

Influence of Covid-19 Pandemic on the Issue of Compensation for Damages Caused by Breaches of International Commercial Contracts

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ABSTRACT

The covid19 pandemic not only affects the global economy but also causes damage to human health and life. Learning and understanding about the impact of the Covid-19 pandemic always been the subject of many scientific publications. This article will analyze the effect of the Covid-19 pandemic on the compensation of damages caused by a breach of international commercial contracts, the paper will also analyze the appropriate arguments to accept pandemic Covid-19 as a "force majeure event" leading to damage. It shall state the remarks, comments, and contributions legally to improve the legal system to decide similar future problems. By using methods of analysis, proof, comparison, and synthesize information, the paper will prove that Covid-19 pandemic has a big influence, and is the cause of the loss of many commercial contracts. The paper also considers that Covid-19 is a force majeure event and emphasizes that the legal system should have more specific provisions on dealing with the damage caused by the epidemic. The paper will also provide suitable solutions to improve the legal system to resolve disputes between parties when they need to compensate for damages caused by an epidemic.

Keywords: Compensation, compensation of damages, breach of contract, commercial contracts, international commercial contract, commercial law, Covid-19, pandemics.

1. INTRODUCTION

In the end of 2019 to 2020, all the world are facing pandemic covid-19, this pandemic is not only damaging to human health but also influences on the global economy. Many countries around the world have to close their economy to prevent pandemics, which affects economic groups, trading companies, and entrepreneurs. Postponement or cancellation of economic contracts leads to big damages to the contractual participants. There is a big issue that needs to be addressed is who will be responsible for compensation of damages which caused by Covid-19 pandemic? There are many opinions explaining that the Covid-19 pandemic is considered a force majeure event, leading to an exemption of liability in compensation for damages caused by breach of contract. However, the author found that the determination of force majeure event not specified in international trade law has caused many disputes between contractual participants. At the same time, the parties of contract cannot foresee all the events that may happen in the future and mention all force majeure event under the contract. These problems have big influence on determining the liability for damages caused by breaching contracts. The paper will analyze the above issues and give comments on the issues, and at the same time, propose plans

to amend and improve international commercial law to improve the efficiency of law implementation.

2. BACKGROUND

2.1. Basic legal terms and practical context

International Commercial contract: is a commercial contract containing foreign elements: Entity comes from two or more countries, legal relations arising in foreign countries, the contracting subjects abroad... these factors determine whether commercial contract is an international commercial contract.

"Breach of contract" is a legal cause of action and a type of civil wrong, in which a binding agreement or bargained-for exchange is not honored by one or more of the parties to the contract by non-performance or interference with the other party's performance. Breach occurs when a party to a contract fails to fulfill its obligation(s), whether partially or wholly, as described in the contract, or communicates an intent to fail the obligation or otherwise appears not to be able to perform its obligation under the contract. Where there is breach of contract, the resulting damages will have to be paid by the party breaching the contract to the aggrieved party". There is an opinion that breaching the contract is an act of the contractual obligor who has failed

to perform or performed improperly and in full its obligations. These laws also provide relatively detailed regulations on the violations of the contract and the applicable sanctions for each violation. Contract breaches are understood relatively consistently, but the application of sanctions against the breaching party is made differently. In England and the United States' common law system, a breach of contract is a violation of contractual obligations. This violation may be reflected in the failure to fulfill the committed obligations in the contract or interfere with the performance of the contract of the partner. The breach of the contract can be the failure to perform the contract or refuse the agreements in the contract or both of the above acts. Any breach of the contract gives rise to the aggrieved party's right to claim compensation, even if the aggrieved party does not suffer any property damage. In French law, breach of contract includes not only failure to perform the contract, but also late performance or failure to fulfill its obligations as well as breach of sub-obligations or obligations arising from the contract. When there is a breach of the contract, the first right of the obligee to be violated is to require the violating party to perform the contract (enforcement of the contract) or to choose between forced enforcement—performance and Contract Cancellation Sanctions (Contract Cancellation Compensation usually applies together with damage compensation). However, the enforcement of the contract must be selected firstly, if it proves that this sanction cannot perform or does not meet its requirements, it can be changed to cancellation and claim compensation for damages. And we certain that the request for contract cancellation and compensation has been made, then it is not possible to switch to enforcement action.

"Compensatory damages are paid to compensate the claimant for loss, injury, or harm suffered by the claimant as a result of another's breach of duty that caused the loss". Usually damages is the sum of the damages listed by the aggrieved party to cover the losses caused by the breaching party.

Summary of the impact of the Covid-19 epidemic on the conclusion and performance of international commercial contracts and damages caused by contract breaches due to the Covid pandemic 19.

The first phase of the Covid-19 pandemic: After declaring the Covid-19 epidemic, China immediately closed the trade border gates with Vietnam, Laos, Cambodia, and Hong Kong.... Therefore, many goods are stagnant and the problems were not resolved in time, leading to big losses for merchants. Closing borders was a legal and reasonable action, but almost countries did not find the fastest way to solve problems for businesses, making the consequences of the damage worse.

