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The attribution of contractual liability for the act of third parties used by the creditor in the performance of their obligation

La atribución de responsabilidad contractual por el hecho de los terceros utilizados por el acreedor en el cumplimiento de su prestación

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Abstract

Debtors everywhere fulfill their obligations through third parties in a wide array of ways. It can frequently be assumed that the acts of these third parties determines a breach of contract. The doctrine on this topic in Chile is scarce. In its first part, this article proposes that it is possible to deduce from articles of the Civil Code a regime of liability for these third parties and characterizes it. In the second part, it proposes that the limit of this liability is *force majeure* and that the requirement of externality of the *force majeure* event determines that, regarding certain third parties, unforseeability and irresistibility alone are not enough for the debtor to be freed from liability, whereas for others, it is sufficient.

Keywords: *Liability; third parties; force majeure; sphere of control; fault.*

Resumen

Por doquier los deudores se sirven —de maneras que pueden ser muy diversas entre sí— de terceros para cumplir con su prestación. Con cierta frecuencia, es dable asumir, el hecho de estos terceros determina un incumplimiento contractual. La doctrina en Chile que hemos encontrado sobre el tema es escasa. En su primera parte, este artículo propone que es posible inferir de artículos del Código Civil un régimen de responsabilidad por esos terceros y lo caracteriza. En la segunda parte, que el límite de esa responsabilidad es el caso fortuito y que el requisito de exterioridad del caso fortuito determina que, respecto de ciertos terceros, no sea suficiente la imprevisibilidad e irresistibilidad para que el deudor se libere de responsabilidad, en cambio, de otros sí.

Palabras claves: *Responsabilidad; terceros; caso fortuito; esfera de control; culpa.*

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I. INTRODUCTION

The intervention of third parties in the performance of the debtor's obligation is a sufficiently conspicuous phenomenon in contract law and the debtor's breach due to the act of these third parties is a frequent occurrence.

Unlike the liability for the actions of third parties in tort law, the liability of the debtor for the act of third parties involved in the performance of a contractual obligation has been scarcely explored in Chile. Our attempt is not, of course, to complete this exploration (probably, something like that is not possible), but to continue it.

We advance in two directions. First, we attempt to strengthen certain ideas that have been mentioned in Chilean law. The first of these is that liability for the act of third parties is a responsibility that is not exhausted in *in eligendo* and/or *in vigilando* fault; the second idea is that it is not limited to dependents, but to any third party used in the performance of the obligation. That is the first part of this work.

Secondly —here we believe that our main contribution lies—, we explore the limits of the debtor's liability for the act of the third parties to whom reference has been made. Our thesis in this regard can be formulated simply; the limits of the debtor's liability for the act of third parties are the same as those of the debtor for their own acts, that is, the limit would be in both cases the *force majeure*. We understand that this thesis rests on a non-peaceful assumption, namely, that the *force majeure* is the limit of contractual liability, so we seek to justify it. Later, we develop this idea by reading the requirement of the externality of the *force majeure* in the terms of "sphere of control"; to then identify which third parties are within and which are outside that sphere. We respond with reference to Article 79 of the United Nations Convention on Contracts for the International Sale of Goods (hereinafter, CISG), considering that it is an appropriate model to fill with content the sphere of control relative to the debtor's auxiliary third parties in Chilean law.

II. PART ONE: A GENERAL RULE AND ITS CONTENT

In this first part, we show that it does not seem possible to conceive the performance of certain contractual obligations without the participation of third parties who assist the debtor in this task, and that these third parties may concur in different ways. Thus, the following question arises quite evidently: is the debtor liable for the act of these third parties in such a way that it constitutes a breach of the obligation?

The answer —as so often in Law— is it depends. To understand what it depends on, we propose, in the first place, to examine the regulation of the situation of third parties in search of a rule. Secondly, we give an account of the content of this rule as it has been understood by the scarce doctrine that has considered it and some rulings from higher courts of justice.

As can be seen, in this first part, we rely on what has been understood by the doctrine and the courts. However, we consider that the way we present it constitutes, we trust, a development of the prevailing doctrine in this regard.

2.1 The intervention of third parties in the execution of contracts and the debtor's liability for them

It is easy to conceive of obligations whose performance involves the debtor employing third parties in various ways. Conversely, what is impossible, or at least very difficult to imagine, is

how a vast number of obligations could be performed without the assistance of third parties.[1] Contractual reality indicates that, normally, the debtor must employ third parties in the execution of the contract. This is recognized by Carrasco Perera, when he states that:

> (...) the debtor is entitled to introduce auxiliaries in its compliance activity. Otherwise, no obligation of complex content could be performed. It would be absurd to maintain that a public limited company dedicated to construction cannot use its own personnel to build or comply in general, as then legal entities would never be able to comply.[2]

Thus, for example, a food production company uses dependent workers for the handling and processing of raw materials supplied by a third party. Once processing is complete, dependants of an external company handle the packaging of the food. After packaging, an independent third party to the debtor is entrusted with the transport of food. Once delivered, a dependent employee of the selling company issues the respective invoice and handles the collection of the price (administrative staff).

But not only that, as Cristóbal Montes warns; unless there are *intuito personae* obligations involved, the debtor can perform the obligation personally or through another person.[3]

So, who can be considered as third parties for these purposes? In the national context, the only author who has referred to this issue is María Graciela Brantt. In her opinion, it includes: "all those persons, natural or legal, other than the business entity and who intervene, whether in the planning, preparation, or execution of its obligation, contributing to some extent to compliance."[4]

In Brantt's opinion, the organization, preparation, and execution of the obligation could involve auxiliaries *stricto sensu* or assistants, and substitutes, suppliers, and administrative staff of the debtor.

With regard to auxiliaries *stricto sensu* or assistants, she states that:

> (...) they are characterized by performing their functions in a relationship of dependence with respect to the debtor (...) Likewise, all those individuals belonging to a company that the debtor has hired to provide personnel who will regularly join its organization and perform functions of collaboration in the preparation and fulfillment of its obligations can be placed in this category.[5]

As regards to substitutes:

> (...) they are those individuals to whom the debtor entrusts the execution of the obligation in whole or in part. They are characterized by the fact that they develop their activity autonomously and not merely collaborating with the debtor, but ultimately replacing him. They are not mere collaborators because they do not perform their functions by assisting the debtor, but they instead take his place concerning the fulfillment activity, either totally or partially. This category commonly includes

[1] DÍEZ-PICAZO (2008), pp. 732 *et seq.*
[2] CARRASCO PERERA (2021), p. 1043.
[3] MONTES (1985), p. 5. In the same vein, Díez-Picazo states that, "normally the activity of the debtor's auxiliaries and dependents is committed by the debtor according to the very nature of the service. Therefore, it is implicit in the contractual will." DÍEZ-PICAZO (2008), pp. 730-731.
[4] BRANTT (2010), p. 90.
[5] BRANTT (2010), pp. 91-92.

