew to isolate. In this case of course there will be a delay in the delivery of the sheep to the buyer in Kuwait.

Next is the sale and purchase agreement made when the pandemic has occurred and the lockdown policy has begun, it should be noted that in making the sale and purchase agreement, the parties must consider very carefully and realize that the parties will carry out the agreement in a pandemic situation. The parties must understand the consequences that will be faced will be different during the pandemic conditions, based on this understanding the parties can conclude whether they will continue their contract or not.

In the case of the sale of 445 tons of lily sine, CIETAC chose between a seller from China and a purchaser from the Netherlands, this is important, because the court rejected the seller's exception, considering the contract the sale was made during the pandemic. Moving on from this case and the ongoing Covid-19 pandemic, it is necessary to take preventive steps to face new challenges in international trade and prevent things that are not desirable in the future.

There are various things that may be done while drafting a contract during this epidemic, the first of which is to add a force majeure provision. In the event of a pandemic, several organizations have changed their guidelines addressing force majeure and difficult provisions. For instance, the International Chamber of Commerce (ICC) provides a basic or detailed explanation of the force majeure clause. The conditions "force majeure" is explained as follows in both versions:

The happening of an incident or situations that prohibits or prevent a party from executing provisions of its agreement obligations under the agreement is defined as force majeure if that the party proves:

- [a]. that such a difficulty is beyond its control; and
- [b]. that it could not have reasonably predicted at the time the contract was signed; and
- [c]. that the impediment's consequences could not have been avoided or overcome by the affected party.²⁷

The ICC also includes a list of presumed events in the extended version of the clause: (a) Hostilities, invasion, act of foreign adversaries, and major military mobilization are all examples of war (whether declared or not);

- (b) Insurgency, act of terrorism, sabotage, or piracy, military or usurped power, civil war, riot, revolt, and revolution, military or usurped authority, insurgency, act of terrorism, sabotage, or piracy;
- (c) Embargoes, sanctions, and currency and trade restrictions;

²⁷ *Loc. Cit.*

- (d) Expropriation, seizures of works, requisition, and nationalisation are all examples of acts of authority, whether legal or illegal.;
- (e) a disease, an epidemic, a natural calamity, or a severe natural occurrence;
- (f) Explosions, fires, equipment destruction, and long-term transportation, telecommunications, information, or energy outages;
- (g) boycotts, strikes, lockouts, go-slows, and occupations of factories and premises are all examples of general labor unrest.²⁸

These presumptive developments could suggest that the parties have reached a standard on the sector of the hindrance. Under this regard, the International Chamber of Commerce articles could provide more certainty and clarity than Article 79 of the CISG. Nonetheless, the ICC noted that, in fact if the discussed case falls under one of the supposed occurrences, the party depending on the force majeure clause created by ICC must show that the event could not be prevented or overcome in a reasonable amount of time. As the phrase "plague, pandemic..." shall enough to describe the current pandemic scenario, the parties might choose to negotiate and determine if acts in response to a pandemic such as the lockdown and exportation forbid must be mentioned directly in the list.³⁷

Another clause, the hardship clause, was developed by the ICC to allow a more supple response to hardship situations. The term "hardship" is defined as follows in the said clause:

- (a) due to an incident beyond its reasonable control that it could not reasonably have been anticipated to have taken into consideration at the time of contract conclusion, continuous performance of its contractual duties has become unreasonably onerous; and
- (b) If the event or its repercussions could not be reasonably averted or overcome, the parties are obligated to negotiate alternative contractual terms within

a reasonable time following the invocation of this Clause that allow them to overcome the event's consequences.²⁹

The ICC hardship clause, like force majeure provisions, requires the party seeking to invoke the provision to demonstrate that the discussed event is beyond rational prospect and cannot be avoided. In contrast to the ICC force majeure clause, the International Chamber of Commerce hardship provision gives the parties many options if hardship is proven. First, rather than receiving a straightforward release from obligations to execute the agreement and pay compensation, the party seeking to invoke the hardship provision must re-deliberate the agreement conditions in order to cope with the established hardship.³⁰

Once the parties choose to rely on the clauses, the problem is to determine whether the occurrence is an exception-covering occurrence, once it is confirmed that the event falls within a registered force majeure event, the agreement must be interpreted to decide what impact the parties want from the case. to the contractual obligations of the affected party.³¹

Some agreements will set an self-acting right to lengthen the delivery date to extend the delivery date or until the specified event occurs, or the consequences stop. In another form of agreement, it directs the contract to be canceled.³² Thus, if the parties conclude that the Covid-19 pandemic is a force majeure, the parties can include it in the force majeure clause along with all the consequences agreed by the parties. On the contrary, if the parties agree that the Covid-19 pandemic is not an obstacle in international trading in accordance with the parties' considerations, then this will not be a problem.