Stage of Covid-19 breaking worldwide: Some countries have many cases such as the USA, Russia, India, Brazil ... has to take measures to prevent epidemics promptly as pause most of the business activities, providing goods, entertainment areas, some stores ... and even restrict the import and export of goods to or from abroad. The locking down of economy has seriously affected the course of contract performance of traders, many business establishments closed completely due to inability to

maintain business operations, many workers lose their jobs do, many contracts are canceled, causing a lot of damage to the parties involved.

The impact of the covid-19 epidemic on the performance of commercial contracts: Many economic contracts were affected due to the Covid 19 epidemic, and failure to perform the contract resulted in big losses to the parties involved. However, many contractors have argued that the Covid 19 pandemic is considered a case of force majeure to waive liability for damages caused by contractors' faults. This explanation may be correct in some cases, but many cases have not been properly resolved, leading to disputes occurring. Contractual disputes are not only costly but time-consuming and affect the business, reputation and honor of the parties involved.

2.2. Compensation for damage caused by the impacts of the Covid-19 pandemic

Many contractual participants, especially those engaged in cross-border trade in goods and services, are now faced with the question of whether they or their trading partners are responsible for not fulfilling obligations due to the adverse effects of the current epidemic or not, and how to avoid trouble. The Covid-19 pandemic can have an impact in many ways on commercial transactions and the fulfillment of their obligations by traders. Production of goods could be delayed if the factory operates in an isolated area; shipping may be cancelled or delayed due to government-imposed import and export restrictions; and the contracts of service are affected by individuals being restricted from traveling, or more seriously, by being infected with the virus and quarantined. Researching on the liability for damages caused by a breach of commercial contracts can be found in national and international legal regulations. According to article 75, CISG convention 1980 "*Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract*". Compensation for damage is referred to as an obligation of the breaching party of the commercial contract. However, the violation due to objective conditions is considered as a force majeure event in a contractual relationship.

"*Force Majeure*" (French for "superior force") is a common clause in contracts which essentially frees both parties from liability or obligation when an extraordinary event or circumstance beyond the control of the parties, such as war, strike, riot, crime, act of God (e.g., flooding, earthquake, volcano), prevents one or both parties from fulfilling their obligations under the contract. However, "*force majeure*" is not intended to excuse negligence or other malfeasance of a party, as where non-performance is caused by the usual and natural consequences of external forces (e.g., predicted rain

stops an outdoor event), or where the intervening circumstances are specifically contemplated".

According to the above provisions, it can be explained that Covid 19 pandemic is considered a force majeure event to lead to damage: Firstly, Covid-19 pandemic happened unexpectedly as the contractors' desire and this is proven in fact, absolutely no one wants the disease to happen. Secondly, the happening of covid-19 epidemic is something that the parties cannot foresee, predict, and this is completely true because no one can predict that disease may happen at the right time they are performing the contract. Thirdly, it is only possible to prove that this is a force majeure case if the parties have tried their best to prevent the damage from happening but failed, this is one of the decisive criteria to decide on consideration of Covid-19 pandemic as force majeure event to lead to damage caused by a breach of contract. At the same time, the offending party should also clearly demonstrate that violations as a result of disease, not by their willing.

However, according to the provisions of the 1980 CISG convention, there is no occurrence of the term "Force majeure events" but the provision of "*Exemptions*". According to article 79, CISG convention 1980, "*A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it, or its consequences*". This concept is generalized and is not specified in any official document. Therefore, to apply this clause in practice, the violating party must prove that the influence of an objective factor caused its violation, moreover, the violating party cannot predict this as well as its consequences cannot be overcome. Thus, the determination of liability exemption in the convention is not specified and is difficult to apply. This does not facilitate the breaching party to explain and demonstrate that they can be exempt from liability due to the effects of the Covid-19 pandemic even though they have breached the contract. In order to be able to implement these terms, first of all, it is necessary to have official explanations on the case of being exempted from damages, and at the same time instructing and specifying more specific conditions for the affected breaching party can prove that their liability exemption. In fact, the Covid-19 pandemic is a reason to prove that the damage was caused by force majeure events and that the violations caused by these events can be exempt from the liability of compensation for damages. However, to use the above clause to prove the possibility of exemption is a difficult task for the breaching party.

2.3 Proposals for law improvement

Complete legal provisions related to "force majeure":

The current laws introduce the concept of "force majeure" by its main definition which is general and lacks the specificities, that caused many disputes between participants. Therefore, it is necessary to specify detailed provisions on force majeure events in the law and the regulations on drafting contracts by that the participants can adequately apply. In legal provisions or contracts, force majeure events should be brought out according to the following methods:

Firstly, method of definition: When using this method, it is necessary to give a basic concept of the force majeure event. The advantage of this method is generalized avoids the omission of cases considered force majeure. However, the biggest limitation of this method is the abstract nature in case we apply, the disputes will arise and need to be specified in the agreement of the parties.

