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# *Force majeure* and CoVID-19 in international sales contracts: an African perspective

*Submitted in partial fulfilment of the requirements of the Master of Laws (LLM) degree in International Trade and Investment Law in Africa*

*by*

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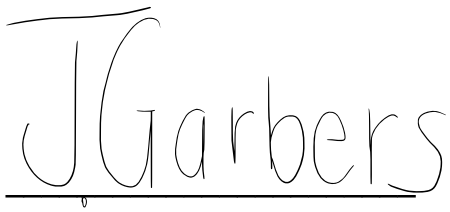
Signature: 

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*“Namate julle ’n genadegawe ontvang het, moet julle mekaar daarmee dien soos goeie bedienaars van die veelvoudige genade van God.” - 1 Petrus 4:10*

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## DEDICATION

*I dedicate this work to my grandfather, Jurie Viljoen, a talented writer who is my inspiration and example, and after whom I am named. Thank you for preserving the Afrikaans language, and the history and culture of our people through your writing. Your legacy will live forever.*

*I furthermore dedicate this work to all of those who have suffered at the hands of the COVID-19 pandemic. I hope that this work can make a difference in the business world and leave us better prepared for the future.*

## LIST OF ABBREVIATIONS

**CIETAC:** China International Economic and Trade Arbitration Commission

**CISG:** Convention on the International Sale of Goods

**ICC:** International Chamber of Commerce

**The Council:** CISG Advisory Council

**UNCTAD:** United Nations Conference on Trade and Development

**UNIDROIT:** The International Institute for the Unification of International Private Law

**UNIDROIT Principles:** UNIDROIT Principles of International Commercial Contracts 2016

**US:** United States of America

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# CHAPTER 1: INTRODUCTION

## 1.1 Background

Early in 2020, the world was gripped by the COVID-19 pandemic. COVID-19 is unlike any other previous pandemic or epidemic in history. It has had and is continuing to have detrimental impacts, both socially and economically, on human life. Apart from the fact that millions of people have died from the virus, the highly contagious nature of the virus has led to extreme lockdown measures being taken by governments to contain the spread of the virus, preventing almost half of the world's workforce from being able to work.[1,2]

There are many other negative impacts that COVID-19 has had on various aspects of society and the economy. An important one to look at for the purposes of this study is the impact it has had on international trade, and more specifically, on international sales contracts. Government measures have had severe effects on business operations. Employees falling ill and lockdown restrictions such as capacity limits and curfews have reduced business productivity. Border closures, disruptions to supply chains, transport restrictions and increased pressure on cash flow have affected the ability of businesses to deliver their goods or services. This has resulted in many businesses finding themselves unable to fulfil their contractual obligations or making the performance of contracts excessively onerous, thus leaving them exposed to contractual damages for breach of contract.[3] These impacts on businesses have had an overall negative effect on trade: across the world, imports and exports have been terminated or delayed, supply chains have collapsed and prices have crashed.[4]

Therefore, in the midst of the COVID-19 outbreak, the million dollar question across the world of trade, investment and commerce has been whether *force majeure* does in fact

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[1] World Health Organisation 'Impact of COVID-19 on people's livelihoods, their health and our food systems' 13 October 2020 https://www.who.int/news/item/13-10-2020-impact-of-covid-19-on-people%27s-livelihoods-their-health-and-our-food-systems (accessed 3 June 2021).

[2] BMJ Global Health 'Lockdown measures in response to COVID-19 in nine Sub-Saharan African countries' (2020) https://gh.bmj.com/content/bmjgh/5/10/e003319.full.pdf (accessed 19 August 2021). Some examples of lockdown measures in Africa include the closure of all airports in Zambia, except for one, and of the land border crossing to Tanzania. In South Africa, sales of alcohol and cigarettes have been suspended. In Ghana, travel into and out of major cities such as Accra and Kumasi has been restricted. Almost all African states have closed non-essential businesses and establishments such as restaurants and gymnasiums.

[3] L Silkin 'Can a contract be terminated if the effects of COVID-19 prevented performance?' https://www.lewissilkin.com/en/insights/can-a-contract-be-terminated-if-covid-19-or-government-sanctions-prevent-performance (accessed 9 June 2021).

[4] K Hayakawa & H Mukunoki 'The Impact of COVID-19 on international trade: Evidence from the first shock' (2021) 60 *Journal of the Japanese and International Economies* 2 https://www.elsevier.com/locate/jjie (accessed 2 June 2021).

incorporate worldwide pandemics. *Force majeure* is an age-old legal doctrine in the law of contract, and it comes into operation when circumstances that are beyond the control of a party render that party's ability to perform in terms of the contract impossible. It has the effect that the contract between the parties must be postponed or cancelled without any monetary damage. The doctrine has evolved substantially over the years, and today it is featured in many international and domestic legal instruments, such as the Convention on the International Sale of Goods (CISG)[5], which is notable in international sales law and which governs many international sales contracts. *Force majeure* has traditionally been formulated in contracts to include acts of God, such as earthquakes and tsunamis, and acts of man, such as war. However, COVID-19 has had more severe consequences than any other single non-war event since the Great Depression of the 1930s.[6] The COVID-19 pandemic places humankind in unprecedented territory, where acts of God and acts of man are extremely difficult to separate: the outbreak of the virus is an act of God, while the government restrictions imposed in reaction to the virus are an act of man.

Since the COVID-19 pandemic, it is expected that there will be an increase in cases relating to *force majeure* brought before arbitral tribunals.[7] Many businesses have declared *force majeure* as a major factor in their commercial contracts, whether as a result of government restrictions, a lack of income or of mere economic uncertainty.[8] Thus, there is a need to determine whether the inability to perform contractual obligations for reasons related to COVID-19 can be resolved without causing monetary damage to the party in breach of contract.

Currently, Africa contributes to only two percent (2%) of the world's international trade.[9] There are many reasons for Africa's futile presence in the world of international trade, but it is mostly due to a tremendous lack of infrastructure, limited production and expertise, poor

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[5] United Nations Convention on Contracts for the International Sale of Goods (hereinafter 'the CISG') https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09951_e_ebook.pdf (accessed 5 June 2021).

[6] International Institute for Sustainable Development '*Force Majeure* and Covid-19: Legal Risks of a Double-edged Sword' (May 2020) https://www.iisd.org/publications/force-majeure-and-covid-19-legal-risks-double-edged-sword (accessed 25 May 2021).

[7] SE Kiraz & EY Üstün 'COVID-19 and *force majeure* clauses: an examination of arbitral tribunal's awards' (2020) *Uniform Law Review* 2 https://doi.org/10.1093/ulr/unaa027 (accessed 30 May 2021).

[8] LexisNexis '*Force Majeure* and Coronavirus: seven critical lessons from the case law' 16 June 2020 https://www.lexisnexis.com/lexis-practical-guidance/the-journal/b/pa/posts/force-majeure-and-coronavirus-covid-19-seven-critical-lessons-from-the-case-law (accessed 23 May 2021).

[9] Office of the United States Trade Representative 'Trade is key to Africa's economic growth' https://ustr.gov/about-us/policy-offices/press-office/blog/trade-key-africa's-economic-growth (accessed 22 April 2021).

economies, poverty and underdeveloped sectors.[10] Two of the largest drivers of economic growth and development are trade and investment, because they bring foreign capital into local markets, create job opportunities and develop industries and infrastructure. Therefore, trade and investment are crucial for the development of the African continent, and government policies should be in place as much as is possible to encourage and assist trade and investment within Africa. A key element considered by foreign traders and investors is that of risk. Traders and investors tend to consider what will happen if the other party, whether it is the state or a private party, cannot deliver on its contractual obligations. One measure that is used to assign risk in contracts is by placing a *force majeure* clause in contracts. It is therefore important that *force majeure* clauses be formulated as accurately as possible in order to mitigate risk and promote trade and investment activities within Africa. This dissertation explores how *force majeure* operates in international sales contracts in the context of COVID-19 and how *force majeure* clauses can be used effectively in international sales contracts.

### 1.2 Research problem

As mentioned above, trade and investment are extremely important for Africa's economy. In its Africa Pulse report, the World Bank indicated that the COVID-19 pandemic has caused the economic growth in Sub-Saharan Africa to decline from 2.4% to about -5.1%, thus causing a recession.[11] This will reduce foreign financial flow into Africa, and will also affect Africa's participation in world trade. Africa is extremely dependent on the rest of the world for exports and imports, and, according to UNCTAD'S Economic Development in Africa 2019 report, as opposed to other countries, intra-African trade is largely underdeveloped.[12] Between 2015 and 2017, exports from Africa to the rest of the world averaged at 85% of Africa's total trade[13], demonstrating the exceptionally high dependence of Africa on the rest of the world for trade.

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[10] Other reasons include political turmoil, over-dependence on certain exporting industries such as oil-exports, increase in competitiveness of the external trading environment, a lack of intra-African trade, and a lack of technology. N Verter 'International trade: the position of Africa in global merchandise trade' (2017) *Emerging Issues in Economics and Development* https://www.intechopen.com/chapters/55353 (accessed 14 September 2021)

[11] World Bank 'Africa's Pulse Report' 31 March 2021 https://www.worldbank.org/en/region/afr/publication/africas-pulse (accessed 27 May 2021).

[12] United Nations Conference on Trade and Development (UNCTAD) 'Economic Development in Africa Report 2019' 26 June 2019 https://unctad.org/system/files/official-document/aldcafrica2019_en.pdf (accessed 30 May 2021).

[13] As above.

However, Africa's trade linkages have been growing steadily over recent decades.[14] But COVID-19 has put a brake on these developments, resulting in mass production shutdowns and supply chain disruptions, leading to even more uncertainty for Africa, which is already struggling with geopolitical and economic instability.[15] The effects of the pandemic will continue even after the COVID-19 crisis has been resolved, with the pandemic having irreversibly changed the way in which some industries operate. There is a need to keep trade flowing during a crisis such as the COVID-19 pandemic, in order to ensure that essential products and services remain available to all, and to ensure that as few livelihoods as possible are lost.[16] One of the ways to protect African traders in a crisis such as the COVID-19 pandemic is to ensure that they do not lose too much money on contracts which are currently proving impossible to uphold. If companies can remain afloat during the pandemic, they can continue to produce products, to employ workers and to contribute to their country's economy. But if they go bankrupt because they have breached their contracts during the stricter lockdown phase, they will close their doors and completely cease to contribute to the economy and society. The domino effect of disrupted supply chains and jobless workers will then gain more momentum.

The COVID-19 pandemic has caused numerous businesses to default on their contractual obligations in the international trade sector. One of the most prominent international transactions is international sales. The COVID-19 pandemic, however, is not the first of its kind, and will certainly not be the last.[17] There are many lessons to be learned from COVID-19 to ensure that, should another pandemic occur within a few years from now, the world economy will not face the same problems that it is currently facing. The main question of this research study is thus: When can a pandemic such as COVID-19 be regarded as a *force majeure* event in international sales contracts? This research question aims to use COVID-19 as a case study to draw lessons for future crises caused by pandemics.

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[14] World Bank Blogs 'How will COVID-19 impact Africa's trade and market opportunities?' 2 June 2020 https://blogs.worldbank.org/africacan/how-will-covid-19-impact-africas-trade-and-market-opportunities (accessed 1 June 2021).

[15] As above.

[16] OECD Policy Responses to Coronavirus (COVID-19) 'COVID 19 and international trade: issues and actions' 12 June 2020 https://www.oecd.org/coronavirus/policy-responses/covid-19-and-international-trade-issues-and-actions-494da2fa/ (accessed 2 June 2021).

[17] Infection Control Today 'Ready for the next pandemic? (Spoiler alert: it's coming)' (2021) https://www.infectioncontroltoday.com/view/ready-for-the-next-pandemic-spoiler-alert-it-s-coming- (accessed 14 September 2021).

### 1.3 Research questions

Based on the legal problem, the main research question is as mentioned above: When can a pandemic such as COVID-19 be regarded as a *force majeure* event in international sales contracts? The following sub-questions flow from the main research question and will be answered in this study:

*a)* What is *force majeure?*

*b)* How will *force majeure* operate in the context of the COVID-19 pandemic in international sales contracts where the CISG applies?

*c)* From a South African perspective, how will *force majeure* operate in the context of the COVID-19 pandemic in international sales contracts where the CISG does not apply?

d) How can *force majeure* contractual clauses be used in international sales contracts to assign risk that is caused by the COVID-19 pandemic?

### 1.4 Hypothesis of the study

In a time as uncertain as during the COVID-19 pandemic, the concept of mitigating risk in contracts is more important than ever. Since *force majeure* is a way to mitigate risk, it has become essential to investigate the extent of *force majeure* and to re-evaluate how it operates in contracts, knowing that just because there is a *force majeure* clause in a contract, this does not mean that the latter automatically includes pandemics. As demonstrated by the literature, there are various international instruments, as well as domestic laws, dealing with *force majeure*, and detailed legal study is needed to determine whether they would in fact include a pandemic. The literature also suggests that the addition of f*orce majeure* clauses in contracts which specifically include pandemics is a possible solution to the dilemma. To answer the question of the circumstances under which *force majeure* would include COVID-19 seems to be a complicated one, to which the answer is: “It depends”. That is the reason why the research is being conducted.

### 1.5 Research methodology

The research in this study was conducted through desktop-based research methods. The focus was on primary sources of law. The domestic law of South Africa was explored, and an analysis of various international instruments dealing with *force majeure* was carried out.

The main focus was on The Convention on the International Sale of Goods[18] (CISG), because it is such a prominent source of international sales law. Furthermore, consideration was also given to the model *force majeure* clauses provided by the International Chamber of Commerce[19] (ICC) of 2020 which can be regarded as international best practice and which provide insightful guidance on the matter. Reference was also made to the writings of the CISG Advisory Council[20] on hardship under the CISG.

Secondary sources were used to interpret and gain a better understanding of the primary sources, which consist of the writings of international jurists, and of scholarly journal articles. The method of research aimed to critically analyse and compare the various sources of law in order to answer the research questions posed. This work proved to be qualitative, descriptive, analytical and prescriptive in nature.

### 1.6 Literature review

The literature on *force majeure* is rich and diverse, and there is a variety of information on *force majeure* in international instruments, especially the CISG. There is a gap in the literature on epidemics or pandemics in general as instances of *force majeure,* but more writings on COVID-19, specifically as *force majeure,* have come to the surface over the past year.

Katsivela[21] explores the difference between the civil law doctrine of *force majeure*, the common law doctrine of frustration and contractual *force majeure* clauses. She points out that whether parties are in civil or common law jurisdictions, they are free in both cases to define the contours of the *force majeure* clauses in their contracts.[22] Katsivela concludes by stating that *force majeure* clauses in contracts adhere to the principle of freedom of contract and avoid the rigid application of the civil and common law doctrines. As such, it is in the interests of the contracting parties to include *force majeure* clauses in their contracts.

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[18] CISG (n 5 above).

[19] International Chamber of Commerce. *Force Majeure* and Hardship Clauses 2020.https://iccwbo.org/content/uploads/sites/3/2020/03/icc-forcemajeure-hardship-clauses-march2020.pdf (accessed 3 June 2021) (ICC *Force Majeure* Clause).

[20] CISG Advisory Council Opinion No 20 'Hardship under the CISG) http://cisgac.com/file/repository/Opinion_No_20_CISG_and_Hardship_Official_.pdf (accessed 1 June 2021).

