

Participant's Right to Terminate or Modify the International Commercial Contracts to Prevent Economic Damages Caused by the Covid-19 Pandemic

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Keywords: International Law, International Trade Law, Commercial Law, Covid-19 Pandemic, Global Economy, Impact of Covid-19 Pandemic, International Economics.

Abstract: Rights of modification or termination contracts are one of the policies stated by national and international legal regulations to prevent damages caused by the effects of the Covid-19 pandemic. Many authors have considered this issue a contractual policy when essential circumstances change; some authors believe it is "Force Majeure"... However, this article will consider this term as Participant's right when an epidemic occurs. By analyzing and comparing legal regulations, demonstrated by actual data and explained according to the general theory, the paper also gives a general picture on the issue of terminating or changing International Commercial contracts due to the effects of the Covid-19 pandemic, assessing and commenting on advantages of this right in development's global economic what was affected by Covid-19 pandemic.

1 INTRODUCTION

From late 2019 to 2020, Pandemic covid-19 has caused a severe impact on the world. (L. 2020), which are the countries with the highest number of infections, such as the USA, Russia, India, Brazil... Countries that are concerned about health and made a lot of measures to prevent economic damage to the countries. At the same time, countries also focus on preventing economic damage to traders. In addition to issuing good economic policies, they also have predictable regulations to prevent damages caused by diseases, natural disasters, and floods (Development 2020). The right to modify or terminate economic contracts is a great privilege that nations grant their traders to prevent damage caused by disease, especially during the Covid-19 pandemic. This is considered a special right and a properly foreseeable regulation; in international commercial law, this right is the best way to protect traders from the impact of epidemics

2 MATERIALS AND METHODS

The article is based on international commercial law, and state laws to clearly analyze the importance of this right; at the same time, it was encouraged to apply this right in different countries. The main linked legal sources are the International Trade Law, United Nations Convention on Contracts for the International Sale of Goods 1980, UNIDROIT Principles, Laws of several countries with specific, clear, and reasonable provisions on this issue: Colombia and Vietnam.

The article uses analytical methods to clarify the legal provisions, and at the same time use the proof method to underline that this is a very important issue for contractual participants, and for the Global economy. At the same time, the author uses the method of listing data and synthesizing give a general review of the status of Global economy which was affected by Covid-19 pandemic.

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3 LEGAL BACK GROUND

We find that in some countries, the recession is severe: in Spain, UK (Lisa Montel 2020), and Tunisia, the output of the economy in the second quarter was 20% lower than the same period last year (Tunisia 2020). This is 4 to multiple times bigger than some other quarterly fall on record for these nations. Also, in Peru the year on year fall was significantly bigger, at 30%.

In Taiwan, GDP in the second quarter of 2020 was under 1% lower than in a similar period in 2019. Finland, Lithuania and South Korea all observed falls in their GDP of around 5% or lesser.... Growth in China under the baseline is forecast to decline to 2.3 percent and under the lower case scenario to 0.1 percent by 2020, according to the World Bank Report, compared to 6.1. % in 2019 (Michael D. Sutherland, Karen M. SutterRebecca M. Nelson, James K. Jackson, Coordinator 2020). The Covid-19 pandemic containment will be a condition for recovery, but the risk of prolonged financial stress is still heavy, even after 2020. According to data by the National Bureau of Statistics announced on 03/16/2020, from January to May 2/2020, the epidemic has affected the Chinese economy's different indicators at different levels.

Industrial production and service manufacturing, market consumption, and investment, the Purchasing Management Index (PMI) are reducing. But in general, under the influence of different policies and measures, the resumption of production and production of enterprises has been accelerated. Order of production and living has been gradually restored, the national economy has achieved an orderly operation and a basic livelihood has been effectively secured.

With such a heavy economic impact, traders tried their best to enforce and fulfill contracts, but many merchants still could not fulfill their obligations, leading to commercial agreements breaches.

Commercial contract: is an agreement between business entities to establish, change, and terminate the rights and obligations of the parties in the performance of commercial activities (Karton 2009). A commercial contract has the following basic legal features: the field of the contractual relationship is commerce, including the areas of trade in goods and trade in services; One party subject to the contract must be the trader. In many commercial contract relationships, both parties must be traders, such as contracts for traders' representatives, goods sale and purchase agency contracts; the purpose of the trader when entering into a contractual relationship is to serve their business; The form of the contract can be verbal, behavioral or written. (Karton 2009): When

the conditions on the subject, purpose, and form of a contract are satisfied, a commercial contract is of the nature of an economic contract. For example, contracts in commercial activities are established in writing between traders, in which at least one party is a legal entity to serve its business. If these conditions are not met, a commercial contract will be considered as a civil contract. The article is clearly scoping the right to change content or terminate International commercial contracts.

