

1. An Introduction

The issue concerning the impossibility of performance in international contracts² is usually analysed not only under the law indicated in the contract, but also taking into account uniform principles and rules entrusted by the international business community, such as the *United Nations Convention on Contracts for the International Sale of Goods* ('CISG', 1980); the *Unidroit Principles on International commercial Contracts* ('PICC', 2016); the *International Chamber of Commerce force majeure clause* ('ICC-FMC', 2020): models of international best practice in terms of law-making or black-letter rules. According to these international sources, the limit to the performance of an obligation lays in the rule that the debtor's diligence consists of his/her best (professional) efforts in satisfying the creditor's interest and to stand against any impediment, in compliance with the contents and extent of the obligations, according to an objective assessment related to the current context. This is the essence of the above quoted international provisions: an impediment may exempt the debtor from liability – either for breach of performance, or for the delay of performance – whereas it is out of his/her control, and it was not foreseen (nor was it foreseeable) at the time of the conclusion of the contract. The provisions underline that the debtor's diligence is due also in avoiding or overcoming the impediment or its consequences (art. 79(1) CISG³; art. 7.1.7.(1) PICC⁴; ICC FMC §1⁵).

Non-performance by third parties follows the same discipline (art. 79(2)⁶ CISG; § 2 ICC-FMC⁷).

2. Refusal of Money Transfer by the Financial and Credit Institutions

A. Delays in Payments

The first question raised to the Brescia Chamber of Commerce is:

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²A contract shall be considered international if, at the time of the conclusion of the contract, the parties have their places of business in different States; and or (b) if the place of execution of performance of the main obligations of a contract is agreed to take place in a different country than the party's executing it.

³(1) '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'.

⁴(1) 'Non-performance by a party is excused if that party proves that the non-performance was due to an impediment beyond its control and that it 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'.

⁵**Definition.** "Force Majeure" means the occurrence of an event or circumstance ("Force Majeure Event") that prevents or impedes a party from performing one or more of its contractual obligations under the contract, if and to the extent that the party affected by the impediment ("the Affected Party") proves:

a) that such impediment is beyond its reasonable control; and
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.

⁶(2) 'If the party's failure is due to the failure by a third person whom he has engaged to perform the whole or a part of the contract, that party is exempt from liability only if: (a) he is exempt under the preceding paragraph; and (b) the person whom he has so engaged would be so exempt if the provisions of that paragraph were applied to him'.

⁷**72. Non-performance by third parties.** 'Where a contracting party fails to perform one or more of its contractual obligations because of default by a third party whom it has engaged to perform the whole or part of the contract, the contracting party may invoke Force Majeure only to the extent that the requirements under paragraph 1 of this Clause are established both for the contracting party and for the third party'.

whether the refusal of money transfer given by European financial and credit institutions, in compliance to sanctions inflicted to seller by the U.S. agency OFAC⁸, may exempt buyers from damages (or liquidated damages) due as a consequence of delays in payments of goods delivered by the seller under contractual obligations.

The Italian financial policy system relies on a complex anti-money laundering and anti-terrorism provisions⁹, which in its entirety provides for control measures, obligations to report suspicious transactions and the abstention of intermediaries from carrying out transactions where due diligence is not possible. These reinforced control measures imply that financial and credit institutions are responsible of monitoring their clients' transactions, check any European or international list in order to verify that payments and transactions do not involve individuals and companies included in such lists, and apply restrictive measures, like denial of money transfer in favour of designated entities. Should the Italian financial or credit institutions act in breach of these provisions, the national financial authority (*Banca d'Italia*) and the delegated organism (UIF¹⁰) would apply to them strict sanctions, like freezing of funds and exclusion from the international circuit.

Therefore, once an individual and/or a company has been designated on a list, like the European Union Consolidated Financial Sanctions List, or the SDN¹¹, after the contract has been concluded, the denial of money transfer by an Italian financial or credit institution represents a legitimate action imposed by the national laws; such a behaviour can be considered as a supervening event that cannot be neither controlled nor avoided or overcome by a party to a contract: in other words, a force majeure circumstance under the above mentioned international provisions. Because the above mentioned anti-money laundering system protects the internal market of the European Union as well as the international development, it also applies to any European financial or credit institution; it cannot be bypassed through unlawful actions (i.e., filing legal claims against the credit institutions) or transactions (i.e., assignments of receivables or instalments payments).

Beyond this argument, the threat of economic and financial exclusions can be presumed as force majeure circumstance under the international provisions and in an international business context, as clearly specified in the ICC-FMC at §3 (c): sanction, any law or governmental order, they all represent force majeure events presumed to fulfil conditions (a) and (b) under §1 (fn.)¹²; the party in breach must in any case prove the existence of condition (c), i.e., that the effects of the impediment could not reasonably have been avoided.

⁸OFAC, *Office of Foreign Assets Control* of the US Department of the Treasury administers and enforces economic and trade sanctions based on US foreign policy and national security goals against targeted foreign countries and regimes, terrorists, international narcotics traffickers, those engaged in activities related to the proliferation of weapons of mass destruction, and other threats to the national security, foreign policy or economy of the United States.