> subcontractors, i.e. individuals or companies that independently take charge of a specific part of the complex task of fulfilling an obligation.[6]

In relation to suppliers, she states that:

> (...) they appear as subjects involved in the businessman's fulfillment activity: Those who supply their company with the inputs or materials used in the development of the execution activity, for example, the flour producer who supplies a pastry company.[7]

Finally, the administrative staff corresponds to:

> (...) subjects involved in the business activity, the administrative staff of the company: secretaries, messengers, cleaners, telephone operators, etc. Although they do not belong to the category of auxiliaries in fulfillment —since they do not directly or materially collaborate in the task of preparing and carrying out the performance of the obligations contracted by the company— they still form part of the debtor's organization.[8]

In light of Brantt's statements, it can be affirmed that third parties include the debtor's dependents and its administrative staff, substitutes or subcontractors, and suppliers.

A Supreme Court ruling of January 26, 2006[9] will serve to illustrate the situation. In this case, the debtor (Aglamar) hires a third party (the company K&N) to transport 40 bags containing 1000 kgs/n of agar (vegetable gelatin) powder, to the city of São Paulo, Brazil, for a certain price, to be delivered to the creditor (Etti Productos Alimenticios Ltda). To perform the contract, K&N subcontracts FedEx to transport the goods and deliver them to the consignee. Although FedEx transported these products on September 27, 1996, the air waybill accompanying the cargo recorded the flight date as August 27, 1996. For the above, the Brazilian Customs applied a fine of USD$ 7,107.16 to the consignee, an amount that Aglamar had to bear, along with storage expenses.

Next, it is important to remember, as shown by the example of the food producer, that third parties may participate in different ways in the performance of the obligation.

The second thing that is simple to conceive is that the action or omission of any of these third parties may cause a breach of contract by the debtor. When this happens, the question is perfectly evident: is the debtor liable for these third parties?

For these purposes, let us consider the opinion of the Supreme Court in the aforementioned case. In the trial, it was discussed whether there was a breach on the part of K&N which entrusted the execution of the contract to FedEx and, therefore, whether or not K&N was liable to Aglamar for the damages caused by the error incurred by FedEx in entering the date in the air waybill. The ruling states that: "[w]hoever assumes an obligation implies in its fulfillment not only their conduct and behaviour, but also the conduct and behaviour of the persons for whom they are responsible, an opinion shared by this Court" (recital 7).

As can be seen, the Supreme Court considers that the debtor is liable for the persons that they have employed in the execution of the obligation for which they are liable. However,

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[6] BRANTT (2010), pp. 92-93.
[7] BRANTT (2010), p. 93.
[8] BRANTT (2010), pp. 93-94.
[9] *Algamar with Kuehne and Nagel* (2006).

accepting this as correct raises two questions. The first is, are there articles in the Civil Code that support this opinion? And second is, what is the model for this type of responsibility?

The debtor's liability for the act of third parties employed in the performance of the obligation is a matter that, despite some very valuable contributions,[10] has not received sufficient attention from the doctrine. This, of course, contrasts with liability for the act of others in non-contractual matters, where we find a more robust treatment.[11]

But the contrast is not only at the doctrinal level, there is also a contrast in terms of its regulation. Title XXXV of Book IV of the Civil Code establishes rules, in its articles 2320 and 2322, which must be considered as general, and which provide models for attribution of liability for the act of third parties in non-contractual matters.[12]

The situation is, then, as follows: third parties are employed everywhere in the performance of contracts. Secondly, it is reasonable to estimate that, with some frequency, the

[10] FUENZALIDA (2009); RODRÍGUEZ GREZ (2005); BECQUÉ (2009).

[11] In this sense: BARROS (2020), pp. 188-200; ZELAYA (1997), ZELAYA (1999); CORRAL (2013), pp. 227-245, among others.

[12] We call the first of them *liability for own fault*. In this case, in order to hold a person responsible for the act of another, it is necessary that he or she can be blamed for not having adequately monitored the third party (fault). This is what happens in Article 2319 of the Civil Code, which disciplines the guilt of those who have in their care incapables of civil crime or quasi-crime, as provided for in Article 2318 of the same legal body, which is why these people are not responsible for the damage they cause. BARROS (2020), p. 175. In this regard, the Supreme Court, quoting Barros Bourie, has said "[t]he following Article 2319 of the Civil Code, after establishing that minors under seven years of age are incapable of committing a civil crime or quasi-crime, adds that the persons in whose charge they are responsible shall be liable for the damages caused by them, if negligence can be imputed to them." *Palominos with Sociedad de Profesionales Princic y Pérez Ltda.* (2021).

The responsibility of the tutor or guardian established in the aforementioned article is for their own act: not having adequately complied with the duty of care, requiring the negligence to be proven. In this regard, Barros Bourie warns that: "... For the purposes of responsibility, it must be assumed that custody or personal care is not primarily a power, but a duty with respect to the child. Therefore, liability arises both for the negligent exercise of care, as well as for abandonment or other inexcusable circumstance that involves omitting due care. Following the general rule, the fault of the father or mother for not exercising the duty of care must be proven in these cases." BARROS (2020), pp. 177-178.

The second model is extremely similar to the first; it differs, simply, in that, since we are dealing with persons capable of civil crime or quasi-crime, the fault of the third party who must choose, train or supervise the person who caused the damage, is presumed. So, we call it the *presumed-fault model*. In Chilean law, the main article that corresponds to this second model of attribution is Article 2320 of the Civil Code. In particular, in what is of interest here, the responsibility of a person who has the care of another who commits a civil crime or quasi-crime. BARROS (2020), pp. 189-201. We present this case of liability for the act of another as one of presumed fault, since that is how the Civil Code conceived it. However, the jurisprudence of the Supreme Court has tended to objectify it. On this point, see ZELAYA (1999), pp. 49-79.

The third model we are going to use is what we are going to call *vicarious liability*, and which is based on article 2322 of the Civil Code. It is a model that, unlike the previous two, prescinds from the fault of the person who is going to answer for the third party, but maintains it with respect to the latter. Zelaya explains this figure in relation to the liability of the employer —alluding to the case of the carrier— for the act of his employee as follows: "It is a responsibility for the act of another as such, since the employer is responsible through no fault of his own for the act or fault of a third party (his dependent). Once the fault of the employee (fault in driving) has been proven, the employer cannot exonerate himself by claiming to have used all the care that his quality confers and prescribes." ZELAYA (1999), p. 52.