[21] M Katsivela 'Contracts: *Force Majeure* Concept or *Force Majeure* Clauses?' (2007) 12(1) *Uniform Law Review* 101–120.

[22] Katsivela (n 21 above) 110.

Schwenzer[23] considers various international approaches to *force majeure*, with a detailed focus on the CISG. In the absence of an express provision dealing with *force majeure* or hardship, Article 79 of the CISG relieves a party from paying damages if he should breach contract and if the breach were to be due to an impediment beyond the party's control. According to Schwenzer, Article 79 does indeed cover hardship. Even though the two principles go hand-in-hand, she further provides an important distinction between *force majeure* and hardship. *Force majeure* features when, owing to an impediment beyond the control of the party in breach, there is a failure to perform in terms of a contract because performance have become impossible. On the other hand, hardship is applicable when a party seeks to cancel a contract owing to the fact that the contract has become excessively onerous to perform - to the effect that the equilibrium of the contract has been fundamentally changed.[24] She states that '…hardship can be considered as a special group of cases under the general *force majeure* provisions…', and that is the reason why hardship can also be considered to fall under Article 79 of the CISG.[25]

Mazzacano (2011)[26] looks at the question as to whether *force majeure* can be an autonomous legal doctrine in international sales to which the CISG applies. He gives an in-depth analysis of the historical origins of *force majeure*, which he calls 'the principle of excuse for non-performance'. The author then goes on to look at the common and civil law origins of the principle of excuse for non-performance. He also explores Article 79 of the CISG, and, like Schwenzer (2008), finds that although the terms 'hardship' and '*force majeure*' are not mentioned in the CISG, Article 79 of the CISG nonetheless covers both cases of hardship and *force majeure*. He concludes by stating that Article 79 of the CISG can be seen as an autonomous legal principle because it acts as a bridge between the various common law and civil law principles.

All three of the authors above discuss the general characteristics of *force majeure* and similar doctrines as they appear in the various international instruments and domestic laws. However, they neglect to discuss specific instances of *force majeure* which might

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[23] I Schwenzer '*Force Majeure* and Hardship in International Sales Contracts' (2008) 39 *Victoria University of Wellington Law Review* 709.

[24] Schwenzer (n 23 above) 715.

[25] As above.

[26] P Mazzacano '*Force Majeure*, Impossibility, Frustration & the Like: Excuses for Non-Performance; the Historical Origins and Development of an Autonomous Commercial Norm in the CISG' (2011) 2 *Nordic Journal of Commercial Law* https://www.researchgate.net/publication/228204507_*Force_Majeure*_Impossibility_Frustration_the_Like_Excuses_for_Non-Performance_the_Historical_Origins_and_Development_of_an_Autonomous_Commercial_Norm_in_the_CISG (accessed 3 June 2021).

have given some insight into the extent of the operation of the doctrine of *force majeure*. None of the authors mention the possibility of pandemics as instances of *force majeure.*

Kiraz and Üstün[27] analyse how COVID-19 can be assessed in terms of *force majeure* in the light of the *force majeure* clauses laid out under various international instruments, as well as the possible attitudes of arbitral tribunals towards these cases. The authors deal briefly with the issue of an absence of a *force majeure* clause in a sales contract, stating that the principles of conflict of laws will apply in determining which law is applicable to the contract, and that an applicable law will then fill in the gap regarding *force majeure.*[28] The authors do not, however, look at the specific laws on *force majeure* in some domestic legal systems.

Furthermore, Kiraz and Üstün discuss whether COVID-19 falls within the various requirements of triggering *force majeure* in a contract. They found that it still remains debatable as to whether or not COVID-19 constitutes a *force majeure* event in terms of these international instruments, even though some of the instruments have been updated within the context of the COVID-19 pandemic.[29] The authors conclude with the following:

> Whether COVID-19 triggers *force majeure* clauses depends upon the wording of the parties' contract, according to which the parties might have agreed to cover an epidemic or pandemic as a *force majeure* event. When examining the CISG, the [Unidroit principles] and the ICC's 2020 *force majeure* model clauses, it is possible to claim *force majeure* because COVID-19 can be deemed to be an act of God, and the harsh measures imposed by governments to deal with COVID-19 are an impediment within the sphere of *force majeure*.[30]

The authors, however, remain undecided as to whether or not COVID-19 can be regarded as unforeseeable, unavoidable or insurmountable.

### 1.7 Significance and limitations

This topic is significant because many questions have been raised about *force majeure* in the COVID-19 pandemic and whether or not, owing to circumstances related to COVID-19, it can be used to protect traders who are unable to carry out their contractual obligations, which are beyond their control. This study specifically focuses on *force majeure* in the context of international sales contracts. Although reference might be made as to how *force*

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[27] Kiraz & Y Üstün (n 7 above).

[28] Kiraz and Üstün (n 7 above) 5.

[29] Kiraz and Üstün (n 7 above) 9.

[30] Kiraz and Üstün (n 7 above) 28.

*majeure* operates in other types of commercial contracts, such as leases or construction contracts, the focus is not on these contracts, with the references to them serving only as examples.

### 1.8 Chapter outline

CHAPTER 1: INTRODUCTION

This chapter introduces the research topic of this study. It presents background information to the topic, the research problem and questions, and the importance and relevance of the study. Furthermore, it discusses the research methodology, reviews the relevant literature and considers the limitations of the study.

CHAPTER 2: *FORCE MAJEURE*: DEFINITION, ORIGINS AND DEVELOPMENT

This chapter attempts to define *force majeure* and also gives the general requirements for *force majeure*. It presents an overview of the historical origins and development of the doctrine in both common and civil law jurisdictions and explains the current international sources of *force majeure.*

CHAPTER 3: OPERATION OF *FORCE MAJEURE* IN INTERNATIONAL SALES DURING THE COVID-19 PANDEMIC WHERE THE CISG APPLIES

This chapter investigates the way in which *force majeure* operates in international sales contracts where the CISG is applicable. It presents an analysis as to whether COVID-19 can be raised as *force majeure* under the CISG.

CHAPTER 4: OPERATION OF *FORCE MAJEURE* IN INTERNATIONAL SALES DURING THE COVID 19 PANDEMIC WHERE THE CISG DOES NOT APPLY: SOUTH AFRICA

If the CISG is not applicable to an international sales contract, then the principles of conflict of laws need to determine which domestic law will govern the contract. This chapter looks at the domestic law on *force majeure* in the context of an African state. The law of South Africa is considered, and an attempt is made to determine whether COVID-19 can be raised as a *force majeure* under South African law.

# CHAPTER 5: CONCLUSION AND RECOMMENDATIONS

This chapter briefly discusses how Africa stands to benefit from having optimal *force majeure* laws in the midst of a pandemic. It then concludes the study and makes key recommendations. The recommendations section features discussions as to how contractual clauses can be used to provide for *force majeure* in international sales contracts, and specifically how to provide for COVID-19 in a *force majeure* clause. The focus then briefly falls on the *force majeure* clause of the ICC model of 2020.

# CHAPTER 2: *FORCE MAJEURE*: DEFINITION, ORIGINS AND DEVELOPMENT

## 2.1 Introduction

The previous chapter discussed the background of this dissertation and set out the reasons why it is relevant and important to determine whether COVID-19 can qualify as *force majeure* in international sales contracts. The concept, *force majeure,* initially evolved from the notion of excuse for non-performance and refers to instances when a supervening event makes performance in terms of a contract impossible. Related to *force majeure* is the concept of hardship, which arises when the circumstances of a contract have changed so drastically that performance has become extremely onerous. The two terms go hand-in-hand, but they are different. The main focus of this study, however, is on *force majeure.* Hardship, on the other hand, remains in the background and is considered where it is relevant to do so. Furthermore, *force majeure* can be applied to a situation either through the operation of law, where the relevant law provides for *force majeure* generally, or under a *force majeure* clause, which has been agreed upon by the parties of the contract in question. *Force majeure* clauses are discussed at a later stage in this dissertation.

This chapter seeks to provide a background to the concept of *force majeure* and its historical development. It discusses the definition of *force majeure* and considers the historical origins of the doctrine. It also considers how the doctrine of excuse for non-performance has evolved in civil law into the doctrines of frustration, hardship and impracticability. Furthermore, it discusses how the doctrine of excuse for non-performance has developed in civil law into *force majeure* and certain related concepts. The current sources of *force majeure* are also considered. It should be noted that the origins and evolution of excuse for non-performance were developed in Europe - many years before Africa consisted of independent states. Thus, the discussion in this chapter does not provide examples from Africa.

## 2.2 Definition of *force majeure*

*Force majeure* is an age-old legal doctrine which features in contract law, that allows for performance under a contract to be excused under certain circumstances. *Force majeure*

was first adopted in the French Civil Code (the Napoleonic Code) of 1804, and directly translated from French; it means 'superior force'.[31] Thus, *force majeure* is relevant when a party to a contract is prevented from performing in terms of the contract owing to an unforeseen and supervening event, which falls outside the control of either contracting party.[32] If a *force majeure* event occurs, then a party can be excused from performing an obligation under a legally-binding contract.

An exact definition of *force majeure* does not exist, as it differs from one jurisdiction to another. There are nonetheless certain characteristics of *force majeure* that are similar across various jurisdictions, despite the fact that there are also many differences. Originally, French law in the Napoleonic Code set out three requirements that must be satisfied for an event to qualify as a *force majeure* event, namely that the event must be (a) unpredictable; (b) uncontrollable/irresistible; and (c) external.[33] An event is unpredictable if it could not have been foreseen by either party at the time of the conclusion of the contract; An event is uncontrollable if a party could not have taken any action to mitigate or avoid the occurrence of the event, and an event is external if it is not attributable to the fault or negligence of a party.[34]

### 2.3 An overview of the historical origins and development of the concept, *force majeure*

*Force majeure* started out as a concept of legal excuse for the non-performance of an obligation owing to an unforeseen event. It first originated in Roman law, although it was not explicitly recognised in the ancient laws of Rome.[35] The underpinnings of the idea can be found in a variety of undeveloped legal maxims and ancient laws, for example, in the Code of Hammurabi (2250 B.C.E.), where the following is stated:

> The hirer of an ox is bound to return it safe and undamaged but he is excused from his liability for its death in two cases: the first is…where the ox is devoured by a lion in the open country; the second is…when a god has struck it.[36]

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[31] F Azfar 'The *force majeure* 'excuse'' (2012) 26 *Arab Law Quarterly* 249.

[32] WC Wright '*Force majeure* clauses and the insurability of *force majeure* risks' (2003) 23(4) *Construction Lawyer* 16.

[33] Azfar (n 31 above) 250.

[34] As above.

[35] JT Sawada *Subsequent conduct and supervening events: a study of two selected problems in contract jurisprudence* (1968) 114.

[36] Mazzacano (n 26 above) 4.

It is evident that the idea of legal excuse for non-performance is present in the above-mentioned provision. However, it would require drastic legal development and articulation before becoming a modern concept such as *force majeure.*

Excuses for non-performance evolved out of two conflicting Latin maxims found in Roman law, which relates to contracts: *pacta sunt servanda* and *rebus sic stantibus.*[37] *Pacta sunt servanda* (hereinafter 'the principle of sanctity of contracts') translates into 'agreements must be honoured'.[38] It provides for the sanctity of contracts and means that once obligations are agreed upon between parties, they must be performed. *Rebus sic stantibus*, on the other hand, translates into 'assuming that things remain the same'.[39] This means that obligations should only be honoured if the circumstances that prevailed at the conclusion of the contract continue to prevail. Neither of the two maxims on their own adequately addresses the situation where there is an unforeseen supervening event which renders performance of the obligations impossible - in terms of the principle of sanctity of contracts, performance must occur in spite of the impossibility, whilst *rebus sic stantibus* might result in too much uncertainty in contractual relations.[40] As the principles of excuse for non-performance developed, so the question arose as to how to reconcile these two Latin maxims, which subsequently became the fundamental principles of the law of contract. This development of excuse for non-performance has taken different courses in civil and common law systems respectively and has resulted in diverse outcomes, which are discussed in the next section.[41]

### 2.4 Common law development of the doctrine of excuse for non-performance

Common law tradition initially placed great emphasis on the importance of the principle of sanctity of contracts, whilst neglecting the *rebus sic stantibus* doctrine.[42] This strict reading of the principle of sanctity of contracts was enshrined in the 1647 English case of *Paradine v Jane*[43] as the doctrine of absolute contracts. This case serves as an authoritative

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[37] Mazzacano (n 24 above) 7.

[38] R Hyland 'Pacta sunt servanda: a meditation' (1994) 34(2) *Virginia Journal of International Law* 405 at 412.

[39] G Treitel *Frustration and force majeure* (2004) 1.

[40] Mazzacano (n 26 above) 7.

[41] Mazzacano (n 26 above) 12.

[42] Mazzacano (n 26 above) 13.

[43] Paradine v Jane (1647) EWHC KB J5.

reference for the common law principle that an impossible supervening event does not excuse a party from performing in terms of a contract, and it serves as an implicit rejection of the principle of *rebus sic stantibus*.[44]

Shortly, the facts of the case of *Paradine v Jane* follow: Paradine, the plaintiff, leased land to Jane, the defendant. During the lease period, an enemy army invaded the land and occupied it for three years. Paradine sued Jane for three years' back rent, but Jane argued that his failure to pay rent was not due to his own fault, but due to the fact that the land had been occupied by an enemy force. The court rejected this argument and found that Jane was still liable to pay rent, stating that "…as the lessee is to have the advantage of casual profits, so he must run the hazard of casual losses."[45] The court further stated that when a party takes on "…a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have made provision for it through his contract."[46] In other words, there was always a risk that Jane would not necessarily make a profit from the leased land, which was assumed by him upon conclusion of the lease. If the parties had wanted to avoid liability for non-performance in certain instances, they should have expressly made provision for such avoidance in their contract. Otherwise, the parties would have remained liable under the contract even if performance had become physically impossible.

*Paradine v Jane* served to bring to effect that physical impossibility is not a justifiable excuse for non-performance. This has been the position for almost two centuries, up to the case of *Taylor v Caldwell*[47] in 1863 which introduced the notion that there could be mitigating factors which could discharge an otherwise absolute contract. In this case, Caldwell agreed to rent a music hall to Taylor for a music concert, but the music hall was destroyed in a fire before the concert could take place. Taylor subsequently sued Caldwell for his failure to rent the hall. The court acknowledged the precedent set by *Paradine v Jane*, but dismissed Taylor's claim, stating the following:

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[44] Mazzacano (n 26 above) 14.

[45] Paradine v Jane (n 43 above) para 3.

[46] As above.

[47] Taylor v Caldwell (1863) 3 B & S 826 122 E.R. 309 QB. Caldwell (the defendant) agreed to allow Taylor (the plaintiff) to use Caldwell's music hall for four days for payment of 100 pounds per day. The contract required that the hall should be fit for a concert, but there were no express provisions for dealing with disasters. Before the first concert could take place, the hall was destroyed by a fire. Taylor sued Caldwell for breach of contract for his failure to rent the hall, and for Taylor's expenses for advertising the concert.

> "…in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance."[48]

The court held that the destruction of the hall was not the fault of either party and rendered performance for both parties impossible. Thus, both parties were excused from performing.[49] This case thus provided an exception to the principle of sanctity of contracts in instances where the subject matter of the contract is destroyed - which was not the fault of either party.