⁹See in particular: *decreto legislativo* 21.11.2007, n. 231, implementing Directive (EU) 2015/846 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing; *decreto legislativo* 22.11.2007, n. 109, on the prevention, counteracting and repressing financial supports of terrorism; Bank of Italy document 05.02.2020 and provisions of 30.07.2019 on adequate controls on clients.

¹⁰The UIF is the Italian Financial Intelligence Unit in charge of counteracting money laundering and terrorisms actions.

¹¹OFAC publishes a list of individuals and companies owned or controlled by, or acting for or on behalf of, targeted countries. It also lists individuals, groups, and entities, such as terrorists and narcotics traffickers designated under programs that are not country-specific. Collectively, such individuals and companies are called "Specially Designated Nationals" or "SDNs." Their assets are blocked and U.S. persons are generally prohibited from dealing with them.

123. Presumed Force Majeure Events. 'In the absence of proof to the contrary, the following events affecting a party shall be presumed to fulfil conditions (a) and (b) under paragraph 1 of this Clause, and the Affected Party only needs to prove that condition (c) of paragraph 1 is satisfied. [...] (c) currency and trade restriction, embargo, *sanction*; (d) act of authority whether lawful or unlawful, *compliance with any law or governmental order*, expropriation, seizure of works, requisition, nationalisation'.

The answer to the question above shall therefore be the following: **the financial and credit institutions denial to transfer money to the seller represents a supervening impediment of a third party, not foreseen and not foreseeable by the buyer/debtor, beyond its control and whose effects could not reasonably have been avoided or overcome by the buyer/debtor. So therefore, the buyer/debtor cannot be held liable in damages for the delay of payments. Payments and the execution of the debtor's performance shall take place after the withdrawal of the international sanctions inflicted to seller.**

B. Liquidated Damages

The second question is:

Whether a penalty clause amounting at an annual rate of 36,5% can be enforced within the international business community or within the Italian national legal system.

The exemption of liability for damages stated at 2. A. involves liquidated damages as well¹³. On this issue, it is worth saying that liquidated damages (or penalties clauses) are contractual provisions which envisage a monetary sum unrelated to an actual harm against a defaulting party; they require the defaulting party to provide monetary compensation to the innocent party in respect of a breach of a secondary obligation contained in a contract, so that the aggrieved party is entitled to that sum irrespective of its actual harm. The civil law systems (like the Italian) generally enforce fixed sums even if intended as a 'penalty', whether aiming to approximate damages or to deter breach (art. 1382 Italian civil code): the sole issue in international model law (as well as in the Italian law: art. 1384 Italian civil code) is the amount of the penalty, and whether that amount is deemed 'grossly excessive': see art. 7.4.13. PICC¹⁴. Under the international model law, PICC seem to allow parties to set a penalty clause beyond merely the loss, but not much higher than that: 'grossly excessive' sums relate to (a) the harm resulting from non-performance; and (b) the other circumstances. Like in the Italian civil code (art. 1382), PICC establish the judicial review as public policy and a mandatory rule.

As concerns the judicial review of the 'grossly excessive' fixed sums, reference to the current loss suffered by the party invoking the penalty clause at the time of performance is permitted but, it should be limited to the foreseeability of the damage at the time when the contract was concluded¹⁵. In the case of a primary obligation to pay money in return of the delivery of goods, the grossly excessive assessment of fixed sums should be determined having regard to average remuneration of the cost of money not enjoyed by the creditor, that is the annual interest rate (on Euro bonds it is settled at 4-4,5% per year). The burden of giving evidence of 'other circumstances' - providing the creditor with a possibility to claim a particularly excessive amount of the fixed sums – rests on the creditor.

In any event, a grossly excessive amount of money imposed to the debtor as penalty clause would not be enforced by the Italian courts: under the Italian law, a penalty clause serves to strengthen a contractual relationship and quantify damages in advance: if its provision entails an abuse in the parties' freedom of contract it is invalid, unless it is reduced by the judge, even on its own motion¹⁶.

13See UNCITRAL Uniform Rules on Contract Clauses for an Agreed Sum Due upon Failure of Performance (A/38/17, annex I) (A/CN.9/243, annex I), art. 5: 'The obligee [i.e.: *the innocent party*] is not entitled to the agreed sum if the obligor is not liable for the failure of performance'.

14'(1) Where the contract provides that a party who does not perform is to pay a specified sum to the aggrieved party for such non-performance, the aggrieved party is entitled to that sum irrespective of its actual harm. (2) However, notwithstanding any agreement to the contrary the specified sum may be reduced to a reasonable amount where it is grossly excessive in relation to the harm resulting from the non-performance and to the other circumstances'.

15Cass. civ. 6 Dec. 2012, n. 21994.

With reference to question concerning the enforcement of a penalty clause, although it the answer is positive, a penalty clause (or liquidated damages clause) grossly excessive shall be reduced by a Court on its own motion.

Yours faithfully,
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16Arts. 1384 Italian civil code provides for the power of the judge to reduce the amount of the penalty if it is manifestly excessive (or in the case of partial execution of the contractual obligation). Cass., sez. un., 13 Sep. 2005, n. 18128: 'the necessity of an interpretation of the rule in Article 1384 of the Italian Civil Code that better reflects the need of safeguarding the objective interest of the legal system in light of constitutional principles'.