In the case of dependents —which is what is of greatest interest to us in this work— the situation seems to be as follows: the Civil Code establishes a regime of liability of the employer for presumed fault, however, when applying the rules, the higher courts of justice have converted it into one of vicarious liability. See, for all: DOMÍNGUEZ & DOMÍNGUEZ (1991), pp. 95-110.

action or omission of third parties causes a breach of contract. Thirdly, unlike what happens with tort liability, the doctrine has not paid much attention to the issue (it is true that it has mentioned it, but not sufficiently developed it). On the other hand, in contractual matters, there are no rules that, explicitly and generally, fulfill the function satisfied by articles 2320 and 2322 of the Civil Code.

In this scenario, it seems necessary, in the first place, to attempt an "anchoring" task, that is, to procure articles from which a model of attribution of liability of the debtor for the act of the third parties employed in the performance of the obligation can be inferred. We deal with this in the next section.

2.2 An inductive effort in pursuit of a general rule

Some Civil Codes, such as the German,[13] Italian,[14] Portuguese,[15] Swiss Code of Obligations,[16] the Peruvian,[17] or the Belgian[18] Codes, contain a general precept regarding the debtor's liability for third parties employed in the performance of the contract. Something similar happens with the CISG[19] and with the Revised Proposal for the Modification of the

[13] Section § 278 of the Bürgerliches Gesetzbuch (BGB) states: "*Verantwortlichkeit des Schuldners für Dritte. Der Schuldner hat ein Verschulden seines gesetzlichen Vertreters und der Personen, deren er sich zur Erfüllung seiner Verbindlichkeit bedient, in gleichem Umfang zu vertreten wie eigenes Verschulden. Die Vorschrift des § 276 Abs. 3 findet keine Anwendung.*"

[14] Article 1128 of the Italian Civil Code reflects this general rule, stating: *"(Responsabilita' per fatto degli ausiliari). Salva diversa volonta' delle parti, il debitore che nell'adempimento dell'obbligazione si vale dell'opera di terzi, risponde anche dei fatti dolosi o colposi di costoro.*"

[15] Article 800 of the Portuguese Civil Code prescribes: "*1. devedor é responsável perante o credor pelos actos dos seus representantes legais ou das pessoas que utilize para o cumprimento da obrigação, como se tais actos fossem praticados pelo próprio devedor. 2. A responsabilidade pode ser convencionalmente excluída ou limitada, mediante acordo previo dos interessados, desde que a exclusão ou limitação não compreenda actos que representem a violação de deveres impostos por normas de ordem pública.*"

[16] In this regard, paragraph 1 of Article 101 of the Obligationenrechts (OR) states: "*Haftung für Hilfspersonen. Wer die Erfüllung einer Schuldpflicht oder die Ausübung eines Rechtes aus einem Schuldverhältnis, wenn auch befugterweise, durch eine Hilfsperson, wie Hausgenossen oder Arbeitnehmer vornehmen lässt, hat dem andern den Schaden zu ersetzen, den die Hilfsperson in Ausübung ihrer Verrichtungen verursacht.*"

[17] Article 1981 of the Peruvian Civil Code provides as follows: "*Responsabilidad por daño del subordinado. Aquel que tenga a otro bajo sus órdenes responde por el daño causado por éste último, si ese daño se realizó en el ejercicio del cargo o en cumplimiento del servicio respectivo. El autor directo y el autor indirecto están sujetos a responsabilidad solidaria.*"

[18] Article 6:170 of the Belgian Civil Code provides: "Liability for faults (tortious acts) of a subordinate. (1) The person in whose service a subordinate fulfils his duty, is liable for damage caused to a third person by a fault of this subordinate, if the risk of the fault has been increased by the assignment to fulfil this duty and the person in whose service the subordinate was, had —because of the legal relationship between him and the subordinate— control over the behaviour which constituted the fault. (2) Paragraph 1 does not apply when the subordinate is in service of a natural person who, when entering into the legal relationship with the subordinate, did not act in the course of his professional practice or business. In that event the person in whose service the subordinate [e.g. nanny, cleaning lady] was, is only liable if the subordinate, when committing the fault that caused the damage to the third party, was acting in the performance of the duty assigned to him by the natural person in whose service he was. (3) If the subordinate and the person in whose service he was are both liable for damage caused to a third person, then in their internal relationship the subordinate does not need to contribute in the payable damages, unless he has caused the damage on purpose or he has knowingly behaved recklessly. The circumstances of the case and the nature of their legal relationship may demand a different result than the one mentioned in the previous sentence."

[19] In this regard, Article 79 (2) of the CISG states that: "(2) If the failure of one of the parties to perform is due to the failure of a third party to whom it has entrusted the performance of all or part of the contract, that party shall be exonerated from liability only:

Spanish Civil Code.[20] Other Codes, however, such as the Spanish and Chilean Codes, lack a general rule on this matter, but they do contain some specific provisions from which progress can be made towards the formulation of a general rule such as that provided for in the aforementioned legal bodies.[21]

In the case of the Chilean Civil Code, a slightly inconvenient feature is that, quite frequently, norms with a general —even structural— vocation are found in an article that presents a particular provision. A sufficiently conspicuous example of the above is found in Article 1887 of the Civil Code. Its provision is particular because it is located in relation to the contract of sale. Noting its general vocation advises starting with its literal wording: "Any other lawful accessory agreements may be added to the contract of sale; and they shall be governed by the general rules of contracts". And now its general vocation allows it to be affirmed that: any other lawful accessory agreements may be added to the contract; and these shall be governed by the general rules of acts and contracts.

The detail is that this second formulation does not exist in the Civil Code, rather, it must be deduced from the general principles and its instantiation in Article 1887.

In our opinion, this is exactly what happens in the case of Article 1679 of the Civil Code. Its character as a special provision comes from its placement —concerning a mode of extinguishing obligations— the loss of the owed object. However, it is possible to deduce its general vocation, first, from its literal wording: "The act or fault of the debtor includes the act or fault of the persons for whom he is responsible". As can be easily observed, a first clue to the generality of its vocation is to be found in its literality. Unlike Article 1887, it is not necessary to exclude any word in order to read it in general terms: the act or fault of the debtor includes the act or fault of the persons for whom he is responsible.

Secondly, if attention is paid to the opinion of the higher courts of justice, the opinion of the Court of Appeals of Santiago in a 2009 ruling[22] can be considered, which, although ruling on a claim of illegality, recognizes that Article 1679 of the Civil Code contains a general principle according to which the debtor is liable for the act of the third parties that he hires for the execution of the obligation. The ruling states the following:

> (...) it is the case that if the debtor, in order to fulfill his obligation, in turn contracts with another to execute it, the fault of the latter is included in the fault of the former and, consequently, in the species, if ITACA was obliged to the State of Chile to provide satellite Internet to rural schools, including a Monitoring System and, to fulfill this obligation, it in turn contracted Telvent's services, the fault of the latter is included in the fault of ITACA fault and it cannot be exempted by alleging that the breach originates from the act or fault of the person it contracted to fulfill its obligation with the State. Professor Pablo Rodríguez Grez, in his article "Regarding Article 1679 of the Civil Code", published in the magazine "*Actualidad Jurídic*a" of the *Universidad del*

(a) if it is exempted in accordance with the preceding paragraph, and

(b) if the third party responsible for enforcement would also be exonerated if the provisions of that paragraph were applied to it."