Secondly, the enumeration method: It is necessary to list the considered force majeure events. However, helping to identify specific and clear force majeure cases leads to a lack of listing of identified cases of force majeure.

Thirdly, synthetic method: This method is a combination of the above two methods, this is the method which has both general and specific properties. So this is a pretty optimal measure when building force majeure clauses in legal regulations and contracts.

Proposing a term to change the content of the contract when there is a change of prerequisites:

The Covid-19 Pandemic is a prerequisite for the parties to change their contract. The addition of this clause is essential to the law, and it is necessary to adjust and guide the parties to change contents of contract when facing the following circumstances:

Firstly, at the time of entering into the contract, the parties to the agreement cannot foresee a change in circumstances. Under these conditions, it must be demonstrated that the event was beyond the aggrieved party's control, and in contracting, the aggrieved party could not foresee this. Simultaneously, the event happened objectively, not due to the violation of any party when joining the contract.

Secondly, the circumstances change so that one of the parties will not be able to continue the contract. Influence is assessed objectively among stakeholders or assessed by professional bodies. The effect of the objective conditions (floods, epidemics, natural disasters ...) has made the business cannot achieve the desired signing and implementing contracts with other parties such as sales decline significantly, not have the ability to pay rent for the premises, pay wages for workers.... In addition, the disadvantaged party in the changing circumstances needs to prove and point out to the business partner that "Continuing to perform the contract without changing contractual contents will cause serious damage" to their business. And even though the disadvantaged party has "applied all necessary measures in its capacity", such as narrowing down business, reducing the number of employees or changing the business method, restructuring but still cannot have revenue corresponding to the costs to maintain operations under the signed contract. In the above cases, the legal entities must change the contract's content even though the other parties do not agree. The changes of the

contractual contents will aim: to prevent too big damage to all parties to the contract, to create an active position for the parties to deal with objective circumstances, as well as an opportunity to facilities so that the subjects can negotiate better in the spirit of goodwill and compliance with the law. Thirdly, the affected party has applied all necessary measures in its permissible capacity but is unable to prevent or minimize the impact on its interests. This factor is critical in demonstrating that damage occurred is caused by objective events, which show the breaching party's willingness to prevent and minimize damages.

Necessity in completing legal provisions on compensation for damage caused by a breach of contract

On the basis of studying the provisions of the law on international commercial contracts to understand the causes of limitations and shortcomings to find solutions and propose improvement of commercial law, specifically in the application of compensation for damages caused by breach of contract is necessary for theory and practice. The request to amend and complete the law in general, to perfect the Commercial law in particular is currently a necessary demand, in which many solutions need to be implemented. Firstly, the law on compensation for damage caused by breach of contract in international trade must ensure freedom of business entities in the economy, including the freedom of contract and ensure adjustment effective economic relations, creating the necessary legal guarantees for the entities to be able to exercise their freedom of business. To meet this requirement, the completion of regulations must be in the direction of detailing existing regulations with many different interpretations, removing rigid regulations to limit unnecessary interference of the State to agreement of the parties.

Secondly, the legal system of commercial laws must aim to create a healthy business environment: ensuring equality, without discrimination between different types of actors participating in the market; respect citizens' rights to freedom of business; protecting all legitimate rights and interests of consumers while protecting public interests and economic policies.

Thirdly, the provisions of international trade law must be highly feasible, well-forecasted, transparent, specific, easy to apply and in line with domestic and national commercial practices.

In fact, this is a common and controversial issue, but the damage caused by the effects of the Covid-19 epidemic raises more questions that need to be resolved. Therefore, in addition to analyzing, understanding and solving the epidemic problem, we should also improve the law so that similar diseases can be foreseen in the future. The regulations on compensation for damage caused by breach of contract still have certain shortcomings, therefore, perfecting the legal system is a necessary: firstly, it is necessary to define the cases that are exempt when causing damage due to a breach of contract; secondly, it is important to clearly define how and the mandate to demonstrate that compensation should be waived; thirdly, it is important to specify how the amount of damages and how much exemptions can be made.

3. CONCLUSION

In short, can assert Covid-19 disease not only affects the economic and health, but also affect the implementation of the law. Because legal nature is the regulations governing social relationships. Therefore, when social circumstances change, the law also needs to be changed and improved. The impact of the Covid-19 pandemics has caused lawmakers to change their minds, widen their knowledge of lawmaking, and at the same time pay more attention to legislation related to epidemics and social circumstances, which influences the legislative and practice of law around the world. The above-mentioned paper is evaluated and proposed the development direction of the legal system towards building a complete law and more effective law practice. And the paper also affirms that law is an important factor leading to the development of the country's economy, especially international trade law. Therefore, to have a developing society and economy, it is necessary to pay more attention to perfecting the legal system.

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