This exception, formulated in the *Taylor v Caldwell* case, continued to evolve over the years, and eventually recognised the doctrine of *rebus sic stantibus*.[50] By the early 1900s, the law had developed to such an extent that it recognised that a situation that occurs when, owing to a supervening event, a party cannot perform in terms of a contract because performance has become impossible, it could not then be considered the fault of either parties and would thus fall beyond the control of the parties.[51] This concept is called the doctrine of frustration, and is briefly considered in the next section.

### *2.4.1 The doctrine of frustration*

The doctrine of frustration was developed within the common law to deal with three types of situations concerning non-performance owing to a fundamental change in circumstances, namely: i) impossibility; ii) frustration of purpose; and iii) temporary impossibility.[52]

The first situation, where frustration can be claimed to excuse performance, is an impossibility. As seen in the discussion above, the common law in its early developmental stages was reluctant to allow for the termination of a contract on account of an unforeseen event that would render performance impossible. This could be attributed to the strict application of the principle of sanctity of contracts, and it was first recognised in the *Taylor v Caldwell* case that performance can in fact be excused where the subject matter of the contract has been destroyed and performance has become impossible. This concept

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[48] Taylor v Caldwell (n 47 above).

[49] Taylor v Caldwell (n 47 above).

[50] Mazzacano (n 26 above) 16.

[51] JD Wladis 'Common law and uncommon events: the development of the doctrine of impossibility of performance in English contract law' (1987) 75 *Georgia Law Journal* 1575 at 1599.

[52] JD McCamus *The Law of Contracts* 573.

continued to develop to eventually become an implied condition to a contract under the common law, which had the effect that if, owing to the destruction of the subject matter of a contract, performance would become impossible, performance would then be excused.[53] This excuse is thus an implied condition of the common law, and parties to a contract need not expressly provide for it. Thus, if a contract is deemed 'frustrated' on account of an unforeseen supervening event, it is implied by law that owing to the impossibility of performance, performance can then be excused.

The second situation under the doctrine of frustration is frustration of purpose. This involves a situation where performance in terms of a contract is not impossible, but that the circumstances of the contract have changed so much that to continue with performance would in essence bind the parties to a new agreement, under new circumstances.[54] An example of frustration of purpose can be seen in the English case of *Jackson v Union Marine Insurance Co. Ltd*[55], which is also the first case in which the concept of frustration of purpose was recognised. In this case, a ship, which was chartered, was damaged on account of a supervening event, which was not the fault of either party. This caused a long delay in the availability of the ship. The ship could have been repaired and dispatched at a later date, but by the time it would have been ready, the original purpose of the charter could no longer be fulfilled. The court thus found that although there was no issue of physical impossibility, practical frustration or frustration of purpose had resulted, and the contract was cancelled.

The third situation under the doctrine of frustration is temporary impossibility. This refers to a situation where performance in terms of a contract becomes impossible, and then - at a later stage - the impossibility ceases. In this case, performance is merely delayed.[56] The question then arises as to whether, subsequent to the delay, the party should then perform, or whether performance should be entirely excused - even if the impossibility of performance had been only temporary. The answer to this question is that where performance becomes temporarily impossible, the obligation to perform is not completely terminated, but only suspended. If impossibility of performance ceases to exist, then performance can still be demanded.[57] The only exception to this doctrine is when it is

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[53] Mazzacano (n 26 above) 20.

[54] Mazzacano (n 26 above) 23.

[55] Jackson v Union Marine Insurance Co. Ltd ('Jackson v Union Marine') (1874) LR 10 CP 125.

[56] Mazzacano (n 26 above) 27.

[57] As above.

found that time is of the essence, in which case the contract could be cancelled in instances of temporary impossibility.

Related to the doctrine of frustration under the common law are the doctrines of hardship and impracticability. These occur when, owing to an unforeseen change in circumstances, the performance of an obligation becomes extremely onerous.[58] The principles of hardship and impracticability are similar and have their own requirements and developmental path. In short, English law, as well as most other common law jurisdictions, does not expressly recognise the principles of hardship and impracticability.[59] The United States (the 'US'), on the other hand, expressly recognises the principle of impracticability[60], although US courts rarely excuse performance on the grounds of impracticability.[61]

### 2.5 Civil law development of the doctrine of excuse for non-performance

The civil law also acknowledges the principle of sanctity of contracts, but does not place as much importance on a strict interpretation of this principle as opposed to that of the common law, and focuses more on the exception to the rule. Unlike the common law, the civil law does not embrace the notion that parties could contract to do the impossible, as stated in Justinian's Digest as *impossibilium nulla obligatio*, which means that "the impossible is no legal obligation".[62] Unlike common law remedies, civil law remedies are more concerned with performance and not with damages.[63] Therefore, a party cannot be forced to do the impossible, even if it was so agreed upon in a contract. As such, an impossible obligation cannot be enforced by a court.[64]

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[58] An example of hardship and impracticability is the 1915 English case of *Greenway Brothers Ltd v S.F. Jones & Co* (1915) AC 166 HL, where the defendant, who contracted to sell zinc ingots, could obtain the metal alloy only at an unexpected and abnormal price owing to the outbreak of war. The court did not excuse the defendant from performing.

[59] Treitel (n 39 above) 290-291.

[60] This recognition of impracticability can be found in the US Uniform Commercial Code s 2-615 and in the US Restatement (Second) of Contracts s 261.The US principle of impracticability follows the idea that the purpose of a contract could not be accomplished without commercially unacceptable costs and time imputed that is far beyond what was initially contemplated by the contract. This differs from frustration of purpose which indicates that the performance being received by a party has substantially decreased in value, while impracticability involves the cost of performance for a party to have increased so drastically that the original obligation has become economically unviable [Mazzacano (n 26 above) 31-32].

[61] Mazzacano (n 26 above) 34.

[62] Justinian's Digest Dig. 50.17.*185* https://droitromain.univ-grenoble-alpes.fr/Anglica/D50_Scott.htm#XII (accessed 17 August 2021).

[63] Mazzacano (n 26 above) 12.

[64] As above.

The civil law, unlike the common law, could simultaneously acknowledge the principle of sanctity of contracts, as well as the doctrine of *rebus sic stantibus.*[65] In other words, a contractual obligation should be performed as agreed, assuming that the circumstances remain the same. Under this balance between the two doctrines, a party could be held liable for contractual non-performance only if the party were found somehow to be at fault. If the impossibility of performance was not the fault of the party, then his performance could be excused.[66]

Whilst the common law has developed this balance between sanctity of contracts and *rebus sic stantibus* through case law, the civil law has developed it through philosophical and political debate. Two prominent political philosophers who contributed to the development of the principle of sanctity of contracts in the 17th century are Thomas Hobbes (1588-1679) and Benedict de Spinoza (1632-1677) who attacked sanctity of contracts in the context of state power, stating that should they cause harm to other persons or threaten state security, agreements need not be kept.[67] This attack on the principle of sanctity of contracts had the effect of automatically increasing the importance of *rebus sic stantibus.*[68] Furthermore, it is suggested that the rise in popularity of *rebus sic stantibus* in Europe was due to efforts to address the effects of numerous wars in Europe at that time.[69]

By the nineteenth century, the term *rebus sic stantibus* seemed to have disappeared. However, the concept that it represented, which is that of changed circumstances, continued to evolve.[70] Many civil law jurisdictions developed various principles, doctrines and terms to deal with the concept of changed circumstances, the most popular one being the doctrine of *force majeure*, which is considered in the next section.

### *2.5.1 Force majeure*

As stated above, the term *force majeure* originated in the Napoleonic Code of 1804 which is the oldest codification that still exists today. Articles 1147 and 1148 of the Napoleonic

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[65] As above.

[66] Mazzacano (n 26 above) 13.

[67] Mazzacano (n 26 above) 37.

[68] R Zimmerman *The law of obligations: Roman foundations of the civilian tradition* (1996) 581.

[69] Mazzacano (n 26 above) 38.

[70] As above.

Code define *force majeure* generally as circumstances that fall beyond a person's control. In the private commercial law of France, *force majeure* applies to two types of situations: i) legal impossibility and ii) physical impossibility.[71] Legal impossibility refers to a situation where there is a supervening change in the law that makes it illegal for a party to perform a contractual obligation, whilst physical impossibility is deemed to be an event that is regarded as an "act of God" that makes it physically and materially impossible for a party to perform - for example, the destruction of goods by a fire.[72] *Force majeure* is thus a supervening event, an act of God or of man, that is beyond a party's control and which makes performance of a contract legally or physically impossible. Just to name a few, such examples include events such as natural disasters, a strike, war, or a governmental proclamation. *Force majeure* focuses on the relative fault of the party in breach[73], and this is confirmed in Article 1147 of the Napoleonic Code, which states that a party in default is not liable to pay damages; only if the non-performance is the "… result [of] an outside cause which cannot be imputed to him".

As mentioned above the requirements for an event to qualify as *force majeure* in terms of the Napoleonic Code are listed as follows:[74] i) The event must be external. It must occur as a result of an outside cause, and not as a result of the fault of the obligor. ii) The event must be unforeseeable at the time that the contract is concluded. The test for making this determination is subjective, considering the surrounding circumstances of the event, but a reasonable person test is also used.[75] iii) The event must be irresistible, meaning that the event cannot be avoided or prevented by the obligor, and the event should then present a great obstacle to performance.

*Force majeure* can be equated to the common law doctrine of frustration. However, it is much broader and more flexible than frustration. Both frustration and *force majeure* deal with situations where there is an unforeseen supervening event that prevents a party from performing. The difference is that frustration requires that the entire subject matter of the contract be destroyed, and it intends to relieve parties permanently of all of their contractual obligations, while *force majeure* does not require the entire subject matter of

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[71] R David 'Frustration of contract in French law' (1946) 28 *Journal of Comparative Legislation and International Law* 11 12.

[72] Mazzacano (n 26 above) 40.

[73] DR Rivkin 'Lex mercatoria and *force majeure*' in E Gaillard (ed) *Transnational rules in international commercial arbitration* (1993) 173.

[74] Mazzacano (n 26 above) 43.

[75] DR Rivkin 'Lex mercatoria and *force majeure*' in E Gaillard (n 73 above) 175.

the contract to be destroyed so that the contract can in fact be restructured by the court to account for the unforeseen event.[76] *Force majeure* provides for a wider range of unforeseen events for which relief can be granted, and can also be applied temporarily to suspend a contract until an event has passed.[77] It is evident that *force majeure* is much more flexible and aims to preserve contractual relations, while frustration is a blunt instrument that ends all contractual obligations.

Many other civil law jurisdictions have followed the same or a similar approach to that of France regarding *force majeure.* Some common law jurisdictions, such as Canada, have also imported the term to use it to deal with supervening events and changed circumstances.[78] The French term of *force majeure,* or its Latin equivalent, *vis major*, which translates to “superior force”, is currently used in a generic way to deal with a wide range of supervening events. Examples are the ICC’s *force majeure* clauses, the UNIDROIT Principles, and the CISG Article 79, which are discussed at a later stage.

Related to *force majeure* is the principle of hardship, which relates to instances where there is a fundamental change in the circumstances of a contract that makes performance extremely burdensome and onerous. Hardship under the civil law, just like hardship under the common law, has different requirements and a different developmental path. There are many variations of hardship in civil law countries.[79] Furthermore, unlike common law countries, many civil law countries expressly provide for the concept of hardship.[80]

### 2.6 Current international sources of *force majeure*

The discussion above deals with how the concept of excuse for non-performance, and more specifically *force majeure,* has developed over the years in both common and civil

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[76] Mazzacano (n 26 above) 36.

[77] As above.

[78] Mazzacano (n 26 above) 39.

[79] For example, the principle of *imprevision* in French law, which translates to ‘lack of foresight’, and the principle of *wegfall der geschaftsgrundlage’* in German law, which translates to 'elimination of the business foundation’.

[80] In French law, the courts only apply *imprevision* in contract cases where there is a fundamental change in circumstances between private parties and the government of France, but they have refused to recognise the defence in contracts between private parties [J Gordley and AT Von Mehren *An introduction to the comparative study of private law* (2006) 524]. Some jurisdictions have statutes which expressly recognise hardship, including those of Germany, the Netherlands, Italy, Greece, Portugal and Scandinavia [Schwenzer (n 23 above) 711]. In other jurisdictions, the principle of hardship is recognised only in case law, such as in Switzerland, Austria and Spain [C Brunner *Force majeure and hardship under general contract principles* (2009) 403. the Netherlands: Wolters Kluwer at 403].

law systems. The principle of excuse for non-performance owing to a supervening event has also been incorporated into various international law sources.

The International Institute for the Unification of Private Law (UNIDROIT) is an independent international organisation which aims to study the need to harmonise and co-ordinate modern private and commercial law between states, and to create uniform law instruments, principles and rules to achieve its objectives.[81] Since 1994, UNIDROIT has developed the UNIDROIT Principles of International Commercial Contracts (UNIDROIT Principles) which have been updated on various occasions - most recently in 2016. The UNIDROIT Principles are non-binding or soft law instruments of international contract law which are adapted to the special requirements of modern international commercial practice.[82] Thus, parties to an international contract can elect whether or not the UNIDROIT Principles should govern their contracts. Article 7.1.7 of the UNIDROIT Principles deals with *force majeure,* while Article 6.2.2 deals with hardship.[83]

Furthermore, the International Chamber of Commerce (ICC) has also developed model *force majeure* and hardship clauses, which are other soft law instruments that can be used by parties in their international commercial contracts. The CISG does not explicitly deal with *force majeure* and hardship, but its Article 79 deals with exemption of performance and the adaptation of an agreement under certain circumstances and incorporates the notion of excuse for non-performance. Both the ICC model clauses and Article 79 of the CISG are discussed at a later stage.

## 2.7 Conclusion

This chapter demonstrated how the doctrine of excuse for non-performance is applied differently in civil and common law jurisdictions. While each country has its own specific rules regarding excuse for non-performance, they all resemble one another in similar legal systems. Furthermore, it was shown that the concept of *force majeure* is a civil law concept, which does not exist in the common law. In civil law jurisdictions, *force majeure* is thus implied in the law, because *force majeure* originated in the civil law and is codified in statutes and case law within civilian legal systems. This means that *force majeure* applies

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[81] UNIDROIT https://www.unidroit.org/about-unidroit/overview. (accessed 12 September 2021))

[82] As above.

[83] https://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2010/404-chapter-7-non-performance-section-1-non-performance-in-general/1050-article-7-1-7-force-majeure. (accessed 12 September 2021)

automatically to contracts in civil law jurisdictions, and the parties do not have to include a *force majeure* clause in their contracts.[84] By contrast, *force majeure* is not implied in common law jurisdictions, because the relevant principle dealing with excuse for non-performance under the common law is that of frustration, which is less flexible and more rigid than *force majeure.* Thus, if parties to a contract governed by the common law wish to include *force majeure* in their agreements, they must insert a *force majeure* clause into their contracts.[85]

*Force majeure* appears in many international legal instruments and is applied to many international contracts. The next chapter considers whether provision has been made for *force majeure* in the CISG, and if so, explanations follow on how it operates in international sales contracts in the context of the COVID-19 pandemic.

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[84] M Polkinghorne & C Rosenberg 'Expecting the unexpected: the *force majeure* clause' (2015) *16 Business Law International* 49 at 51.

[85] Polkinghorne & Rosenberg (n 84 above ) 51.