[20] Article 518-2 of the Proposed Civil Code provides as follows: "Liability of the debtor for auxiliaries. If the debtor employs the assistance or collaboration of a third party for the performance, the acts and omissions of the latter are imputed to the debtor as if they were carried out by the debtor himself." ASSOCIATION OF CIVIL LAW PROFESSORS (2018).

[21] Regarding the Spanish Civil Code, see MONTES (1985).

[22] *Sociedad Informática y Tecnologías Avanzados de Canarias S.A with Fisco de Chile* (2009).

> *Desarrollo*, No. 12, page 189, states, precisely, that "To measure the liability of the debtor, his conduct and the conduct of the third party for whom he is liable cannot be considered separately. In other words, the debtor cannot allege that the actions of the third party are unrelated to him and, therefore, it is not lawful for him to exonerate himself by alleging that, with due diligence, he could not prevent this third party from obstructing the fulfillment of the obligation. In other words, the debtor cannot invoke his own act to exempt himself from fault and thus evade his liability" (recital 2).

A second ruling, also issued by the Court of Appeals of Santiago on March 9, 2015,[23] resolves the liability of a commercial bank for the act of third parties assisting it in its operations. It states the following:

> That it is a proven fact that on December 22, 2012, the client of Banco BCI, Mr. Mauricio Rodríguez Arellano, went to an ATM located in the Arauco Central Station Mall to withdraw money with his debit card for CLP$107,000, an amount that appears to have been deducted from his account with the bank (pp. 17 and 18). Also, that the client filed a complaint with the Bank for not having received such money, which was briefly and negatively responded (pp. 21 and 22). That the ATM belongs to Banco Estado, which through Redbank provides the service to Banco BCI (pp. 11 and 135), and that the cash dispensing machine in question underwent technical repair —not preventive maintenance— on 24 December, 2012 (p. 123) (recital 2).

Regarding Article 1679 of the Civil Code, the ruling indicates the following:

> (...) Banco BCI stated that it had no interference in the management of the ATM, so it would be exempt from answering for the interventions that would have been made in the device, a criterion that this Court does not share, since the service and proper functioning of a device for the timely and efficient delivery of a commercial operation correspond to the Bank that offers service to its client, being responsible of ensuring that the third parties supporting its management do so on adequate and satisfactory terms. This arises from the contract signed between the Bank and its client, and also from Article 1679 of the Civil Code, which pertinently establishes that the act of the debtor includes that of the persons for whom he is responsible. It is clear that Banco BCI has a duty of security regarding the services it offers to its clients, for the operations carried out in their accounts, a duty that includes the services of third parties supporting its management, whether they are direct dependents, subcontractors, or those connected to it through other figures (recital 6).

Finally, the opinion of the Court of Appeals of Antofagasta can be considered in the same sense. In a ruling dated August 3, 2015, it reads that "(...) from a general civil approach, it should also be borne in mind that Article 1679 of the Civil Code establishes liability for the act of others in the contractual sphere (...)"[24] (recital 11).

Thirdly, now paying attention to the doctrine, the generality of Article 1679 is mostly recognized.

Thus, very early on, Claro Solar, commenting on the aforementioned article 1679, indicates the following:

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[23] *National Consumer Service-Rodríguez with BCI* (2015).
[24] *Fermina Laferte Marín with the Treasury of Chile* (2015).

> When referring to the breach of the contract due to the fault of the debtor or by *force majeure*, we have taken into account the personal acts or deeds of the debtor himself; but the responsibility of the latter subsists when those acts or deeds are of persons for whom he is responsible.
>
> If fault has been committed or *force majeure* has been caused by an employee, an artisan, a worker, a servant, or another dependent or agent of the debtor, it is understood to have been committed by the debtor, since with due diligence he has been able to prevent it. Thus, art. 1679 provides that "in the act or fault of the debtor" that destroys the species or object that is owed, "the act or fault of the persons for whom he is responsible is included"; Article 1925 provides that, "if the lessor, due to his act or fault or that of his agents or dependents, has rendered it impossible to deliver the thing, the lessee will have the right to withdraw from the contract with compensation for damages (...)"; and art. 1926 adds that, "if the lessor, by his own act or fault or that of his agents or dependents, is in default of delivery, the lessee shall be entitled to compensation for damages"; art. 1941 also provides that "the lessee is responsible not only for his own fault, but also for that of his family, guests, and dependents", in the enjoyment of the leased thing; art. 2014 imposes on the transport contractor the obligations to which the hauled person is subjected, "as responsible for the damage or injury, suitability, and good conduct of the people he employs"; and according to art. 201, "the liability of the carrier shall arise not only for his own act, but also for that of his agents or servants."[25]

For his part, Abeliuk argues that:

> In order to determine the liability of the debtor who incurs in non-compliance due to the act or fault of a third party, it is necessary to distinguish whether he is civilly liable for him or not...
>
> But the act of the third party for whom the debtor is civilly liable is considered to be his own act. This is provided in Article 1679: "the act or fault of the debtor includes the act or fault of the persons for whom he is responsible." We are, therefore, faced with a case of indirect liability or liability for the act of another, as occurs in non-contractual liability (Nos. 277 *et seq.*).
>
> However, the legislator did not specify in this provision who are these third parties for whom the debtor is civilly liable. In the contracts in particular, it does enumerate several cases: Arts. 1925, 1926, 1929, 1941, 1947, final par.; 2000, par. 2º, 2014, 2015, par. final; 2003, rule 3, 2242, 2243.[26]

Later, he adds:

> For our part, we are also inclined to recognize, according to this latter position, the liability of the debtor for the breach caused by wilful misconduct or fault of his dependents and other persons that the debtor employs for the fulfillment of his obligation; note that it is the solution that the Code provides for cases that involve the intervention of auxiliaries, such as lodging, business, transport. There would be no reason to exclude it in other contracts, such as the manufacture of goods ordered from a factory, which also require such intervention. On the other hand, if one is liable in

[25] CLARO SOLAR (1978), p. 541.
[26] ABELIUK (2014), p. 981.