Compensatory harms (likewise called " actual damages ") cover the misfortune the non-penetrating gathering caused because of the agreement's break. The sum granted is proposed to make great or supplant the misfortune brought about by the break.

There are two sorts of compensatory harms that the non-breaking gathering might be qualified for recuperate:

General Damages: General harms cover the misfortune straightforwardly and essentially brought about by the break of agreement (Charlie 2006). General damages are the most widely recognized kind of harms granted for penetrates of agreement.

Uncommon Damages (David Pearce, Roger Halson 2008): Exceptional harms (additionally called " consequential damages ") cover any misfortune acquired by the penetrate of agreement in view of extraordinary conditions or conditions that are not customarily unsurprising. These are real misfortunes brought about by the penetrate, yet not immediately and quickly. To acquire harms for this kind of misfortune, the non-penetrating gathering must demonstrate that the breaking party knew about the exceptional conditions or necessities at the time the agreement was made.

These are the profits that the aggrieved party could gain from the business if no infringement had occurred. The fulpayment principle is very commonly used to determine the amount of compensation caused by a breach of contract, which is the original as defined in Article 74 and 79 of the convention CISG 1980 and the countries' laws.

4 RIGHT OF MODIFICATION OR TERMINATION CONTRACT UPON CHANGE OF BASIC CIRCUMSTANCES

4.1 International Laws

According to Article 6.2.2. UNIDROIT Principles, There is hardship where the occurrence of events

fundamentally alters the equilibrium of the contract either because the cost of a party's Performance has increased or because the value of the Performance a party receives has diminished, and:

Firstly, the events occur or become known to the disadvantaged party after the contract's conclusion; the change in circumstances to perform the contract must be objective, that is not dependent on the will of the contractual parties (Doudko 2000). For example, storm, flood, fire, strike, riot, a decision of state authority, or an objective event taking place out of the control of a party ... This condition is similar to events that are considered "force majeure". Simultaneously, a change in circumstances occurs after the conclusion of a contract, when the parties cannot foresee the possible circumstances.

Secondly, the events could not reasonably have been taken into account by the disadvantaged party at the time of the contract's conclusion; In other words, events that happened must be objective, not due to human subjective will. If difficult circumstances arise after the conclusion of a contract, but the disadvantaged party knows or must know in advance these adverse events (events that can be foreseen due to actual manifestations: War is about to break out, the political crisis is on the rise...) at the time of entering into the contract, the disadvantaged party is still unable to invoke this Hardship term to obtain the right to apply for a modification of the contract.

Thirdly, the events are beyond the control of the disadvantaged party (Dietrich 1992). According to this regulation, hardship can be considered only when the events that caused a situation are beyond the control of the parties. This means that the parties cannot foresee difficulties happening, the objective events beyond the ability to anticipate or reasonably consider the parties in the contract.

Fourthly, The disadvantaged party did not assume the risk of the events. However, we cannot consider all changed circumstances beyond the party's control as a hardship. According to this provision, if the troubled party has explicitly accepted the risk of a change in circumstances, there will be no "hardship", the party will not be able to invoke the hardship provision. These can be deduced from the contract's nature that the party entering into a speculative deal considers accepting a certain level of risk.

Thus, "hardship circumstance" (Maskow 1992) is one of the conditions for the parties to modify or terminate the contract. Also should demonstrate the consequences of continued Performance of the contract. The circumstances change so dramatically that if the parties know in advance, the contract has not been entered into or entered into but with

completely different contents; According to this provision, the modification in contract performance circumstances makes the parties unable to perform the contract under the signed terms. The degree of change in circumstances may prevent the conclusion of a contract from taking place or taking place with other content. The contract's continued Performance without changing the contents of the contract will cause serious damage to one party; If as not change the content of the contract, will be serious damage to a contractual party: serious damage referred to herein means that if the damage occurs, one of the parties fails to reach the purpose of entering into the contract. The affected party has applied all necessary measures to the extent possible, consistent with the nature of the contract, and cannot prevent or minimize the impact on benefits. This is a provision to determine the obligations of the party affected by modification in contract performance circumstances. If the affected party has the right to request termination or modification of the contract, they themselves have the obligation to prevent and minimize the impact of the change of circumstances on their interests. When the affected party requests to terminate or modify the contents of the contract, it must prove all the conditions, especially proving that it has applied all necessary measures and still cannot prevent, minimize the impact to benefits from such change.