# CHAPTER 3: OPERATION OF *FORCE MAJEURE* IN INTERNATIONAL SALES WHERE THE CISG APPLIES DURING THE COVID-19 PANDEMIC

## 3.1 Introduction

The previous chapter provided a historical overview of the development of *force majeure*, and pointed out that today *force majeure* features in many international contracts and international legal instruments. The main question of this dissertation focuses on the operation of *force majeure* in international sales contracts, and therefore this chapter considers whether the COVID-19 pandemic can be regarded as a *force majeure* in international sales contracts to which the CISG applies.

International sales contracts are among the most prevalent international transactions. They have certain characteristics that make them exceptionally complicated and vulnerable to problems: the parties to an international sales contract are located in different countries; the goods sold have to be transported and delivered across borders; and payment has to be made internationally and often in a different currency. These factors require that apart from the contract of sale, additional contracts, such as contracts of carriage, insurance, agency and mandate, must also be concluded.

Normally, international sales contracts are governed by the domestic law of a country. The parties can either expressly decide which domestic law should govern the contract, or a court, using the rules of private international law, can assign a domestic law.[86] The problem with this is that domestic laws differ from one another and also regulate identical matters of a sales contract, such as the conclusion of the contract and matters pertaining to delivery and payment, differently.[87] This increases the chances that the parties would dispute some aspects of the contract. Furthermore, there are some issues pertaining to the application of the rules of international private law for assigning the proper law of a contract (the law governing the contract). These rules differ from one jurisdiction to the next, and are very complicated. Thus, their application is not always certain.[88] Also, in cases where parties have expressly chosen a proper law in their contract, it would usually

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[86] JP van Niekerk & WG Schulze *The South African law of international trade: selected topics* (2016) 59-64.

[87] Van Niekerk & Schulze (n 86 above) 95.

[88] As above.

be the legal system that would be preferred by the economically or politically stronger party wielding the stronger bargaining position.[89]

Owing to the issues discussed above, and the complicated nature of sales contracts, the need has arisen for the unification of the law of international sales.[90] There have been many attempts to unify international sales law, but the most successful thus far has been the CISG that was adopted in Vienna in 1980. This chapter aims to provide a background to the CISG and its application to international sales contracts. Furthermore, it presents an analysis as to whether or not the CISG provides for *force majeure*, and if so, whether, under the provisions of the CISG, COVID-19 can be regarded as a *force majeure e*vent.

### 3.2 The Convention on the International Sale of Goods

As of 2020, 94 states have ratified the CISG, which represents two-thirds of world trade.[91] As of 26 November 2020, thirteen African states, namely Benin, Burundi, Cameroon, Congo, Egypt, Gabon, Guinea, Lesotho, Liberia, Madagascar, Mauritania, Uganda and Zambia have ratified the CISG. According to the Preamble of the CISG, the intention of the CISG is to create uniform legal rules for the law on the international sale of goods, which would contribute to remove legal barriers to trade and to develop international trade.[92] The aim is that when there is a dispute between the parties concerned, the rules of the CISG can then be applied by courts in a uniform way. This creates certainty and stability in the law on the international sale of goods.

The CISG consists of four parts: Part 1[93] deals with the scope of application of the CISG and presents some other general provisions; Part 2[94] deals with the formation of a contract on the international sale of goods; Part 3[95] outlines the rights, obligations and remedies of parties in respect of an international contract of sale; and Part 4[96] sets out the final provisions and deals with the relationship of the CISG with other international

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[89] As above.

[90] As above.

[91] Institute of International Commercial Law (IICL) https://iicl.law.pace.edu/cisg/page/cisg-table-contracting-states. 13

[92] DL Grace '*Force majeure*, China and the CISG: Is China's new contract law a step in the right direction?' (2001) 2 *San Diego International Law Journal* 173 at 188.

[93] Articles 1-13 of the CISG. (n 5 above).

[94] Articles 14-24 of the CISG (n 5 above).

[95] Articles 25-88 of the CISG (n 5 above).

[96] Articles 89-101 of the CISG (n 5 above).

agreements, as well as the rules relating to the ratification and coming into force of the CISG. The parties to a contract governed by the CISG still have a large measure of autonomy and must still agree on the special terms that might be applicable to their contract, for which the CISG makes no provision.[97] Parties can also agree, either wholly or partially, to enter contracts outside of the CISG.[98]

### *3.2.1 Sphere of application of the CISG*

Chapter 1 of the CISG deals with its scope of application. The CISG applies to contracts relating to the sale of goods between parties whose places of business are located in different states, provided that the states are contracting states of the CISG, or that the rules of international private law lead to the application of the law of a contracting state.[99] Thus, the CSIG would automatically apply in cases where the places of business of both parties are in contracting states. If one of the parties to an international sales contract has its place of business in a contracting state, and another party has its place of business in a non-contracting state, then the CISG would apply only to the contract of sale in two instances: firstly, if the rules of international private law indicate that the law of the contracting state should govern the contract; or secondly, if the parties expressly agree by way of a choice of law clause that the CISG would apply to their contract.[100]

However, the application of the CISG is limited and certain sales are expressly excluded.[101] Only the sale of goods is covered by the CISG, and not the supply of labour or other services.[102] Furthermore, the CISG only applies to those aspects of the contract that involve the conclusion of the contract of sale and the rights and obligations of the buyer and seller arising from the contract, but is not concerned with the validity of the contract or any of its provisions.[103] Also, the CISG does not apply to the liability of the

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[97] Van Niekerk & Schulze (n 86 above) 96.

[98] JM Bund '*Force majeure* clauses: drafting advice for the CISG practitioner' (1998) 17(2) *Journal of Law and Commerce* 381 at 382.

[99] Article 1(1)(a)-(b) of the CISG (n 5 above).

[100] Van Niekerk and Schulze (n 86 above) 99.

[101] Article 2(a)-(f) of the CISG (n 5 above) Sales that are expressly excluded include sales of goods bought for personal, family or household use, sales by auction, sales on execution or by authority of the law, sales of stock, shares, investments, negotiable instruments or money, sales of ships, vessels, hovercrafts or aircrafts, or sales of electricity.

[102] Article 3 of the CISG (n 5 above).

[103] Article 4(a)-(b) of the CISG (n 5 above).

seller in the case of goods sold to any person that caused his death or injury.[104] Parties can also exclude the CISG from applying to their contract, or vary the effect of its provisions.[105]

Relevant to this study is Article 79, which provides for exemptions in certain instances in respect of performance by the parties. Article 79 is discussed below.

### *3.2.2 Exemptions to performance under the CISG (Article 79)*

Article 79(1) of the CISG reads as follows:

> (1) A party is not liable for 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.[106]

It is evident from this provision that the CISG contains some form of excuse for non-performance. The question is the extent to which the excuse for non-performance applies - whether it is *force majeure*, hardship or some other type of excuse for non-performance. Also, and perhaps more importantly, the issue at hand is whether this provision would include COVID-19 as a reasonable excuse for non-performance in an international sales contract under the CISG. It should be noted that Article 79 has five sub-paragraphs, but because it is the most relevant to this study, the focus of the discussion is only on Article 79(1).

## 3.3 *Force majeure* and Article 79(1) of the CISG

The CISG in Article 79(1) does not expressly mention the term *force majeure* or the related concept of hardship. The drafting history of Article 79 is not very clear, but it has come to light that during the preparations and deliberations of the CISG, the question as to whether economic difficulties should give rise to an exemption under Article 79 has proved to be highly controversial.[107] It has been argued for many years by scholars that the CISG does not make room for hardship under Article 79.[108] However, it later became widely accepted in courts, in arbitral decisions and in scholarly writings that Article 79 does in fact cover

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[104] Article 5 of the CISG (n 5 above).

[105] Article 6 of the CISG (n 5 above).

[106] The CISG (n 5 above) Article 79.

[107] 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* (1989) 602.

[108] Schwenzer (n 23 above) 713.

issues relating to hardship.[109] Therefore, under this provision, hardship cannot be separated from *force majeure*. This is important because if hardship is recognised under the CISG, then the scope of Article 79 would be much broader than if it were to recognise only *force majeure*. This means that a party can then obtain relief under conditions where performance has become excessively onerous, and not only where performance has become impossible.

In determining the extent to which Article 79 allows for hardship, it must be kept in mind that there is no room for domestic concepts of hardship - this would undermine the goal of unification of the law of international sales.[110] As discussed in Chapter 2, there are many different variations of hardship featured in the various domestic law jurisdictions, such as the French term of *imprevision* and the German term of *wegfall der geschaftsgrundlage*. Both of these concepts can be considered to determine which cases of hardship would amount to an impediment under Article 79, and which remedies would be available to the aggrieved party. However, Article 79 should be more than just a compromise between many different ideas and notions of hardship: it is an independent, self-contained, autonomous provision that must be interpreted without reference being made to domestic legal principles.[111]

The general requirements set forth in Article 79(1) for a party to be exempted from liability for damages are the following: 1) The party's failure to perform is due to an impediment beyond his control; 2) The party could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract; and 3) The party could not have avoided or overcome the consequences of the impediment. This is almost identical to the initial requirements of *force majeure* that were first set out in the Napoleonic Code (externality, unforeseeability, and irresistibility/unavoidability). The only requirement that might be slightly different is the first one - the CISG requires the impediment to be beyond the control of the debtor, while the Napoleonic Code requires that the impediment be caused by an outside or external force. However, the requirements are similar in that the essential fact is that the impediment must not be due to the fault of the debtor. These requirements can be found in almost identical wording in many other international instruments, including the ICC's *force majeure* model clause.[112] In fact, the

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[109] As above.

[110] As above.

[111] Mazzacano (n 26 above) 49.

[112] Schwenzer (n 23 above) 714.

ICC model clause provides for a list of events that would amount to an impediment, such as war, natural disasters, explosions, strikes and acts of authority. Thus, to sum up: Article 79 of the CISG makes room for *force majeure*, with three clear requirements: the impediment must not fall within the risk of the obligor; the impediment must have been unforeseeable; and the consequences of the impediment must be unavoidable.[113]

Regarding the provisions dealing with hardship - if one looks at other international solutions on the matter, they all resemble one another and emphasise the principle of sanctity of contracts.*[114]* Hardship can occur only once the performance has become excessively onerous and not merely more onerous than could reasonably have been anticipated at the time of the conclusion of the contract.[115] It is required that the equilibrium of the contract must be fundamentally altered.[116] Considering hardship under Article 79, the impediment in question that causes the hardship must not fall within the scope of the risk of the debtor - it must fall beyond the control of the debtor; it must be unforeseeable; and it must be unavoidable. Therefore, hardship can be considered collectively as a special group of cases under the *force majeure* provisions of the CISG, with the only difference being that the impediment in question will not render performance impossible, but merely extremely onerous.[117]

What follows is an in-depth discussion on the requirements of Article 79(1).

### *3.3.1 'An impediment beyond the control of the aggrieved party'*

For *force majeure,* the type of event that would qualify as an impediment for the purposes of *force majeure* under Article 79 would be, as it has been historically recorded, an act of God or of man, or a superior force, which renders performance in terms of the contract impossible. Impossibility of performance is thus the key requirement in this instance.

The more difficult question is: What is the threshold for hardship? or When does performance become so excessively onerous that the event that caused the hardship can be regarded as an impediment under Article 79 of the CISG? It has been suggested that

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[113] H Stoll & G Gruber 'Articles 79-80' in P Schlectriem & I Schwenzer (eds) *2 Commentary on the UN Convention on the international sale of goods* (2005) Article 79 paras 10-24.

*[114]* The UNIDROIT Principles of International Commercial Contracts 2016 (hereinafter 'The UNIDROIT PRINCIPLES) https://www.unidroit.org/english/principles/contracts/principles2016/principles2016-e.pdf (accessed 5 June 2021). Article 6.2.3.

[115] Schwenzer (n 23 above) 714.

[116] The UNIDROIT Principles (n 114 above) Article 6.2.2.

[117] Schwenzer (n 23 above) 715.

the starting point in this instance is to use the rules of interpretation of contracts to determine how the parties have implicitly or explicitly defined their respective spheres of risk under the contract.[118] For example, if the contract has characteristics that are highly speculative, then the threshold for allowing hardship should be raised, because the risk that the parties implicitly assume is greater.[119] Some factors, such as whether the contract is long term or short term, the profit margin in the respective trade sector and the imminent bankruptcy of the obligor can be considered to assist in determining this threshold.[120] It has been suggested that a threshold of 100% should be the relevant rule of thumb to allow hardship where there has been a fluctuation in prices, but courts tasked with interpreting Article 79(1) have been reluctant to allow hardship in instances of fluctuating prices.[121] The matter remains an uncertain point in the law.

### *3.3.2 'At the time of the conclusion of the contract'*

One of the requirements of Article 79(1) is that the aggrieved party must not have reasonably been expected to take the impediment into account at the time of the conclusion of the contract. It has been accepted that for *force majeure* to be applicable, it does not matter whether the impediment arises prior to or subsequent to the conclusion of the contract. Thus, if the goods were destroyed before the contract was concluded, but the seller did not know about this fact and could not have prevented it, then Article 79(1) would still apply.[122] In cases of hardship, the position is more uncertain.

It has been argued that for hardship, the changed circumstances must have occurred after the contract had been concluded, mostly because this is the position in most domestic legal systems.[123] If the changed circumstances had occurred before the conclusion of the contract and the parties were unaware of that, it is suggested that, in the absence of clear provisions or case law on the matter, domestic law remedies should be applied.[124] In most domestic legal systems, in a situation where the parties misjudge the circumstances of the

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[118] A Katz 'Remedies for breach of contract under the CISG' (2006) I*nternational Review of Law and Economics* 378 at 381.

[119] Brunner (n 80 above) 220.

[120] Brunner (n 80 above) 438-441.

[121] Schwenzer (n 23 above) 716.

[122] Stoll & Guber 'Articles 79-80' in Schlectriem & Schwenzer (n 113 above) Article 79 para 12.

[123] As above.

[124] Schwenzer (n 23 above) 718.

contract, the contractual remedy of mistake is available.[125] The problem with this approach is that the same legal rules in domestic systems differ drastically from one another in application, and this undermines the uniformity of the CISG and results in uncertainty. Therefore, it is important that the notion of hardship under the CISG be interpreted as broadly as possible - so that it includes the issue of changed circumstances before the conclusion of the contract. The reason for this is that there can be certainty in the law on this matter so that there is no need to resort to domestic law solutions which might lead to divergent outcomes.

### *3.3.3 'Impediment that could reasonably be taken into account or avoided or overcome'*

The last requirement for Article 78(1) to apply is that the aggrieved party must not have been reasonably able to take the event causing the impediment into account, avoided or overcome it. If the event could have been predicted, then it is expected of the party to have included a contractual clause in the contract to deal with the problem, or it is assumed that the party would have considered the risk of the problem occurring.[126] Also, even if the aggrieved party could not have foreseen the possibility of an impediment occurring, he would not have been exempt from performing under the contract if he could reasonably have avoided or overcome the impediment.[127]

### *3.3.4 Consequences of force majeure and hardship under Article 79*

If Article 79(1) is successfully applied, then the non-performance by an obligor would be excused and he would be exempt from paying damages. In addition, the party would retain the right to exercise any other right or remedy for which provision is made under the CISG.[128] Furthermore, should there be a fundamental breach of contract, the party would, amongst other options, retain the right to avoid the contract.[129]

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[125] As above.

[126] Stoll & Guber (n 113 above) Article 79 para 22.

[127] Stoll & Guber (n 113 above) Article 79 para 23.