In drafting the contract, the parties can also consider the current situation where most countries in the world have implemented a "New Normal" policy where the existence of this corona virus has begun to be accepted and the community must be ready to live side by side with Covid-19. The current situation is quite different

²⁹ *Loc. Cit*

³⁰ *Loc. Cit*

³¹ Fillippo Lorenzo, (et.al) "Covid-19 Implications for Commercial Contracts : International Sale of Goods on CIF and FOB Terms", *Briefing Note*, 16., 2021.

³² *Loc. Cit.*

from when the Covid-19 pandemic began so that the parties can consider the current situation in the preparation of the contract. On both new contracts and adjustments to existing contracts, all firms must carefully evaluate how to deal with the continued impact of COVID-19, the likelihood of a second wave, and future epidemics and pandemics.³³

With the existence of several standards regarding hardship and force majeure, the parties can take these things into consideration in drafting contracts during this pandemic. It should be a special concern for the parties that the conditions before and after the COVID-19 pandemic are very different, the parties must really consider whether the contract made can be carried out by each party, the obstacles that may occur related to the pandemic, if it occurs it is not desirable whether the agreement can still be renegotiated and so on.

If the parties are not able to come to a mutually acceptable agreement, on another contractual conditions under the ICC hardship provision, they have three additional choices. First, the party seeking to invoke the hardship provision has the option of terminating the agreement. Next, either party can ask an arbitrator or a judge to modify or terminate the contract. If one of the parties determines to change the contract, the arbitrator or the judge might request the parties to suggest new contractual conditions for re-deliberate. The last alternative is for either party to obtain a announcement from an arbitrator or a judge to terminating the agreement directly.³⁴

Despite the fact that the first and third alternatives have identical outcomes, the second option allows the party to look for some legal advice to re-deliberate the agreement. In this context, it's worth noting that the International Chamber of Commerce hardship provision recommend the parties to solve their disputes by

³³ Simon Jones (*et.al*), “*The Impact of the COVID-19 Pandemic on Contracts Regarding the Manufacture ,Distr ibution and Sale of Goods*”, Squire Patton Boggs, Mei 2020, https://www.squirepattonboggs.com//media/files/insights/ publications/2020/05/the-impact-of-the-covid19-pandemic-on-contracts-regarding-the-manufacture-distribution-and-sale -of-goods/impact_of_covid19_on_contracts.pdf, [accessed on 24/07/2021]

³⁴ Lok Kan So, *Op. Cit.* 14.15. ⁴⁴ *Ibid*, 15.

collaboration rather than legal process, which could be a better favorable option because it preserves the parties' business relationship.⁴⁴

To summarize, parties to an international sale of goods dealings should be aware that the CISG's Article 79 may not be enough to shield them against obstacle and hardship. In this complicated period of the Covid-19 pandemic, basic agreement terms drafted by respected international organizations can be utilized to safeguard their interests. The parties should not, however, consider these basic contractual clauses to be a total key to their problems. The parties are advised to obtain legal advice and draft their own force majeure clauses (or any other similar agreements) that will satisfy their special requires in this historic period.³⁵

CONCLUSION

In relation to international trade in goods during the Covid-19 pandemic, it can be said that there are no special rules in the CISG that regulate in detail this. More specifically regarding the discussion in this thesis, namely the lockdown policy as an exception in international trade, the CISG does not provide criteria regarding events that are classified as exceptions while the criteria obtained from several sources such as the CISG Advisory Council, ICC and so on are valid only as a reference for the parties in preparing The contract is not a binding guide, and based on the aforementioned jurisprudence, no difference in decisions was found on this matter, so the author concludes that the lockdown policy cannot be categorized as an absolute exception.

Facing international trade in goods in the Covid-19 pandemic situation, the parties who will make the agreement can carefully consider the consequences they will face when carrying out the contents of the agreement, then the parties can take preventive steps such as including a detailed force majeure clause so that it can provide standards agreed upon by the parties. After that the parties conclude whether it is possible to carry out the agreement that has been made. The international sale and purchase agreement made must be carried out in good faith

³⁵ *Loc. Cit*

by both parties and is flexible in the event of the desired conditions so that the agreement can be carried out.

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