> non-contractual liability for the acts of the dependents, it is not clear why it should be excluded in contractual liability. [27]

Similarly, Corral Talciani maintains that:

> We believe, however, that this is a general rule applicable to any debtor who uses auxiliaries, dependents, or agents to fulfill an obligation. It should also apply to agents and those managing other people's businesses and, in general, to anyone managing other people's property or to legal persons employing natural persons to fulfill their contracts.
>
> (...)
>
> The debtor cannot argue that he could not prevent the act or that the dependent was not in charge of that contract or other causes. Essentially, here the conduct of the dependent or auxiliary is regarded as the conduct of the debtor; therefore, the Code states that "the act or fault of the debtor includes the act or fault of the persons for whom he is responsible (art. 1679 CC)."[28]

However, even if the generalization from Article 1679 is not accepted, it should be noted that several articles of the Civil Code reproduce a formula sufficiently similar to that of the precept applied to specific cases. Thus, the first paragraph of Article 1590 provides that: "(...) unless it has deteriorated and the deterioration is due to the act or fault of the debtor, or of the persons for whom he is responsible." On its part, in the matter of leasing, articles 1925 and 1926 provide that "[i]f the lessor by act or fault of his own or that of his agents or dependents (...)"; Article 1940 provides that "(...) in general, those of those types of deterioration that ordinarily occur due to the fault of the lessee or his dependents." Article 1941, in general, provides that "[t]he lessee is responsible not only for his own fault, but also for that of his family, guests, and dependents." The same formula is used in Article 1947.

Another convergent formula appears in Article 2135 of the Civil Code, in the following terms: "The agent may delegate the assignment if he has not been prohibited from doing so; but not being expressly authorized to do so, he will be responsible for the acts of the delegate, as well as for his own."

Well, as we believe, we have sufficient evidence to support the general purpose of Article 1679 and consider that it is an article that establishes a general rule regarding the intervention of third parties in the execution of the obligation by the debtor. But, even if its general vocation is not accepted, we can still assert that it is integrated within the articles that particularize a general rule. Now, we will have to consider the physiognomy of that rule.

To this end, the following question must be answered: what is the model of responsibility that can be extracted from this precept?

2.3 The model of liability of the debtor for the act of third parties

In non-contractual matters, at least in its wording, article 2320 of the Civil Code establishes a model of liability for the act of third parties based on presumed fault and only with respect to

[27] ABELIUK (2014), pp. 982-983. In a similar sense among others: RODRÍGUEZ GREZ (2005), p. 189; PIZARRO (2017), pp. 112 *et seq.*; and BRANTT (2010), pp. 96-99.
[28] CORRAL (2023), p. 492.

those third parties who have a relationship of subordination and dependence with the principal.[29]

In the case of the contractual liability of the debtor for the act of auxiliaries, things work differently both with respect to the subjective imputation and the type of third parties for whom one is liable. On the one hand, it is a case of liability without *in eligendo vel vigilando* fault. On the other hand, the debtor is liable for any third party that he employs to perform the obligation, regardless of whether or not there is a relationship of subordination and dependence between him and the debtor.

2.3.1 It is not a case of liability for fault

Paying attention to Spanish law, Cristóbal Montes notes the absence of a general provision on the matter and wonders whether it is possible to establish liability without fault of the debtor, for the objective fact of having employed third parties in the execution of the obligation.[30] He understands that it is possible, and justifies it as follows:

> If the creditor had to inquire on a case-by-case basis whether his debtor has incurred in *in eligendo* or *in vigilando* fault with respect to his dependents in order to be able to claim liability or not in the event of non-performance of the obligation, the legal market would suffer serious damage and the expansion of trade would see its own foundations endangered. As Messineo realistically highlights, given the organic nature of the company, it is not possible for the injured third party to distinguish when the fault lies with the employer and when it is with the auxiliary, and, moreover, from the perspective of solvency for the injured party, it is easier to deal with the company than with the auxiliary for the purposes of compensation.[31]

He adds that a legal basis must be sought for these socio-economic considerations and considers that this can be sought in the protection of trust, since the contracting party assumes that his counterparty will be responsible for the act of their dependents.[32]

For his part, Carrasco Perera, commenting on the *ratio* of the rule of the debtor's liability for the act of the auxiliaries, maintains that:

> Agreeing with the common opinion both inside and outside our country, the debtor is liable for the act of his auxiliaries without the need for fault on their part (*in eligendo, in vigilando*, etc.). The debtor uses auxiliaries to extend his circle of activity; the corresponding attribution of the risk of this extension is appropriate. It will be at the debtor's risk; and not of the creditor, that the act of the third party will be borne since it was the debtor, and not the creditor who introduced him into the obligation. However, an opinion can be argued that seems to me to have equal legal weight as the previous one. By the principle of the relativity of contracts, the debtor cannot excuse himself from liability by invoking the contract he entered into with a third party, whether it is an employment contract, a mandate, or a lease of services. Hence, it cannot excuse itself by proving that it chose an expert, or that the scope of the required diligence was exhausted by relying on a person who is officially recognized as

[29] It should be noted, however, that jurisprudence has established the physiognomy of this relationship under fairly broad conditions, in terms that it is sufficient for the principal to be able to effectively exercise authority over the third party. See BARROS (2020), pp. 195-197.
[30] MONTES (1985), p. 12.
[31] MONTES (1985), p. 20.
[32] MONTES (1985), p. 13.

> competent by virtue of an official title. It is even admissible construing that the debtor, by introducing the third party, guarantees its activity, as if it were the guarantee of a seller.[33]

These ideas of Cristóbal Montes and Carrasco Perera help explain the reason why the debtor's liability for the act of third parties is strict in those codes, such as the Italian or the Peruvian, which include provisions on this type of liability; and that, in the absence of a specific provision on the matter, the doctrine, at least mostly, has also understood it in this way.[34] In the case of Chilean law, Claro Solar has expressed in the following terms:

> The punctual performance of obligations is of decisive importance and is the basis of the claim which could not exist if the debtor could be released through the fault of his auxiliaries. It is, therefore, necessary for the debtor to be absolutely liable for the act of his auxiliaries. He must bear the risk of non-performance due to the fault of the persons he is forced to employ. This risk is for him a "liability" of the company that must be taken into account as other unfavourable eventualities.
>
> This risk does not constitute a fortuitous event or *force majeure*; and the debtor can only be released from liability when the breach of the obligation arises from an impossibility based on the *force majeure*.[35]

As can be seen, this is not a case of liability for *in eligendo vel vigilando* fault, but rather one close to the model of vicarious liability. The debtor is responsible for the act of the auxiliary that causes the breach as if it were his own.

2.3.2 The rule of liability is not limited to dependents

Within the scope of non-contractual liability, the physiognomy of the relationship of subordination and dependency required for liability for the act of another can be debated; however, it is indisputable that this relationship of subordination and dependency is a requirement of such liability.[36]

As far as the liability for the debtor's auxiliaries is concerned, the situation is different. One is liable, of course, for those third parties with whom there is a relationship of subordination and dependency, but also for anyone who, in multiple ways, participates in the performance on behalf of the debtor. In the words of Claro Solar: "Of course, regarding persons, the debtor is liable, even if he is not personally at fault, for his auxiliaries, that is, for all the persons he employs for the performance of his obligation, which makes contractual liability much broader than tort liability for the act of another."[37]

In contractual matters, therefore, the focus is not on the subordination or dependency of the auxiliary third party to the debtor; it may or may not be so. What does matter, in the words of Claro Solar, is that they are people who are employed by the debtor for the execution of the obligation.