[128] Article 79(5) of the CISG (n 5 above).

[129]The CISG (n 5 above) Article 49. A 'fundamental breach' is described in Article 25 of the CISG as a breach that "… results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract…". Whether a fundamental breach exists will depend on the circumstances of the individual case [Schwenzer (n 23 above) 721].

It has been argued by some authors that the party should have at his disposal the option to renegotiate the contract or to make adaptations to the contract, which is in fact the position in many domestic legal systems.[130] However, since the CISG does not expressly provide for such remedies, it remains a controversial and contentious matter.[131]

### 3.4 Clarity and guidelines regarding the existence of hardship under the CISG: Advisory Council Opinion No. 20

In 2020, the CISG Advisory Council (the Council) finally gave some clarity and guidelines regarding hardship under the CISG in Opinion No. 20.[132] The Council also set out rules on hardship which would apply unless the parties agreed otherwise.[133] Firstly, the council held that the CISG does in fact govern cases of hardship, and stated that, unless there is hardship, a party must perform its obligations in terms of the contract - even if performance were to become more onerous. Hardship could in fact arise with a change in circumstances beyond the control of the party which would make performance excessively onerous. Furthermore, the party could not reasonably be expected to foresee or to avoid such consequences. Hardship might also arise either in cases where the cost of performance increases or the value of the performance declines. Hardship might also arise from events that occurred before the conclusion of the contract, but provided that the parties are unaware of such events. Thus, exemption from performance on account of hardship would be effective only for the period during which the hardship was experienced.

The Council laid out some non-exclusive factors to consider when determining the existence of hardship: whether the risk of the change is assumed by one of the parties; whether the contract is of a speculative nature; whether and to what extent there have been previous market fluctuations; the duration of the contract; whether the seller obtained the goods from his own supplier; and whether the parties made provision for market changes in the contract. Furthermore, the Council gave guidance regarding some remedies available to parties in instances of hardship. It held that parties have no duty to renegotiate their contracts in cases of hardship and that a court or arbitral tribunal may not adapt the contract or terminate the contract in cases of hardship.

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[130] Schwenzer (n 23 above) 722-723.

[131] As above.

[132] CISG-AC Opinion No. 20 (n 20 above).

[133] CISG-AC Opinion No. 20 (n 20 above) 2-3.

Although Opinion No. 20 attempts to establish objective criteria for the determination of the existence of hardship, no guidance has been given as to how the criteria are to be evaluated. It is the concern of some authors that the criteria set out by the Council would be difficult to apply in practice.[134]

### 3.5 Do impediments caused by COVID-19 qualify under Article 79 of the CISG?

After the above consideration of *force majeure* and hardship under Article 79, it can now be considered whether an impediment caused by COVID-19 would qualify as an impediment under Article 79. What might complicate this enquiry is the fact that different countries have put different measures in place in an attempt to control the pandemic. For example, while South Africa imposed a drastic nationwide lockdown and closed all non-essential businesses, as well as its regional and national borders, mandated home confinement, imposed a strict curfew, and more, Tanzania imposed minimal measures and did not close down businesses or its borders.[135] If the question is whether the COVID-19 pandemic itself would qualify as an impediment under Article 79, the answer is not that straightforward. Such an enquiry would be fact-sensitive and would depend on the country in which the party would find itself, and whether the measures imposed by that country would make it impossible or extremely onerous for the party to perform.[136] Thus, each case would have to be considered individually, and the particular impediment caused by COVID-19 would have to be measured against the requirements of Article 79 to determine whether the aggrieved party could indeed be excused from performing under Article 79.

The key requirements that must be satisfied in terms of Article 79(1) are that the impediment must be beyond the control of the parties; it must be unforeseeable; and it must be unavoidable. These requirements are considered below.

#### *3.5.1 Impediment must be beyond the control of the party*

The outbreak of COVID-19 is certainly an event that could not have been controlled by any contracting party to a sales contract. Where an outbreak of the pandemic directly prevents the debtor from performing adequately due to widespread illness in his workforce, for

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[134] LK So, P Sooksripaisarnkit & SR Garimella 'COVID-19 in the context of the CISG: reconsidering the concept of hardship and *force majeure*' (2021) https://www.researchgate.net/publication/348744409 (accessed 17 August 2021).

[135] BMJ Global Health 'Lockdown measures in response to COVID-19 in nine Sub-Saharan African countries' (2020) https://gh.bmj.com/content/bmjgh/5/10/e003319.full.pdf (accessed 19 August 2021).

[136] LK So *et al* (n 134 above) para 3.

example, such circumstances would constitute an impediment beyond the debtor's control.[137] In cases where the pandemic indirectly prevents the debtor from performing adequately due to, for example, government measures imposed in reaction to the pandemic, such as limits on the number of workers that may be present at work, restrictions on the importation and exportation of goods, quarantine restrictions imposed on container vessels, etcetera, these circumstances would also fall beyond the control of the debtor.

### *3.5.2 Impediment must be unforeseeable at the time of the conclusion of the contract*

While also considering the specific circumstances of the individual case, the standard for unforeseeability in this instance is objective.[138] The time at which a contract is concluded is also a factor of great importance. There is literature that argues that within the context of natural phenomena, there is a distinction between ordinary and extraordinary events, and also between the exceptional nature of an event and its exceptional scale.[139] This means that if many of the same or similar impediments have occurred in the past, then the possibility of their recurrence under regular circumstances becomes foreseeable.[140] In other words, if a contract of sale is linked to an area that is prone to a specific type of natural supervening event, such as drought, earthquakes or heavy rainstorms, then such an event can no longer be regarded as unforeseeable. Similarly, if the contract is linked to an area that is prone to other types of supervening events that are caused by political instability or civil unrest, for example, such as strikes and looting, then, because they have repeatedly occurred in the past, such events can also no longer be regarded as potentially unforeseeable.

Over the course of modern history, and even over the past 20 years, there have been various pandemics and epidemics, such as the Spanish Flu, Ebola, and various versions of Coronavirus, and according to medical publications, it is statistically certain that more pandemics or epidemics will occur in the future.[141] However, even though the possibility of

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[137] A Janssen & CJ Wahnschaffe 'COVID-19 and international sales contracts: unprecedented grounds for exemption of business as usual?' (2020) 25(4) *Uniform Law Review* 1 at 5.

[138] Schwenzer (n 23 above) para 14.

[139] LA DiMatteo 'Excuse, impossibility and hardship' (2016) *in* LA DiMatteo, A Janssen, U Magnus & R Schulze *International sales law - contracts, principles & practice* (Munich/Oxford/Baden: CH Beck/Hart/Nomos 2016) para 41.

[140] CFM Davies 'Excuse of impediment and its usefulness' in LA DiMatteo (ed) *International sales law - a global challenge* (2014) 296.

[141] Janssen & Wahnschaffe (n 137 above) 6.

a worldwide pandemic occurring is always there, compared to other outbreaks, the COVID-19 pandemic is exceptional. Apart from the shocking death toll arising from COVID-19 infections, the restrictions imposed by governments across the globe in reaction to COVID-19 have been unprecedented, and could not have been reasonably foreseen by the individual market participant.[142]

The importance of the time at which the contract is concluded comes into play here. The COVID-19 pandemic has been inherent to society since early 2020, when most of the people were infected and the strictest and most stringent governmental lockdown measures were imposed. It can be argued that in cases where a contract was concluded subsequent to the COVID-19 outbreak, the parties cannot rely on Article 79 to claim that, owing to the unforeseen events caused by COVID-19, and because they could not have reasonably foreseen that COVID-19 would influence their ability to perform, they would then be exempted from performance. With the emphasis on the importance of the time of the conclusion of the contract, the 2005 *L-Lysine case* serves as an appropriate example to quote. It was concluded during one of the SARS outbreaks in China, with the Chinese International Economic and Trade Arbitration Commission rejecting an exemption from performance under Article 79 of the CISG on the grounds that the SARS outbreak had occurred two months before the contract was signed.[143]

In the case of South Africa, COVID-19 hit the country in March 2020 and peaked in July 2020, with the government reacting swiftly by imposing strict lockdown measures, which managed to contain the outbreak. A few months later, in December 2020, a second wave of infections arose which prompted the imposition of another round of strict lockdown measures. A third wave was experienced in June 2021, and a fourth wave is expected in December 2021.[144] The recurrence of waves of infection could possibly result in government restrictions being expected to a reasonable extent by parties to an international sales contract, thus making the impediment foreseeable. However, the progression of the vaccine roll-out, which could serve to prevent waves of infection and the fact that the COVID-19 virus is constantly mutating and resulting in new strains that are becoming more and more infectious could impact upon the foreseeability of COVID-19-

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[142] B Majumder & D Giri 'Coronavirus & *force majeure*: a critical study' (2020) 51 *Journal of Maritime Law & Commerce 51* at *58.*

[143] *L-Lysine Case* (2005) China International Economic and Trade Arbitration Commission (CIETAC) in Janssen & Wahnschaffe (n 137 above) 8.

[144] BusinessTech 'When the fourth Covid-19 wave is expected to hit South Africa: expert' (17 August 2021). https://businesstech.co.za/news/trending/513638/when-the-fourth-covid-19-wave-is-expected-to-hit-south-africa-expert/ (accessed 22 August 2021).

related impediments. The unforeseeability requirement is therefore extremely complicated and difficult to apply in practice.

*3.5.3 Impediment must be reasonably unavoidable*

This requirement is strictly applied, and if the debtor could have overcome the impediment and its consequences, but did not take the necessary action to overcome it, then Article 79 would not apply. In practice, however, this requirement has been applied in a limited way, and only a highly exceptional event would comply with the other requirements stated in Article 79 but would fail in terms of the requirement of unavoidability.[145] The key requirement is reasonableness - the debtor must take all measures that are reasonable to overcome the impediment, even if these would involve extra costs. The threshold of reasonableness is suggested to be exceeded should the additional efforts by the debtor to overcome the impediment threaten the very survival of his business.[146]

**3.6 Conclusion**

COVID-19 has had an undeniably devastating impact on international trade. This has been due not only to the highly contagious nature of the virus, but also to the extreme measures taken by governments in their attempts to control the outbreak. This chapter found that Article 79 of the CISG is essentially the "*force majeure* and hardship" provision of the CISG. Under Article 79, there is a possibility that where, for COVID-19-related reasons, a party cannot perform an obligation in terms of an international sales contract, the party can be excused from performance. The analysis has shown that to provide a general answer to the question as to whether COVID-19 can in fact be considered an impediment for the purposes of Article 79 is not possible, and that each case needs to be examined on an individual basis.

This chapter demonstrated that it is not all that straightforward to apply the requirements of Article 79, namely unforeseeability and unavoidability. They require both an objective and subjective investigation, and, depending on the specifics of each individual case, can yield a wide range of results. Furthermore, even though the CISG does in fact recognise hardship, it has rarely been found that, owing to hardship, a party is unable to perform since the threshold for hardship is so difficult to determine. There are, therefore, many

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[145] Janssen & Wahnschaffe (n 137 above) 9.

[146] As above.

uncertainties in the application of Article 79, especially within the context of COVID-19, and it is advisable that parties include contractual clauses in their sales contracts dealing with *force majeure* and hardship to make up for these uncertainties.

The next chapter considers whether COVID-19 can be considered from a South African perspective as a *force majeure* event in international sales contracts where the CISG is not applicable.

# CHAPTER 4: OPERATION OF *FORCE MAJEURE* IN INTERNATIONAL SALES WHERE THE CISG DOES NOT APPLY DURING THE COVID-19 PANDEMIC: SOUTH AFRICA

## 4.1 Introduction

The previous chapter discussed the position of international sales contracts in cases where the CISG governs the contract. However, not all countries in the world have ratified and adopted the CISG, so, on occasion, a contract will not necessarily be governed by the CISG. South Africa, for example, has not ratified the CISG. As such, should a contract of sale be concluded with a South African party, the CISG might not be applicable. The applicable legal system that governs the contract, or the proper law (the *lex causae*), will have to be determined in terms of the rules of conflict of laws. If it is found that South African law governs the contract, then the CISG will not apply. The rules of conflict of laws could also indicate that some other foreign system of law is the proper law of the contract. Should the foreign law belong to a country that has ratified the CISG, the CISG will govern the contract. If not, the domestic contract law of that foreign legal system will apply to the contract at hand. This chapter is concerned with the instance where the rules of conflict of laws indicate that South African law is the proper law of the international contract of sale, which means that the CISG is not applicable, but that South African contract law governs the contract.

This chapter, using South African law as a case study, discusses how the rules of conflict of laws can be used to determine the proper law of an international sales contract to which the CISG is not applicable. This case study can also be relevant to other African countries where the CISG has not been adopted. The chapter continues then to discuss South African law in terms of excuse for non-performance and analyses whether the COVID-19 pandemic can be regarded as an event that can excuse performance. Even though the topic of this dissertation concerns international sales contracts, this chapter discusses many cases and instances that are not necessarily sales contracts. Nonetheless, it represents the position in terms of the South African law of contract.

## 4.2 Conflict of laws

To determine the proper law of a contract, the rules of conflict of laws must first be considered. Firstly, the objective is to determine whether the parties have expressly

indicated what law they would like to govern their contract through a choice-of-law clause.[147] The express choice of law of the parties would then be considered to be the proper law. In the absence of an express choice of law, a competent court would attempt to determine the unexpressed (tacit) choice of law of the parties. This would be done by examining the surrounding circumstances and the other terms of the contract.[148] For example, if the parties were to conclude that a dispute should be resolved by a court or an arbitral tribunal in a specified country, or make reference to the legislation of a particular country, then such terms could then serve as a tacit choice of law. Lastly, if there is no express or tacit choice of law in an international contract, a competent court would then assign a proper law to the contract.[149] In doing this, a court would objectively determine the system of law with which the contract has the closest and most real connection, and that law would then be assigned as the proper law.[150] Various factors can be considered to determine the closest and most real connection that the contract has with a system of law. These aspects would include the place where the contract was concluded, the place where the contract must be performed, the form and language used in the contract and the domicile or nationalities of the parties to the contract.[151] This is not a closed list, however.

### 4.3 South African law on excuse for non-performance: 'supervening impossibility of performance'

If the rules of conflict of laws indicate that South African law should be the proper law of a contract, then South African contract law will also govern matters relating to excuse for non-performance.

Under South African common law, the relevant term used is 'supervening impossibility of performance'. It was found in the case of *Wilson v Smith*[152] that the impossibility of performance cannot create contractual obligations. This position flows from the Latin

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[147] Van Niekerk & Schulze (n 86 above) 59.

[148] Van Niekerk & Schulze (n 86 above) 61.

[149] Van Niekerk & Schulze (n 86 above) 63.

[150] As above.

[151] Van Niekerk & Schulze (n 86 above) 63-64.