4.2 First Section

4.2.1 Colombia

In Colombia, to legitimize the utilization of the hypothesis of unexpected occasions in the agreement, the changing of the balance of the agreement must be one that forces an over the top weight for the burdened party. As the State Council demonstrated:

"It is basic that the lopsidedness in the commitments is sure, genuine, basic, principal, major, gigantic or critical, and no sort of unevenness, to the point that it causes an unnecessary fleeting or perpetual difficulty of things to come administration, an enormous irregularity with an unbalanced increment or detectable reduction of the remuneration, regardless of whether a cash misfortune, because of an abatement of the resources or the normal benefit, because of the expansion of the liabilities as an outcome of the ensuing unanticipated and capricious occasion, whereby there must be an inseparable circumstances and logical results relationship." (Vargas 2012)

Therefore, to apply the hypothesis of unexpected occasions in agreements and end or reevaluate a

business office or conveyance contract, it is basic that the accompanying prerequisites are met: Firstly, that the happening conditions are unexpected right now of the agreement's execution, and in this manner, bar any attribution to one or the other party. Secondly, that the lopsidedness against the distraught party is sure, genuine, fundamental, essential, significant, tremendous, or huge.

Some have even asserted that the lopsidedness must be conjured by the hindered party prior to proceeding with the presentation of the agreement, so the hypothesis of unexpected occasions in agreements and isn't blamed so as to change the underlying terms of the agreement.

4.2.2 Vietnam

Vietnamese Civil Code 2015 provides legal background for Performance of contract upon the fundamental change of circumstances. This is a new provision added in the Civil Code of Vietnam 2015. The addition of provisions on contract performance when circumstances change is to protect the legitimate interests of the parties in the contract and accordingly international practice (Ng 2017).

According to Clause 1, Article 420 of the Vietnam Civil Code 2015. Circumstances change basically when the following conditions are fully met: Circumstances change due to objective reasons occurred after entering into a contract. Change in circumstances must be objective, that is beyond the control of the parties. For example, storm, flood, fire, strike, riot, a decision of state authority, or an objective event taking place out of the control of parties... This condition has similarities with events that are considered "force majeure". At the time of entering into the contract, the parties could not foresee a change in circumstances. That is, the change of circumstances is beyond the will and ability of the parties to anticipate. This provision also shows the objectivity of modification in contract performance circumstances. The circumstances change so dramatically that if the parties know in advance, the contract has not been concluded or entered into but with completely different contents (Huong 2020);

According to this provision, the modification of contract performance circumstances makes the parties unable to perform the contract under the signed terms. The degree of change in circumstances may prevent entering into a contract or take place with other content. Continuing to perform the contract without changing the contract's content will cause serious damage to one party.

Thus, through the analysis of the laws of Colombia and Vietnam, it shows that governments have studied and adjusted the law to limit the damage to traders. At the same time, countries also take a more holistic view of regulation for supporting the injured or at-risk party. Thanks to this regulation, the parties limit the damage caused by the Covid-19 pandemic; This is considered a prerogative of the parties to the contract.

5 CONCLUSIONS

Thus, in addition to the force majeure event, the provision on fundamentally changing circumstances is also a significant provision for businesses, creating more solutions to solve problems in certain difficult circumstances. Stemming from the principle of civil law is freedom, voluntary commitment, and agreement, in addition to the provisions of force majeure events, the parties should also respect the provisions on contract performance when fundamental circumstance was changed. Accordingly, to make it easier for the parties to settle disputes, the participants should clearly define the circumstances of fundamental changes, list the objective and subjective causes, and clearly define the parties' responsibilities. The party must perform when a fundamental change occurs, the parties' rights and obligations in that situation. The right to modify or terminate the contract when there is a change of basic circumstances is a special right in the current complicated epidemic situation. The paper outlines the importance of this right in international economic relations, and also analyzes the legal and practical basis for traders to apply their rights in preventing damages caused by Covid-19 pandemic.