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[33] CARRASCO PERERA (2021), p. 1040.

[34] Regarding the Italian Civil Code, see BIANCA (2007), p. 427. With regard to the Peruvian Civil Code, see GARCÍA (2012).

[35] CLARO SOLAR (1978), p. 478.

[36] At least, this is what the doctrine uniformly requires. However, in a certain type of cases (notably the liability of hospitals for doctors, which can be extended, in general, to the liberal professions) it is rather artificial to use fault *in eligendo vel vigilando.* On the subject, see ZELAYA (1997), pp. 64-69.

[37] CLARO SOLAR (1978), p. 481.

III. PART TWO: THE LIMIT OF THE DEBTOR'S LIABILITY FOR THE ACT OF THIRD PARTIES

In the first part of this work, we have indicated that it is possible to infer from certain articles of the Civil Code a general regulation of the debtor's liability for the act of third parties employed in the performance of the obligation.

Next, we have given an account of the characteristics of that regime. Namely, firstly, it is not due to fault and, secondly, it extends to any person employed by the debtor for the execution of the obligation.

In this second part, we focus on the limit of such liability. And our thesis can be expressed with great simplicity: the limits of that liability are the same as those for liability for one's own act; that is, the limit is constituted by the *force majeure*.

3.1 The *force majeure* as a limit of contractual liability

The idea that the limit of contractual liability lies in the *force majeure* is not a settled matter in Chile.[38]

However, to consider it, it is advisable to confine it to its fair limits. As we believe, in Chile the idea that, in the case of obligations of result, the limit of liability lies in the *force majeure*, is undisputed.[39]

This being the case, the discussion is limited to obligations of means. Thus, the question can be formulated as follows: does the *force majeure* constitute the limit of liability in obligations of means?

Some authors have considered that it does not. Thus, for example, Mauricio Tapia Rodríguez, indicates that:

> (...) it is evident that *force majeure* or fortuitous event is particularly relevant in the matter of contractual obligations of result (those where the debtor undertakes to achieve a specific objective, such as building a house within a certain period), and not in contractual obligations of means (where the debtor undertakes making his best efforts to achieve a result, but does not commit to achieve it, as for example, the obligations of a doctor to heal a patient). Indeed, it is in the former that *force majeure* acquires radical importance, as only by proving it can the debtor excuse himself from fulfilling the obligation. In contrast, in obligations of means, it is sufficient to prove his diligence to be exempt from liability, without it being necessary to prove the occurrence of a *force majeure*.[40]

We do not agree with this view. To evidence why, it will be necessary to begin by noting that what differentiates obligations of means from those of result refers to the content of the obligation, to what the debtor is obliged to do according to the contract. What does not differentiate them, however, is that in the case of means the debtor is only obliged to be diligent and in the case of results, a result is guaranteed without paying attention to diligence.

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[38] In fact, we write about it because an arbitrator who considered a preliminary version of this work indicated that it was necessary. Recognizing the *force majeure* as a limit of contractual liability, Barros indicates that: "the breach itself can be subjectively imputed to the debtor in the form of a kind of infringement fault [*culpa infraccional*], which only admits as an excuse the proof of *force majeure* by the debtor." BARROS (2008), p. 416.

[39] In this regard, see: PEÑAILILLO (2009), p. 340; PIZARRO (2005), p. 119.

[40] TAPIA (2020), p. 133.

In obligations of means, the debtor is not obliged to be diligent, much less to employ "his best efforts", but to perform an obligation to do [*prestación de hacer*] that consists of an activity, which is due, according to the nature of the object of the contract; an activity that, although oriented towards a result, is not incorporated into the obligation.

In contrast, in obligations of result, the debtor is obliged to achieve a specific result and if he does not achieve it or achieves it imperfectly, there will be a breach.

Therefore, it is not accurate to affirm that the debtor of an obligation of means is obliged to be diligent. The debtor of means is obligated to an activity, the content of which is integrated into the contract by applying the rule of integrative interpretation of Article 1546 of the Civil Code. This is clearly evidenced in the case of the doctor whose due activity, according to the contract, is generally determined by the *lex artis*.[41]

The performance subject to obligations of means consists of an act, and if the debtor performs the act in accordance with the contract, even if he does not achieve the result to which such activity was aimed, there will be fulfillment, and the obligation will be extinguished.[42] Conversely, if the debtor does not perform it or, more commonly, does so imperfectly, there will be non-compliance. And this non-compliance, in accordance with the general rules, will be attributable to him and he will be liable unless he proves the *force majeure*, as provided in paragraph 3 of Article 1547.

The same applies to obligations of result.[43] Here non-compliance occurs when the result is not achieved or is achieved imperfectly, and to be exempt from liability the debtor must prove the *force majeure*.[44]

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[41] This has been pointed out by the Supreme Court, when it provides that: "(...) The contract entered into contains an obligation of the clinic that involves not only providing medical care, but also hotel services and, above all, security, in such a way that if all the diligences contemplated in the contract had been employed, including those that were exceptional in the event that those of normal use had not been sufficient, and if the situation for the clinic had been verified in terms of its result, this would have varied considerably. (...) Although the clinic made efforts to prevent these unfortunate events from occurring, they were not sufficient to achieve the intended result, and exceptional physical restraint and permanent surveillance could have prevented the harmful result for the patient. In addition, the existence of a voluntary and malicious intention of the affected party to use a tool provided by the clinic to self-harm is ruled out and it is considered that the defendant's assertion in this regard is inadmissible given the pathologies that affected the patient." From the ruling, it follows that a physician is not obliged to act diligently or to make his best efforts, but to execute the obligation in any respect, in accordance with the terms of the contract. *Escárate with Inmobiliaria Clínica San Carlos S.A.* (2018).

[42] VIDAL (2010), pp. 575 *et seq.*

[43] BRANTT (2010), p. 211.

[44] A lengthy quote from Professor Morales Moreno will help round out what has been said: "In my opinion, the objective or neutral nature, from the perspective of culpability, is a characteristic of non-compliance both in the obligations of result and in the obligations of means. However, it has been argued that the objective nature of non-compliance, inherent of the new contract law, is not appropriate in the case of obligations of means (obligations to provide services), because in them non-compliance is closely tied to the negligent conduct of the debtor: there is no breach without the debtors' fault.