[152] *Wilson v Smith* 1956 (1) SA 393 (W) at 396. In this case, the first respondent purchased a portion of land from the applicant. At the time of the sale, both parties contemplated that it would be possible to sub-divide the lot, but it subsequently appeared that this would be a contravention of a scheme of the Peri-Urban Areas Health Board in whose jurisdiction the lot fell in terms of Ordinance 11 of 1931. The court held that it was impossible for the applicant to transfer the property to the first respondent due to the bar imposed by the Ordinance.

maxim of *impossibilium nulla obligatio est*, which means that parties cannot agree to do the impossible. Thus, contracts that contain obligations which are impossible to perform will be null and void under South African law. Similarly, obligations that become impossible after the conclusion of the contract, and which are not the fault of the obligor, will as a general rule be extinguished. There are two requirements for supervening impossibility, and if they are not met, the debtor will then be in breach of contract and liable to pay damages.[153] The two requirements are: 1) The performance must be objectively impossible, and 2) The impossibility must be unavoidable by a reasonable person.[154]

### *4.3.1 Objective impossibility of performance*

Objective impossibility means that performance must be absolutely impossible, and that no one can tender performance.[155] It is not sufficient for performance to be subjectively impossible, meaning that only the specific party in question would find it impossible to perform. This was found by the court in *Unibank Savings v ABSA Bank*[156], which held that for objective impossibility to exist, it must be impossible for all parties in a similar position to perform.

For objective impossibility to prevail, it is also not sufficient for performance to become more onerous or expensive.[157] This point can be illustrated in terms of an old South African case, *Hersman v Shapiro & Co.*[158] In this case, the parties agreed that the defendant would deliver corn of a particular quality and grade to the plaintiff. On account of excessive rains in the former Transvaal province that year, there was a scarcity of corn of the required quality and grade. As a result, performance by the defendant became much more difficult and expensive than initially anticipated, and the defendant argued for a discharge of his contractual obligations. The court stated that "…one must look to the nature of the contract, the relation of the parties, the circumstances of the case and the nature of the

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153 D Hutchison & C Pretorius (eds) *The law of contract in South Africa* (2017) 395.

154 Hutchison & Pretorius (n 153 above) 395.

155 Hutchison & Pretorius (n 153 above) 214.

156 *Unibank Savings and Loans Ltd (formerly Community Bank) v ABSA Bank Ltd* 2000 (4) SA 191 (W) (Unibank Savings v ABSA Bank). In this case, Unibank Savings was placed under curatorship in terms of the Mutual Banks Act of 1993. According to the Mutual Banks Act read with the Banks Act of 1990, the management duties of a bank under curatorship are vested in the curator. The question at issue was whether the curatorship terminated the employment contracts of the management staff of the bank due to the fact that it had become physically impossible for the management staff to perform their duties.

157 Hutchison & Pretorius (n 152 above) 395.

158 *Hersman v Shapiro & Co* 1926 TPD 367.

impossibility invoked by the defendant" in order to determine whether the obligations should be discharged. Evidence was led in the case that showed that the defendant had not turned to surrounding provinces and countries; neither had he offered 'fanciful' prices to obtain the desired quality of corn. The court concluded that the desired quality of corn was not impossible to obtain, but that the corn was merely limited in quantity (scarce), and on those grounds, the court refused to discharge the defendant's obligation. This position was confirmed in 2008 in the case of *Transnet Ltd t/a National Ports Authority v MV Snow Crystal.*[159]

In *Unibank Savings v ABSA Bank,* the court also gave an input on this point by presenting an example of subjective impossibility and stating the following:

> Impossibility is… not implicit in a change of financial strength or in commercial circumstances which cause compliance with the contractual obligations to be difficult, expensive or unaffordable. Deteriorations of that nature are foreseeable in the business world at the time when the contract is concluded.[160]

The court, however, gave a dissenting opinion to this rule, and stated that performance should still be regarded as objectively impossible as long as performance was still factually possible but had become so difficult and onerous that it could under no circumstances be reasonably expected that a party should comply.[161]

An appropriate example is where the desired object of a sale is a marble statue, which has sunk to the bottom of the ocean. Even though it is factually possible to retrieve anything from the bottom of the ocean, it would be very difficult, onerous and expensive, and a party could not be reasonably expected to retrieve the statue.[162] From this, it is evident that the courts will in certain instances, as in this example of the marble statue, come to the aid of a party and impose a standard of society to determine whether it could be expected of a reasonable person to perform where performance would be extremely difficult and onerous.[163] In other words, if the performance were to become onerous for economic

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[159] *Transnet Ltd t/a National Ports Authority v Owner of MV Snow Crystal* 2008 (4) SA 111 (SCA) (Transnet v MV Snow Crystal). In this case, respondent and appellant agreed that the appellant would make a dry dock available at the Cape Town Harbour for the docking of the respondent's vessel for a period of two weeks and that the appellant should book with the dock master six months in advance. When the respondent's vessel arrived at Cape Town Harbour, it could not dock because another vessel had remained in the dock longer than the period for which it was booked. There was an alternative dry dock available that was large enough for the other vessel, but too small for the respondent's vessel. The respondent sued the appellant for damages, upon which the appellant raised supervening impossibility of performance as a defence.

[160] *Unibank Savings v ABSA* (n 158 above) para 9.3.1.

[161] *Unibank Savings v ABSA* (n 158 above) 783B-E.

[162] Hutchison & Pretorius (n 152 above) 396.

[163] Hutchison & Pretorius (n 152 above) 396.

reasons, such as bankruptcy or a sudden increase in the market price of goods, then the courts would not come to the aid of the party and the party would be liable for performance and would not be excused. Therefore, South African law does not recognise economic hardship, and regards instances of economic hardship as subjective or as a personal impossibility. The position in the *Unibank Savings v ABSA Bank* case was confirmed in the case of *Scoin Trading v Bernstein*[164], where the court found that a mere personal incapability to perform is not sufficient. The court gave the example that the payment of a debt is not rendered impossible by the death of the debtor - that is a subjective or personal impossibility - because the debt can still be paid by the deceased's estate. However, on the other hand, the singing of an operatic score is rendered objectively impossible by death because no one other than the deceased can sing the operatic score exactly like the deceased.[165]

Furthermore, performance would also become objectively impossible in cases where performance is still factually and physically possible but that have since been classified as illegal owing to, for example, new legislation having been promulgated.[166] This position can be illustrated by the case of *Bayley v Harwood.*[167] In this case, the appellant (lessee) leased land from the respondent (lessor). The lessor used the premises for a health and pleasure resort which the lessee wanted to use for the same purposes. After the conclusion of their agreement, the promulgation of new by-laws required that certain structural alterations and additions be made to the property in order for the property to be used as intended by the lessee. The lessor refused to make such changes, upon which the lessee vacated the property and stopped paying rent. The lessor demanded rent from the lessee, but the lessee argued that he had cancelled the lease because he could no longer use the property as a health and pleasure resort. The court found in favour of the lessee, stating that the new by-laws, which prevented the lessee from using the premises as a health and pleasure resort, were not something that he could reasonably have foreseen and made provision for in the lease agreement. The court held that the lessee was prevented by *vis major* (superior force) from using the land as a health and pleasure

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[164] *Scoin Trading (Pty) Ltd v Bernstein NO* 2011 (2) SA 118 (SCA) (Scoin Trading v Bernstein). In this case, the respondent was the executor of a deceased estate. The appellant offered for sale a rare gold coin to the deceased for R 1.95 million. The deceased accepted the offer and paid a deposit of R 200 000 and agreed to pay the outstanding amount of the purchase price by the end of the year. The deceased passed away before he could pay the full purchase price. The respondent, who was appointed as the executor of the deceased's estate, denied liability for the outstanding amount, stating that the death of the deceased caused impossibility of performance.

[165] *Scoin Trading v Bernstein* (n 164 above) para 22.

[166] Hutchison & Pretorius (n 152 above) 396.

[167] *Bayley v Harwood* 1954 (3) SA 498 (A).

resort and was entitled to cancel the lease. It was still physically possible for the lessor to grant possession of the land to the lessee, but the lessee was prevented by law from using the land as intended in their agreement, making performance objectively impossible.

To summarise, objective impossibility of performance means that performance is absolutely impossible and not merely difficult or onerous. It also means that performance is possible for no one and not only for the person claiming the impossibility. Performance is also objectively impossible if it has become illegal to perform, even though it is still physically possible to do so.

*4.3.2 The impossibility must be unavoidable by a reasonable person*

The impossibility of performing must not be self-created or due to the fault of the parties[168], but due to some supervening event over which the party has no control.[169] Such supervening events are called *vis majors* and should be widely interpreted to include all acts of God, such as natural disasters, and acts of man, such as strikes or acts of state.[170] Should a supervening event occur, the parties should not be able to reasonably avoid the consequences thereof.

Foreseeability is not expressly required for the supervening impossibility of performance to be raised, but case law has found that reasonable foreseeability falls under the requirement that the impossibility of performance must be unavoidable to a reasonable person. In *Bailey v Harwood,* the facts of which are stated above, the court made the following observation regarding foreseeability: The question arose as to whether the lessee should have foreseen the possibility that the legislation which prevented him from using the property as a health and pleasure centre had been passed. Furthermore, was his failure to foresee such a possibility an issue pointing to negligence, or did it indicate that he had assumed the risk that something like that might happen? On this point, Greenberg JA stated that a particularly prudent person, but not necessarily a reasonable person, might have foreseen the possibility of the event transpiring and made provision for it.[171] He used the example of destruction caused by lightning in the Witwatersrand area as not being an unforeseeable event owing to the frequent occurrence of lightning strikes in

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[168] *Transnet v Snow Crystal* (n 159 above) para 28.

[169] Hutchison & Pretorius (n 152 above) 397.

[170] As above.

[171] *Bailey v Harwood* (n 167 above) at 503H-504B.

the region. However, it can still be regarded as a *vis major* if a reasonable person could not have avoided the associated damage.[172] Following *Bayley* v *Harwood*, even if the debtor could have foreseen the *vis major* event that could cause impossibility of performance, the debtor had no control over whether the event would actually occur or the extent of the damage that it would cause. In other words, reasonable foreseeability does not mean that a person foresees that a *vis majo*r event will occur, but that the *vis major* event will cause impossibility of performance.

In *Nuclear Fuels* v *Orda*[173], the court had to consider a situation where during the negotiation stages of a contract, the parties had foreseen an occasion for impossibility, but once the contract had been concluded, the parties no longer foresaw that the impossibility might occur. The court referred to the judgment of *Bayley v Harwood* and further stated that a debtor need not remain bound to obligations where the event causing the impossibility is humanly foreseeable, but is in fact not understandably and reasonably foreseen by the parties.[174] Thus, "…if the cause of impossibility is not foreseen or is not such that it ought to have been foreseen, then the usual consequences of *vis major* would follow, even if the cause was within the bounds of human foresight."[175] Parties can also expressly or tacitly agree to take up the risk of supervening impossibility. The court in *Nuclear Fuels v Orda* held that where a party can reasonably foresee that an event might occur that will make performance impossible, the party can tacitly assume the risk of supervening impossibility.[176] To determine whether a debtor would tacitly assume the risk of impossibility, factors such as the nature of the contract, the relationship between the parties, the circumstances of the case and the nature of the impossibility should be considered.[177] In cases where the debtor tacitly assumes the risk of supervening impossibility of performance, he would not be able to claim cancellation of the contract on the grounds of impossibility.

In a nutshell, a debtor who wants to claim supervening impossibility of performance must not have been able to reasonably avoid the consequences of the event causing the impossibility. Should the debtor have been able to reasonably foresee the event and that

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[172] As above.

[173] *Nuclear Fuels Corporation of SA (Pty) Ltd v Orda AG* 1996 (4) SA 1190 (A) (Nuclear Fuels v Orda).

[174] *Nuclear Fuels v Orda* (n 173 above) 49.

[175] *Nuclear Fuels v Orda* (n 173 above) 49-50.

[176] *Nuclear Fuels v Orda* (n 173 above) 50.

[177] *Transnet v Snow Crystal* (n 159 above) para 28.

the event could have caused impossibility of performance, he should have made provision for it in the contract. Otherwise, it would be assumed that the debtor should carry the risk of such an impossibility occurring.

### 4.4 Effect of supervening impossibility of performance

Supervening impossibility of performance terminates the obligation and excuses the debtor from performing.[178] This would be the case unless the party failed to make timeous performance of his obligations when the impossibility ensued (the party is in *mora* or the performance is overdue*),* in which case the debtor would bear the risk of impossibility or the party would expressly or tacitly assume the risk of impossibility.[179]

Supervening impossibility of performance also excuses any counter obligations that are reciprocal under the contract, and would thus also excuse the creditor from performing, unless it was the fault of the creditor that the debtor's performance had become impossible[180] There is a further exception to this rule that is found in sales law and which is called the risk rule: A buyer would not be excused from paying the full purchase price if the object of sale was destroyed or damaged by a supervening event after the contract had become *perfecta.*[181] A contract is *perfecta* when the price and the goods of the sale are fixed and all suspensive conditions are fulfilled. If a contract is *perfecta*, then the risk has been passed on from the buyer to the seller. This rule can, however, be excluded by the parties in their contract.

Lastly, where an event causes only partial or temporary impossibility of performance, the effects thereof would then depend on the circumstances of the case. If an obligation that is divisible becomes partially impossible, the debtor would then be released from those terms of the obligation that are impossible to perform.[182] However, if an obligation that is indivisible becomes partially impossible to perform, then the creditor could elect to cancel the contract or accept partial performance for a proportionally reduced counter-performance.[183] If performance becomes temporarily impossible, the obligation to perform

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[178] Hutchison & Pretorius (n 152 above) 397.

[179] As above.

[180] Hutchison & Pretorius (n 152 above) 397-399.

[181] Hutchison & Pretorius (n 152 above) 398.

[182] As above.

[183] As above.

would then be suspended until the impossibility passes, unless the impossibility continues for such a time that it would no longer be reasonable to expect the creditor to continue the contract, and the creditor could then elect to cancel the contract.[184]

### 4.5 COVID-19 and supervening impossibility of performance

The question as to whether COVID-19 qualifies as an event that causes supervening impossibility has been a popular question in the legal world of South Africa. There are not any authoritative academic writings on the subject as yet - only the fact that hundreds of law firms have published short extracts on the matter on their websites.[185] Almost all of these extracts have recorded the conclusion that whether performance would be excused on account of COVID-19-related reasons would have to be determined on a case-to-case basis, taking into consideration the facts and circumstances of each specific case. In terms of international sales, where a party seeks to cancel a contract on the grounds of COVID-19-related reasons - if it is found through the rules of conflict of laws that South African contract law governs the international contract of sale, then it will have to be determined whether the specific circumstances of the international contract of sale comply with the requirements for supervening impossibility under South African common law.

#### *4.5.1 First requirement: COVID-19 and objective impossibility*

Depending on the type of obligation, if it is impossible for everyone to perform, it would also be objectively impossible for only a single party to perform. For example, in an attempt to curb the effects of COVID-19 by reducing alcohol-related accidents that fill up hospitals, the sale of alcohol was banned in South Africa for several successive periods. As a result, it became illegal to sell alcohol during that period. Therefore, provided that a contract was concluded before the ban was implemented, a party agreeing to sell and deliver alcohol during that time, would be relieved of his obligation owing to the fact that it had become illegal to sell alcohol. Thus, because the ban on the sale of alcohol applies to all alcohol retail outlets and restaurants, the requirement of objective impossibility would be satisfied. Similarly, also in reaction to COVID-19, where there is a blanket ban on

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[184] *Niemand v Okapi Investments (Edms) Bpk* 1983 (4) SA 762 (T).