ACKNOWLEDGEMENTS

If any, should be placed before the references section without numbering.

REFERENCES

- Sutherland, M. D., Sutter, K. M. Nelson, R. M., Jackson, J. K. Coordinator. (2020). Global Economic Effects of COVID-19. *Congressional research services*.
- Charlie, W. (2006). Performance and Compensation: An Analysis of Contract Damages and Contractual Obligation. *Oxford Journal of Legal Studies*, pages 41-71.

- Alderman, R., De Franceschi, A. et al. (2020). Consumer Law and Policy Relating to Change of Circumstances Due to the COVID-19 Pandemic. *Journal of Consumer Policy*, pages 437–450.
- Pearce, D., Halson, R. (2008). Damages for Breach of Contract: Compensation, Restitution and Vindication. *Oxford Journal of Legal Studies*, pages 73–98.
- Development, The secretariat of the United Nations Conference on Trade and. (2020). *Trade and development report 2020 from Global Pandemic to prosperity for all: avoiding another lost decade*. New York: United Nations.
- Maskow, D. J. (1992). Hardship and Force Majeure. *The American Journal of Comparative Law*, pages 657–669.
- Doudko, A. G. (2000). Hardship in Contract: The Approach of the UNIDROIT Principles and Legal Developments in Russia. *Uniform Law Review Volume 5* (Issue 3), pages 483–509.
- Huong, Ng. Thi Thuy. (2020). Legal consequences when circumstances have a fundamental change in the contract performance process. *Journal of the Vietnamese People's Court*.
- Karton, J. (2009). Contract Law in International Commercial Arbitration: The Case of Suspension of Performance. *International and Comparative Law Quarterly*, pages 863-896.
- Yen Nee, L. (2020). *7 charts show how the coronavirus pandemic has hit the global economy*. CNBC.
- Montel, L., Kapilashrami, A., Coleman, M. P., Allemani, C. (2020). The Right to Health in Times of Pandemic: What Can We Learn from the UK's Response to the COVID-19 Outbreak? *Health and Human rights Journal*.
- Dietrich, M. (1992). Hardship and Force Majeure. *The American Journal of Comparative Law*, 40(3): pages 657-669.
- Hong Hai, Ng. (2017). Free will to enter into contract under the Civil Code. *Vietnam Law & Legal Forum Magazine*.
- Tunisia, The World Bank in. (2020). *Overview -Tunisia remains a country of contrasts: while important progress has been made on political transition toward an open, democratic system of governance, economic transition has not kept pace*. The World Bank.
- Vargas, W. N. (2012). *Judgment- Reporting Judge. Supreme Court of Justice, Civil Cassation Chamber. Supreme Court of Justice, Civil Cassation Chamber*. pages 26.

APPENDIX

There have been many articles about the fundamental change in contractual circumstances. Typically "Hardship in Contract: The Approach of the UNIDROIT Principles and Legal Developments in Russia (Doudko 2000)"; Hardship and Force Majeure, Dietrich Maskow, The American Journal of

Comparative Law (Maskow 1992), Vol. 40, No. 3 (Summer, 1992), pp. 657-669 (13 pages), Published By: Oxford University Press. In two articles, the author has analyzed changes in essential circumstances leading to the right to modify and terminate the contract. However, the author has an in-depth orientation and analysis of changing circumstances and has not carefully analyzed the rights of the parties involved.

We can also find many articles on the effects of the Covid-19 pandemic on the global economy and indeed there are many scientific studies from a legal and economic perspective. The specific article

"Consumer Law and Policy Relating to modify of Circumstances Due to the Covid-19 Pandemic (COVID-19- Consumer Law Research Group. 2020)" considers the Covid-19 pandemic a cause of the change in circumstances and if the evidence is provided by the law to protect consumers with a multi-country approach (Europe, UK, USA, ..) to solve problems. However, there is no in-depth research paper explaining that the Covid19 pandemic is also a factor changing circumstances, and the participants have the principal privilege to modify or terminate the contract to reduce economic damage.

Therefore, this article, which is the inheritance from the above articles' research results, aims to study more profoundly and comprehensively the issue of changing circumstances leading to modify in content or termination of the contract. In particular, the author approaches the issue with a new perspective: Considering the contract's modification or termination is a privilege protected by the law to prevent undue damage caused by the Covid-19 pandemic.