I will try to explain, in more detail, what this objection means. Let us first consider an obligation of result; for example, in that of the seller, consisting of delivering the sold item in a condition that conforms with the contract and free of the rights of third parties not foreseen in the contract. Non-compliance occurs when any of these requirements are not met; it occurs regardless of the debtor's fault.

Let us consider, in contrast, the obligations of means. Of these, it is stated that fault is necessary for non-compliance to exist. For example, if the surgeon does not perform the surgical intervention in accordance with the *lex artis* (science protocol) he breaches the contract, because he has acted with fault.

Understood in this way, regardless of the obligation breached —of means or result— the regime of liability and exoneration is the same. Thus, what differentiates the two obligations pertains to their content and when it is understood that there has been a breach.[45]

Sometimes, obligations to provide services (obligations to do) lead to an outcome. This is the case, for example, in the execution of a work [*ejecución de obra*]. The work is the result of the debtor's 'doing' (a service) in accordance with a certain *lex artis*. This result is considered in itself, to determine whether or not there has been non-compliance. The non-compliance of the contract can be verified through the not-achieved result. But other times, the performance of the obligation does not necessarily translate into a specific outcome that can be considered to determine non-compliance; that is, the result sought by the creditor is not necessarily achieved with the fulfillment of the obligation. Other factors can prevent it. Thus, for example, the application of correct medical treatment does not necessarily lead to the patient's cure; (...). In these cases, the performance of the contract does not consist in achieving a result, but rather that the debtor correctly executes the conduct that is required of him, in accordance with the contract. This conduct, as it relates to the performance of the service, has traditionally been called due or enforceable diligence. And the breach of that diligence has been called fault or negligence (...).

The previous reasoning is, without a doubt, very acute. Nevertheless, it seems to me that the difference between the obligations of means and the obligations of result to which it refers is not significant enough to prevent the construction of a unitary concept of non-compliance of contract, applicable to both. (...). I will try to explain it with some reasons.

1. The essential aspect, what characterizes the concept of non-compliance (...) is that the contract has not been performed in the terms provided for therein and, therefore, the interest of the creditor has not been satisfied. It is immaterial whether non-compliance consists, as in some cases (in the so-called obligations of result), in which the result contemplated in the contract has not been achieved, or whether it is a consequence, as in others (in the so-called obligations of means), of the debtor's failure to adequately perform (with due diligence, in accordance with the contract) his obligation to do. The dissatisfaction of the creditor's interest, which occurs in both cases, is what determines the existence of non-compliance.

2. In the case of obligations of means, the necessary consideration of the debtor's conduct in order to establish that there is non-compliance is not a consequence of the fact that in them non-compliance does not consist in the dissatisfaction of the creditor's interest, objectively weighed in accordance with the contract, but rather the particular content of the contractual relationship. The fault of the debtor is not a requirement of subjective imputation, typical of these obligations, but the way of determining the existence of the debtor's non-compliance of the contract. The debtor's fault is the non-compliance.

After all these considerations, we believe it is possible to draw a conclusion: both in the obligations of result and in those of means, what characterizes non-compliance is the fact that the contract has not been performed (it has not been carried out as it imposes) and, as a result, the interest of the creditor has not been satisfied"; MORALES MORENO (2016), pp. 94-96.

[45] Thus, for example, with respect to Spanish law, Carrasco Perera indicates that: "In Spanish jurisprudence, however, this distinction between the two types of obligations has never been aimed at finding separate spaces for non-fault and *force majeure*, but exclusively to determine to what extent the debtor is obliged or not to produce a result that constitutes the *empirical* interest of the creditor. (...) The distinction between obligations of means and of result is an illustrative description of the content of the various types of professional services performance, but should not receive any distinctive value beyond the illustrative. Because in fact all obligations are of result. The debtor is always obliged to fulfill the promised performance and nothing more. Curing the patient cannot be the object of the contract, because the cure cannot be controlled or produced by professional expertise alone. The debtor must provide what constitutes a risk inherent to the creditor, which the debtor has not assumed by contract. The question to ask is what the debtor is obliged to, and nothing more. Within the scope of obligation, the contingency that causes the empirical interest of the other party to fail will either be a risk of the debtor (it does not charge for the service) or the breach of the debtor (not only does it not collect, but it also indemnifies). Outside that scope, the contingency in question is always the creditor's own risk, who will pay for the service even if not cured. For this reason, and not because the latter is an obligation of result, the duty of diligence and the assumption of the risk of failure are different, for example, in a discretionary management contract of the same portfolio. When the duty to provide for the debtor ends, the risk of failure for the creditor begins (in the obligations of means), but where that duty ends and this risk begins is something that is not resolved by resorting to the dual classification of means/result." CARRASCO PERERA (2021), pp. 1026-1027.

This has been claimed, for example, with respect to the UNIDROIT Principles of International Commercial Contracts (hereinafter referred to as PICC). They establish the obligations of the parties depending on the classification: whether the achievement of a specific result, or the deployment of the appropriate means or the best diligence in the execution of an activity.[46] Guiding factors are provided for in Article 5.1.5,[47] to be considered individually or collectively. Thus, in the PICC the distinction attends to the content of the obligation, and does not operate with respect to non-compliance and subsequent liability.

Thus, the fact that the regime of liability and exoneration is the same, entails that in the obligations of means, as in those of result, the debtor in the execution of his performance must use the diligence required according to the contract. Understanding things in this way entails that, in addition to being obliged to execute his obligation, he must foresee those impediments that affect such performance and adopt the measures to resist such impediments and their consequences, so that he performs the contract in the same way that another diligent and reasonable debtor would under the same circumstances.[48] And it will be this same diligence that the judge will use to determine whether or not the requirements of the *force majeure* are met, as explained.[49]

It will be helpful to use an example to illustrate what has been said. Let us consider a doctor who is obliged to operate on a patient suffering from severe peritonitis. The doctor's obligation is to perform the intervention, adjusting his conduct to the medical *lex artis*; therefore, he does not necessarily have to cure or heal the patient, but rather carry out his activity, complying with the procedures, protocols, and standards imposed by the aforementioned *lex artis*. That is what the doctor is obliged to do and not to make "his best efforts." The activity due by the doctor —according to the *lex artis*— is equivalent to the

[46] Article 5.1.4 of the IPCC states: "(Obligation of result and obligation to use best efforts)

(1) To the extent that a party's obligation involves a duty to achieve a specific result, that party is obliged to achieve that result.

(2) To the extent that the obligation of a party involves a duty to use best efforts in the performance of the performance, that party is required to exercise such diligence as would be exercised in similar circumstances by a reasonable person of the same condition."

[47] "(Determination of the type of obligation). In determining the extent to which a party's obligation involves an obligation to use best efforts or to achieve a specific result, the following factors shall be taken into account:

(a) the terms in which the performance is described in the contract;

(b) the price and other terms of the contract;

(c) the degree of risk that is usually involved in achieving the expected result;

(d) the ability of the other party to influence the performance of the obligation."