[185] For example: Adams & Adams 'Is COVID-19 *force majeure* or breach of contract?' (2021) https://www.adams.africa/commercial-law/covid-19-force-majeur-or-breach-of-contract/; Cliffe Dekker Hofmeyr 'Regulating the consequences of *force majeure* in your contract' (2021). https://www.cliffedekkerhofmeyr.com/en/news/press-releases/2020/Regulating-the-consequences-of-force-majeure-in-your-contract.html; ENSafrica 'South Africa: Coronavirus - illegal and impossible performances under derivative transactions - contractual provisions and South African common law' (2020) https://www.ensafrica.com/news/detail/2461/south-africa-coronavirus-covid-19-illegal-and (accessed 15 September 2021).

certain exports or imports, or a prohibition on crossing provincial borders, or the closure of certain businesses, which would prevent a party from performing, that party could then be released from his obligations because the impossibility would be objective since no one would be able to perform.

However, in cases where COVID-19 has caused economic hardship or personal impossibility, the seller cannot rely on supervening impossibility of performance. Such hardship could be in the form of financial distress owing to a decline in economic activity or difficulty in obtaining certain supplies, these aspects being due to the collapse of the supply chain. The first case dealing with supervening impossibility in times of COVID-19 is the case of *Matshazi v Mezepoli.*[186] The facts of the case follow below:

The respondents in the case were a group of restaurants trading in restaurant services and goods. When the lockdown was implemented, business slowed for the respondents and they took the decision to stop trading completely until the lockdown was lifted. It must be noted that although the national lockdown severely restricted the operations of restaurants, they were still allowed some activity, such as trading in some food products or engaging in trade on a delivery/collection basis. The respondents announced a temporary layoff of their employees, and owing to the '…down-trading and continued losses incurred during the recent months [of the lockdown], exhausting any historic profits that there might have been',[187] stopped paying their employees' salaries. When the applicants, who had tendered their services at all times, pursued action against the respondents through business rescue proceedings, the respondents contended that as a result of *force majeure*, the applicants were no longer employees and the respondents could therefore be relieved of their obligations under the employment contracts.

The court found that for *force majeure* to apply, the parties must have made provision for *force majeure* and have expressly stated that their obligations towards their employees would be eliminated should a lockdown occur. In the absence of a *force majeure* clause, the parties would have to rely on the stringent common law doctrine of supervening impossibility of performance, for which objective impossibility would be a requirement.[188] Citing the cases of *Transnet v Snow Crystal* and *Unibank Savings v ABSA* as authoritative references, the court came to the conclusion that the obligation of the respondents to pay

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[186] *Matshazi v Mezepoli Melrose Arch (Pty) Ltd and Another* 2020 ZAGPJHC 136; 2021 (42) ILJ 600 (GJ). (Matshazi v Mezepoli).

[187] *Matshazi v* Mezepoli (n 186 above) para 24.4.

[188] *Matshazi v Mezepoli* (n 186 above) para 36.

the salaries of their employees was at no time objectively impossible, but only personally impossible on account of the financial distress (economic hardship) of the respondents that had been caused by the lockdown.

In *Nedbank v Groenewald*[189], a case heard in June 2021, the plaintiff and defendant entered into a loan agreement in 2002. The defendant fell into arrears during the national lockdown, claiming that the pandemic and lockdown constituted supervening impossibility, because the restrictions on economic activity had made it impossible for the defendant to perform under the loan agreement. The court referred to the recent case of *Matshazi v Mezepoli,* as well as to older cases of *Scoin Trading v Bernstein* and *Unibank Savings v ABSA*, and found that the change in the financial strength and commercial circumstances of the defendant had caused his compliance with his contractual obligations to be difficult, expensive or unaffordable, but that it did not constitute impossibility, because a mere personal incapability to perform does not amount to objective impossibility.[190]

In an even more recent case, namely *Wesbank v Pillay*[191], which was heard in August 2021, the parties had entered into an instalment sale agreement in 2014. The defendant had fallen into arrears with his instalments sometime in 2019, and continued being in arrears in 2020, during the national lockdown. The defendant claimed that *force majeure* or supervening impossibility of performance on account of the national lockdown restrictions and his retrenchment had made it impossible for him to perform. The court found that if provision has not been made in a contract for the application of the *force majeure* principle, a party cannot rely on it as a defence.[192] In this case, there was no *force majeure* clause in the contract, so the defendant would therefore have to rely on supervening impossibility of performance. The court found that financial difficulty caused by lockdown restrictions is a mere manifestation of personal impossibility, but it is not objective impossibility. Therefore, the defence of supervening impossibility of performance must fail.[193]

The above cases are authority for the fact that economic hardship and financial difficulty that are brought about by the COVID-19 pandemic and national lockdown cannot be used

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[189] *Nedbank Limited v Groenewald Familie Trust & Others* 2021 ZAFSHC 150. (Nedbank v Groenewald).

[190] *Nedbank v Groenewald* (n 189 above) para 16.

[191] *Firstrand Bank Limited t/a Wesbank v Pillay* 2021 ZAGPPHC 514. (Wesbank v Pillay).

[192] *Wesbank v Pillay* (n 191 above) para 11.

[193] *Wesbank v Pillay* (n 191 above) para 15.

as excuses for a party's obligation to perform under supervening impossibility of performance.

Another question arises, namely whether hardship (that is not economic hardship) caused by the pandemic will excuse a party from performance by rendering performance objectively impossible. An example is where a party cannot perform owing to his entire staff (or a large portion thereof) falling sick because of a COVID-19 outbreak in the workplace and of having to quarantine for 14 days, with those exposed needing to isolate for ten days. In this example, it is not financial difficulty that would prevent a party from performing, with performance still physically possible, but the fact that performance would be excessively difficult and onerous under conditions of having no employees for at least ten days. Would this be regarded as personal impossibility and not objective impossibility, or would the courts apply the 'standard of society', discussed in 4.2.1 above, in order to determine whether it could be expected of a reasonable person to perform where performance would be extremely difficult and onerous? There has yet to be case law on this matter. In any event, even if it could be regarded as objective impossibility, it might still fall short of the requirements of supervening impossibility of performance if the parties could have reasonably foreseen a COVID-19 outbreak in the workplace and did not put measures in place to avoid the effects of an outbreak. This issue is discussed next.

*4.5.2 Second requirement: COVID-19 and reasonable unavoidability*

It must be remembered that, as discussed above in 4.2.2, an event causing impossibility of performance could have been reasonably avoided if the event had been reasonably foreseeable. Furthermore, a party cannot rely on supervening impossibility of performance where the impossibility to perform is self created or due to the fault of the party. Taking the example of the ban on the sale of alcohol during the lockdown: there has been no way that a reasonable person could have foreseen or avoided the effects of such a ban. But the facts of all cases are not as straightforward as this, and therefore each case must be determined on an individual basis.

The case of *Matshazi v Mezepoli,* with the facts as discussed above, is relevant here. Despite the fact that the court found that the economic hardship of the respondents was not an example of objective impossibility, the court further held that the respondents' financial distress had in part been caused by themselves. During the national lockdown, restaurants were still allowed to conduct limited trade, such as the sale of cold foods or to operate on a delivery/collection basis. The court concluded that the respondents could not

be excused from their obligations to pay the salaries of their employees because they had decided not to trade under circumstances where they were actually able to do so.[194] This case serves as authority that a party should do everything that is reasonably possible to avoid the effects of the national lockdown and to meet his contractual obligations.

Whilst the COVID-19 pandemic and the strict national lockdown were not foreseeable by any reasonable person at first, today, after the passage of about a year-and-a-half since the onset of the COVID-19 pandemic, that position might have changed. Subsequent to the first wave in South Africa, the pandemic was brought under control for a few months, until the second wave emerged. The same pattern continued for the third wave, and a fourth wave is expected to emerge later this year. With each wave came another round of lockdown, and the same is obviously expected to happen if or when the fourth wave hits South Africa in the future. Therefore, the national lockdown can now be regarded as foreseeable by any reasonable person, and it has already been established that where an event that might cause impossibility of performance is reasonably foreseeable, it would also be reasonably unavoidable by making provision for the event in a contract. Thus, the pandemic and lockdown are at this stage probably no longer reasonably unavoidable.

### 4.6 Conclusion

The South African courts have applied the requirements of supervening impossibility of performance very strictly during the COVID-19 pandemic. This can be illustrated by the following quote by Justice Nekosie AJ in *Nedbank v Groenewald:*

> The Covid-19 pandemic and its crippling effect on the economy and businesses in general must be recognised when considering matters where it caused persons to default on their obligations. Not doing so would undermine the severe effect [that the pandemic has] had and continues to have. It would, however, be untenable that a person in default, with a means of avoiding or minimising their failure to honour their obligations, be allowed to use the pandemic as a shield to deprive creditors of what they are rightfully entitled to.[195]

This quote shows that the courts acknowledge the devastation that COVID-19 has caused to the economy and in the business world, but that the effects of COVID-19 cannot be allowed to be used by parties as a shield to escape their obligations. This demonstrates that the South African courts will continue to apply the law strictly despite the severe impacts of the pandemic.

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[194] *Matshazi v Mezepoli* (n 186 above) para 40.

[195] *Nedbank v Groenewald* (n 189 above) para 17.

In an international sales contract, where South African law is the proper law of the contract, the South African law of contract, including the principles and application of the rules for supervening impossibility of performance, applies. The South African courts apply the requirements for supervening impossibility of performance very stringently, and the principle of hardship is not recognised in South Africa. As a result, it will be very difficult in most cases for a party who seeks to be excused from performance of his obligations under an international sales contract due to COVID-19-related reasons, to do so under the common law doctrine of supervening impossibility of performance. Case law has shown that where there is no *force majeure* clause in a contract, the default position would be to apply the common law. It is suggested that parties should negotiate *force majeure* clauses into their international sales contracts, and specifically make provision for the COVID-19 pandemic and national lockdown as events that would excuse them from performing. A *force majeure* clause would determine the risk that is carried by each party and would provide protection to parties in times such as the COVID-19 pandemic.

The next chapter concludes this dissertation, and makes recommendations on how *force majeure* clauses can be used to effectively provide for *force majeure* during a pandemic.

# CHAPTER 5: CONCLUSION AND RECOMMENDATIONS

## 5.1 Introduction

This dissertation attempted to investigate whether the notion of excuse for non-performance, or *force majeure,* as it is more widely known, can be applied to situations where a debtor cannot perform on account of the effects of the COVID-19 pandemic. In conducting the investigation, some key issues were considered. They include the historical development of *force majeure;* how f*orce majeure* would operate in a contract of sale under the CISG in the context of COVID-19; and how, using a case study where South African law applies, *force majeure* would operate in a contract of sale where the CISG does not apply in the context of the COVID-19 pandemic. The hypothesis of this study states that the requirement for COVID-19 to be recognised as a *force majeure* event depends entirely on the individual circumstances of each case.

The discussions in the previous chapters have shown that both the CISG and the South African common law provide a general concept of excuse for non-performance in instances where a superior force prevents a debtor from performing his contractual obligations. The discussions have also revealed that although these concepts do in fact provide relief and protection in some instances, there are nonetheless gaps, difficulties and uncertainties when it comes to applying them in the context of the COVID-19 pandemic.

It has been shown that unless the parties to a contract have expressly agreed to a *force majeure* clause, the default position of the applicable law will be used to determine matters involving excuse for non-performance. In other words, unless the parties expressly incorporate a *force majeure* clause into their contract, and as long as the CISG applies, then Article 79 will govern matters of excuse for non-performance during COVID-19. Furthermore, if South African law applies, the doctrine of supervening impossibility of performance will be used. However, in cases where a *force majeure* clause has been included in the contract, the courts will rely instead on the *force majeure* clause to deal with matters of excuse for non-performance during the COVID-19 pandemic simply by following the principles of interpretation of contracts.

It has been illustrated above that owing to its strict requirements, Article 79 and the South African law on supervening impossibility of performance may not be broad enough to cover all instances of impossibility of performance caused by COVID-19. To avoid this

default position, it is of vital importance that parties negotiate a *force majeure* clause in their international contracts of sale. The principle of freedom of contract will grant the parties free rein to decide on the exact scope and extent of an excuse for non-performance under their contracts. In this way, parties will be better able to protect themselves by making provision for events that would make performance impossible and which they could not foresee, but that would fall short of the requirements of Article 79 or of supervening impossibility of performance. Parties could also include situations of hardship under their *force majeure* clause, which would further broaden the scope of events that could excuse a party for non-performance and which would provide for optimal protection during difficult and uncertain times such as the COVID-19 pandemic.

### 5.2 Overview of the findings of the study

The discussion of the historical development of *force majeure* in Chapter 2 showed that "*force majeure"* is actually one of many terms used to describe the doctrine of excuse for non-performance. This doctrine has followed different developmental paths in different jurisdictions, with major differences being found in civil and common law jurisdictions. It has resulted in a diversity of terms for the doctrine of excuse for non-performance, including *force majeure*, which is the French version of the doctrine - a civil law doctrine. *Force majeure* is the most widely-known term for the doctrine of excuse for non-performance, even in jurisdictions where *force majeure* does not actually feature in the domestic law. It has become a popular practice to include *force majeure* clauses in contracts, irrespective of whether the domestic law provides for *force majeure* or some other version of excuse for non-performance.

Chapter 3 discussed the CISG. It was found that the CISG does not expressly mention *force majeure*, but a critical analysis and interpretation of Article 79 of the CISG demonstrated that it does in fact make provision for both *force majeure* and hardship in those international sales contracts to which the CISG applies. Whether Article 79 can be applied to situations where a party cannot perform on account of the COVID-19 pandemic was found to be a difficult question to answer, because the answer is not that clear-cut. Investigations will have to be made on a case-to-case basis by applying the requirements of Article 79 to the specific situation at hand in order to determine whether the impediments preventing the party from performing qualify as impediments under Article 79, over which the affected party has no control and which could not therefore be foreseen or overcome. After a detailed discussion, it was found that because the requirements of

Article 79 are strict and the threshold is high, they might not be sufficient to protect parties in a contract of sale against the obstacles that the pandemic might cause them. Furthermore, the discretion of courts in applying them might yield inconsistent and unpredictable results.

Chapter 4 discussed a situation where the CISG is not applicable, but where the domestic laws of South Africa govern international sales contracts. Under South African law, the doctrine of supervening impossibility of performance is the relevant term for *force majeure* situations. It was found that, as with Article 79, the question as to whether supervening impossibility of performance can be applied to situations involving COVID-19 will depend on an individual analysis of the case at hand and whether the requirements for supervening impossibility of performance are fulfilled. It will have to be proved that the impediment caused by the COVID-19 pandemic makes it objectively impossible for a debtor to perform, and that the debtor could not reasonably foresee or avoid the effects of the event that caused the impossibility. The courts apply these requirements very strictly, and it was found that obstacles to performance caused by the COVID-19 pandemic are likely to fall short of the strict requirement of supervening impossibility of performance, leaving a debtor with no remedy and vulnerable in that he will have to pay damages for breach of contract. This study has thus correctly proved the prediction made in the hypothesis which questions whether COVID-19 will present an excuse for the performance of a party and which states that this would depend entirely on the circumstances of each case.

The discussion of the CISG and South African law has led to the conclusion and recommendation that in order to optimally protect parties in international sales contracts by assigning risk effectively during the COVID-19 pandemic, the best option is to insert a *force majeure* clause into the contract. Should a dispute arise, the courts would then apply the *force majeure* clause, instead of Article 79 or the law on supervening impossibility of performance. In this way, parties can avoid the strict requirements of the established doctrines in the CISG or the relevant domestic law, and will have free rein to determine their own definition of *force majeure* and prescribe which situations would qualify to excuse the performance of a party. The drafting of a *force majeure* clause is thus of utmost importance, and is considered below.

### 5.3 Recommendations: *force majeure* clause

The main purpose of a *force majeure* clause is firstly, to allocate risk between the parties, and secondly, to give notice to the other party of what events would constitute a *force majeure* event that would suspend or excuse performance.[196] A *force majeure* clause allows parties to terminate or suspend their contractual obligations should a supervening event that is described in the clause occur.[197]

A *force majeure* clause can be a general, broad, 'catch all' clause that sets out the requirements for an event to meet in order to qualify as a *force majeure* event.[198] Generally, the following requirements are associated with a 'catch all' clause: 1) the event must be external; 2) the event must make performance impossible or radically different from what was originally contemplated; 3) the event must have been unforeseeable; and 4) the event must be beyond the control of the parties.[199] These requirements are similar to the requirements that one would find in domestic legal systems for excuse for non-performance, but parties are free to define the limits of the requirements to be more inclusive of certain events. A *force majeure* clause can also expressly refer to specific events that would constitute a f*orce majeure* event, such as fires, floods, earthquakes, acts of state, riots and terrorism. A *force majeure* clause can also be a combination of a 'catch all' clause and a list of specific events that would constitute *force majeure* events.

In cases where the parties have included a *force majeure* clause in their contract, courts would then apply the logic of the parties to interpret the clause, and not the existing principles of excuse for non-performance found in various domestic law jurisdictions.[200] The parties are thus at liberty to make their *force majeure* clause much broader than the domestic law concepts of excuse for non-performance found in common law and civil law jurisdictions.

The possible risks or issues that could go wrong in a contract are often so numerous that it would not be possible to contemplate every single problem that might arise in the future and to list them as explicit *force majeure* events. It is therefore crucial that *force majeure* clauses are drafted skillfully and with the utmost care. Parties should use specific and

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[196] WC Wright '*Force majeure* clauses and the insurability of force majeure risks' (2003) Fall Edition *The Construction Lawyer* 16.

[197] Katsivela (n 21 above) 109.

[198] Wright (n 32 above) 16.

[199] As above.

[200] Katsivela (n 21 above) 110.

detailed language and carefully define the scope and effect of a *force majeure* clause, keeping in mind the surrounding circumstances of their contracts.[201] As long as a *force majeure* clause is well drafted, it will maximise the protection of parties

### 5.3.1 Drafting of *force majeure* clauses

To be well drafted, a *force majeure* clause should be custom-drafted for a specific contract.[202] If a contract uses a vague standardised clause, it then leaves a lot of room for a court's own discretion to interpret what the true intentions of the parties are.[203] The international practice for the drafting of *force majeure* clauses has generally evolved to firstly provide a definition of the concept of *force majeure*, followed by a non-exhaustive, "including-but-not-limited-to" list of events that have been agreed upon by the parties to constitute a *force majeure* event.[204] Following on the compilation of such a list is usually the setting of a standard expecting the required behaviour of the party affected by the *force majeure* event. This might also involve notifying the other party.[205] There is typically also an express obligation that a party must take all possible measures to overcome the *force majeure* event or to mitigate its impact on the performance of the contract.[206] International practice has further shown that most f*orce majeure* clauses generally either suspend the obligation that must be performed or extend the time period within which the obligation must be performed.[207] However, parties can also agree that the contract will terminate either immediately or after the passage of a certain period of time since the *force majeure* event occurred. Alternatively, the parties can agree that the contract must be renegotiated or referred for arbitration in order to adapt the contract to the new circumstances.[208]

The person drafting a *force majeure* clause should consider whether the clause establishes the following: 1) the events that constitute a *force majeure* event; 2) the

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[201] Wright (n 32 above) 16.

[202] Katsivela (n 21 above) 113.

[203] As above.

[204] U Draetta 'Force majeure clause in international trade practice' (1996) 5 *International Business Law Journal* 547 at 551.

[205] Draetta (n 204 above) 551.

[206] As above.

[207] As above.

[208] As above.

minimum level of impact required of the triggering event; 3) the notice that must be provided by the party invoking the *force majeure* provisions; 4) the relief to which the performing party is entitled as a result of the *force majeure* event; and 5) the mitigatory efforts the invoking party must undertake to minimise the effects of the *force majeure* event.[209]

Regarding the events that constitute a *force majeure* event, a drafter should consider contract-specific factors such as the location of contract performance and the type of performance required. A drafter should also carefully decide how to phrase the clause, and if a general "catch all" clause should follow a specific list of events that might constitute the *force majeure*. Here, it is important to consider the governing law's interpretation of "catch all" language. Regarding the interpretation of lists in South African law, it has been found that the *eiusdem generis* rule applies. As such, words with a general meaning will be restricted if they are used in association with words with a specific meaning.[210] This means that if general words follow a list of specific words, they will be interpreted restrictively as referring only to the type of things identified by the specific words in the list. Another rule of interpretation in South African law is the *inclusio unius est exclusio alterius* rule, which means that the inclusion of the one implies the exclusion of the other.[211] Thus, if something is expressly mentioned, it indicates the intention to treat items that are not mentioned differently. If a drafter of a *force majeure* clause wants to include COVID-19 as a *force majeure* event, he should expressly consider the inclusion of "pandemic" in the clause, and not merely "illness".

A drafter of a *force majeure* clause should be careful in choosing the wording to describe the required impact of the event. If the drafter uses the word "prevent", it could mean that performance must be rendered impossible. However, if the drafter wants to incorporate hardship into the clause, words such as "hindered", "difficult" or "unprofitable" should also be used. Furthermore, a drafter of a *force majeure* clause should be particular in determining the type of notice to be presented to the non-affected party by the party affected by the *force majeure* event and the most appropriate time to serve it. Here, if "prompt notice" is required, it might create ambiguity as to when - at which point exactly -

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[209] JH Robinson *et al* 'Use the force? Understanding *force majeure* clauses' (2020) 44(1) *American Journal of Trial Advocacy* 1 at 30.

[210] *First National Bank of SA Ltd v Rosenblum* 2001 (4) SA 189 (SCA) 196–198.

[211] RH Christie & GB Bradfield *Christie's the law of contract in South Africa* (2013) 232.

notice is required, and it might also jeopardise the effect of the notice requirement, which is to protect the non-affected party.[212]

A *force majeure* clause should also establish the remedies available should a party be impacted by a *force majeure* event. A clause can terminate, suspend or extend obligations. The drafter of a clause should base the available remedies on the individual circumstances of the contract, which might be impacted by, for example, whether the objects of sale are fresh products or live animals, or whether time is of the essence.

A drafter of a *force majeure* clause has a difficult and important task - now more so than ever. He has many factors to consider, but must keep it clear and simple at all times in order to avoid disputes over the available remedies.

### *5.3.2 ICC Model Force Majeure Clause 2020*

In 1985, the International Chamber of Commerce (ICC) introduced a standard *force majeure* model clause with the aim of providing traders with an appropriate and balanced tool to include in their international contracts or to use as a basis for drafting their own *force majeure* clauses. This model clause has been updated on numerous occasions over the years. In March 2020, in response to the uncertainties caused by the COVID-19 pandemic, the ICC updated the clause again and published the 2020 *ICC Force Majeure* Model Clause[213] (the model clause). The previous model clause was published in 2003[214], and because there was a need for simpler variations and expanded options to suit the different needs of businesses during the COVID-19 pandemic, it was updated.[215]

The model clause is a good example of what a *force majeure* clause should look like, especially in the context of COVID-19, since it was drafted in reaction to the pandemic. Whilst the model clause can be incorporated into any contract by reference, it is advised that a drafter should not blindly incorporate the model clause into a contract without making provision for the specific individual circumstances of the contract. The model

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[212] Robinson *et al* (n 209 above) 32.

[213] ICC *Force Majeure* Clause (n 19 above).

[214] International Chamber of Commerce *Force Majeure* and Hardship Clauses 2003 https://iccwbo.org/publication/icc-*force-majeure*-clause-2003icc-hardship-clause-2003/ (accessed 15 September 2021).

[215] Crowell Moring 'International Chamber of Commerce updates its model *force majeure* and hardship clauses amidst COVID-19 pandemic' (2020) https://www.crowell.com/NewsEvents/AlertsNewsletters/all/International-Chamber-of-Commerce-Updates-its-Model-Force-Majeure-and-Hardship-Clauses-Amidst-COVID-19-Pandemic (accessed 15 September 2021).

clause should thus be used only as a foundation to build a *force majeure* clause for a specific international contract of sale.

Some important provisions of the model clause are briefly mentioned. The model clause defines *force majeure* as "the occurrence of an event or circumstance…that prevents or impedes a party from performing one or more of its contractual obligations under the contract…"[216] It provides the following three requirements that must be proved by the affected party: a) that the impediment is beyond its reasonable control; 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. This definition and the associated requirements provide for a lower threshold for invoking *force majeure* than impossibility of performance. The model clause further provides for a list of presumed *force majeure* events, which include amongst others, trade restrictions, acts of authority, governmental orders, plagues and epidemics. Should they wish to do so, the parties are able to amend this list.

A party who successfully invokes *force majeure* under the model clause will be relieved of his obligations to perform and also from any liability in respect of damages.[217] However, such suspension of obligations will only apply as long as the impediment that is preventing the affected party from performing exists.[218] The affected party has a duty to mitigate the effect of the *force majeure* event on the performance of his obligations and must take all reasonable measures to do so.[219] Furthermore, the parties can terminate the contract in instances where the duration of the impediment caused by the f*orce majeure* event has the effect of substantially depriving the contracting parties of what they were reasonably entitled to expect under the contract.[220]

One of the most significant differences between the 2003 and the 2020 model clause is that the 2020 model clause provides for a shortened form of the *force majeure* clause. Furthermore, it is particularly well suited to small to medium-sized businesses.[221] The

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[216] ICC Force Majeure Clause (n 19 above) para 1.

[217] ICC Force Majeure Clause (n 19 above) para 5.

[218] ICC Force Majeure Clause (n 19 above) para 6.

[219] ICC Force Majeure Clause (n 19 above) para 7.

[220] ICC Force Majeure Clause (n 19 above) para 8.

[221] Crowell Moring (n 215 above). There are some other key differences between the 2003 and the 2020 model clauses :eg. the 2003 clause's list of presumed *force majeure* events have been modified and updated in the 2020 clause; and the 2020 clause provides for the parties to terminate the contract if the impediment exceeds 120 days, whereas the 2003 clause does not.

model clause also provides for a hardship clause, which the parties can incorporate into their contracts to excuse performance in cases where performance has become excessively onerous.

The 2020 model clause of the ICC demonstrates the position of international best practice on the issue of *force majeure* clauses during the COVID-19 pandemic. The model clause effectively balances the interests of both parties in the contract in a way that is not overly complicated. The model clause is quite broad and descriptive, but not unreasonably so, as it truly seeks to achieve what is in the best interests of both parties without prejudicing the other. The 2020 model clause is therefore a good starting point for parties who wish to draft a *force majeure* clause.

### 5.4 Conclusion

This study is relevant because COVID-19 can cause parties to default in various ways on their contractual obligations in respect of international sales. The pandemic can cause the loss of production on the part of the seller.[222] This can be due to, for example, governmental measures that have forced companies to suspend production, or to a mass outbreak of infection at the workplace which caused the company to temporarily suspend its operations. The pandemic has also caused disruptions to the supply chain - especially reported by the automotive and electronics industries.[223] Such disruptions could prevent sellers from fulfilling their obligations under an international sales contract, especially if the seller needs certain supplies in order to produce the agreed-upon merchandise. Furthermore, the effects of COVID-19 have had severe economic repercussions for businesses in that they can potentially cause the liquidation of buyers in international sales contracts.[224] This is bound to cause many payment defaults on the part of the buyers. The pandemic has also had a noticeable impact on freight traffic.[225] For example, it is reported that since the start of the COVID-19 pandemic, air freight traffic between Europe and China fell by 60%, and between USA and China by 80%, and that transport costs have

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[222] Janssen & Wahnschaffe (n 137 above) 11.

[223] As above.

[224] Janssen & Wahnschaffe (n 137 above) 12.

[225] Janssen & Wahnschaffe (n 137 above) 13.

risen by two or three percent compared to the previous year.[226] This is due to import and export restrictions being imposed by governments and to stricter measures for travel such as the requirement for operators to present with proof of having produced a negative COVID test result. Such a disruption in freight traffic can cause merchandise to be delivered late and not on the agreed-upon delivery date.

These are just a few examples of how COVID-19 has affected and could possibly affect international trade. But it is a moot point that the COVID-19 pandemic has had and continues to have detrimental impacts on international trade. The significance that international trade carries for Africa has already been established in this study. The African economy depends on it, and international trade has contributed immensely to the growth of Africa's economy. COVID-19 has put a halt on the international trade sector which has had devastating impacts on African businesses, business owners and the economy as a whole. As long as a debtor is unable to fulfill his obligations under an international contract of sale, he will be sued for damages, and if he does not have an effective remedy, such as a f*orce majeure* clause or any other law providing for an excuse for non-performance to rely on, he will then have to pay damages to the other party. The financial burden of paying damages as a result of debtor's default, which has been caused by the effects of the COVID-19 pandemic, is the reason why businesses will be forced to close their doors - they will probably become insolvent and will no longer be able to pay their employees. A *force majeure* clause could be a tool to avert this type of risk.

It has been shown that there is a need to include a *force majeure* clause in an international contract of sale, not only during the COVID-19 pandemic, but in order to protect the parties from all unforeseen risks. This need has arisen as a result of the fact that domestic laws, such as South African law, and other legal regimes that might apply to an international contract of sale, such as the CISG, might not be sufficient to accommodate all possible risks that might arise from unforeseen supervening events. It is therefore of crucial importance that *force majeure* clauses be drafted with care, skill, and with reference to the specific circumstances of the individual contract of sale. In order to prevent disputes, *force majeure* clauses should also not be overly complicated and ambiguous.

Whether COVID-19 will be a *force majeure* event will depend on the wording of the *force majeure* clause in the parties' contract - whether the parties agree that a pandemic and its effects are deemed to be a *force majeure* event, or whether the requirements for *force*

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[226] W Shepard 'China-Europe rail is set to boom as COVID-19 chokes air, sea and road transport' (31 March 2020) https://www.forbes.com/sites/wadeshepard/2020/03/31/china-europe-rail-is-set-to-boom-as-covid-19-chokes-air-sea-and-road-transport/?sh=37344c8837db (accessed 5 September 2021).

*majeure* decided on by the parties cover COVID-19 and its effects.[227] Drafters should be wary of using standardised forms of *force majeure* clauses over and over again in contracts, because such standardised clauses do not make provision for the specific circumstances of the individual contract. However, because it was formulated in reaction to the COVID-19 pandemic, and aims to balance the interests of both parties, the ICC model clause of 2020 provides a good example and foundation for a *force majeure* clause for an international contract.

An effective, well-drafted *force majeure* clause might mean the difference between becoming bankrupt and staying afloat during a crisis such as the COVID-19 pandemic. To introduce effective *force majeure* clauses into international contracts of sale is thus crucial for African traders for the simple reason that Africa has a frail economy that is dependent on international trade to remain stable and strong. Not only will African traders benefit from keeping their doors open during a crisis; the entire population of Africa will benefit from a strong, healthy and stable economy during the COVID-19 pandemic, or any other pandemic that might possibly occur in the future.

[227] Kiraz & Üstün (n 7 above) 28.

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