[48] VIDAL & BRANTT (2013), pp. 421 *et seq.*; DE LA MAZA & VIDAL (2018), pp. 618-619.

[49] On this point, Brantt explains that: "(...) The *force majeure* constitutes the cause of exoneration in both types of obligations, and in my opinion, there are no different rules of liability for one or the other. For this reason, I do not share the view of those authors who, both in national and comparative law, resort to the distinction between obligations of means and result to propose a different construction of the contractual liability regime in each of them. (...)

As I pointed out, the promoting diligence is enforceable even in the obligations of result, and in the case of those of means, it cannot be said that the breach is identified with the imputation, both corresponding to the lack of the same diligence. The omission of integrative diligence, constituting the performance, which corresponds, strictly speaking, to non-compliance, and which has no influence for the purposes of attributing liability, should not be confused with the absence of diligence in its promoting function, which is the one that is of interest in the last sense indicated (to determine whether or not there is a *force majeure*)." BRANTT (2010), p. 211.

performance, which is the object of any kind of obligation. The peculiarity is that the result "healing the patient" is not involved.

If the patient dies as a result of the intervention and the doctor proves that he performed the content of his obligation —did things as he was supposed to— this means that he has fulfilled his obligation and, consequently, is released from it because he performed the payment —provision of what is due— under all respects in accordance with the contract —Article 1569 of the Civil Code. On the contrary, if it is proven that the patient's fatal outcome is causally linked to the doctor's breach of the *lex artis* —procedures, protocols, and standards— the professional will have performed his service imperfectly, and in this scenario, there is non-compliance, in principle, attributable, so that the doctor will be obliged to compensate.

However, the issue of exoneration remains: how does the *force majeure* operate in a case like this? Let us consider that, due to an event —which is assumed to constitute an external cause— the doctor is prevented from applying the procedure that integrates his obligation and is dictated by the *lex artis*. The question will be the same as the one formulated in general. Whether, in accordance with the diligence required of the doctor, another professional in his specialty, and in the same circumstances, would have foreseen or not that impediment, and whether or not it was required of him to resist it. If the answer is that the event was unforeseeable and irresistible, there is no doubt that the procedure was not followed and that there was a non-compliance, nor is there any doubt that this non-compliance is not attributable to the debtor because it originated in a *force majeure*. If this is the case, the doctor will be exonerated from the obligation to indemnify.

In conclusion, following Jordano Fraga, in the event of non-compliance with either of these two types of obligations —obligations of means or result— exoneration operates through the discipline of the *force majeure*.[50] In this, there is no difference between them. The limit of civil liability is the *force majeure* and, in any case, it will be the diligence required of the debtor —a promoter of compliance— that allows the setting of the metric to calibrate, in each case, whether or not the requirements of the *force majeure* are met and whether the debtor is exonerated from liability.

The difference refers to the content of the obligation (what the debtor is obligated to), and the configuration of non-compliance.

If the assertion we hold is correct that the *force majeure* constitutes the limit of the liability —regardless of whether the obligation is of means or of result— it is then possible to combine this assertion with the thesis that animates this second part, according to which the limits of the debtor's liability for the act of third parties are the same as those of the liability for their own act, that is, the *force majeure*.

On the contrary, if we are not right, that assertion should be restricted, in the sense that, at least in the obligations of result, the limit of the debtor's liability for third parties is the *force majeure*.

However, in either scenario, in order for the debtor to be able to allege the *force majeure*, its requirements must be satisfied. Presented in this way, it is time to consider one of those requirements, the externality of the *force majeure*, with respect to which, it seems to us,

[50] JORDANO (1991), p. 11.

we can add valuable background to the discussion on the debtor's liability for non-compliance caused by third parties employed in the execution of the performance.

3.2 The question of the externality of the *force majeure*

The externality of the *force majeure* is not a requirement found in Article 45 of the Civil Code. However, as Campos correctly points out, it can be inferred from other provisions, such as Article 1672 first paragraph, Article 1679, Article 1925 first paragraph, Article 1926, Article 2015 third paragraph, Article 2016 second paragraph, Article 2178, Article 2242, etc.[51] Tapia adds that this is a requirement that has invariably been demanded by the courts and doctrine.[52]

A look at the texts of Tapia and Campos, the most recent books referring to this element, shows that there has been some discussion regarding its scope; more precisely, whether the externality of the *force majeure* is determined by fault, causality, or the allocation of risks made by the contract.

In another article we have developed why, in our opinion, the best understanding of the externality requirement is from the sphere of control, that is, is external that which is outside the debtor's sphere of control.[53]

In this work we show that it is an opinion shared by an important sector of national doctrine[54] and that it has gained traction in countries such as Spain[55] or France,[56] as well as in the CISG and the Principles of European Contract Law (hereinafter, PECL).

To assert that "external" is that which is outside the debtor's sphere of control, it is then essential to determine the content of that sphere and, in doing so, its interest for the subject we are discussing, that of third parties assisting the debtor in the execution of the obligation, will become evident.

It is appropriate to begin with the text of Article 79 (1) of the CISG, which deals with the excuse of non-compliance by the debtor, which reads as follows:

> 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. [57]

Specifying what is included in the sphere of control of Article 79 of the CISG, Schwenzer, one of the main commentators of the CISG, indicates that "[t]he promisor's typical sphere of risk includes responsibility for his own sphere, such as his financial capacity or for personal circumstances, procurement risk, utility risk, and liability for his own personnel."[58]

Finally, it concludes by stating that:

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[51] CAMPOS (2020), p. 25.
[52] TAPIA (2020), p. 115.
[53] DE LA MAZA & VIDAL (2023).
[54] In this sense: CAMPOS (2020), p. 25; TAPIA (2020), pp. 122-124; CORRAL (2023), pp. 493-494.
[55] For all, FENOY (2011), pp. 1654-1655.
[56] For all, FABRE-MAGNAN (2021), p. 759.
[57] The same rule is reflected in Article 8:108 (1) of the PECL and Article 7.1.7 (1) of the Unidroit Principles on International Commercial Contracts (PICC).
[58] SCHWENZER (2016), p. 1134.

> The promisor typically is liable for his own sphere. He is not exempted under Article 79 by circumstances that hay their origin in his person. Even unforeseen illness, death or arrest of the promisor or of one of his key employees does not exempt the promisor because, according to common trade understanding, the risk of such personal impediments to performance is borne by the promisor. The promisor is further responsible for his sphere of control, i.e. for impediments attributable to the nature or organization of his sphere of control, for example, a failure of production or accounting systems or the data processing equipment. Furthermore, the promisor is responsible for correct organization and trouble-free passage of steps necessary to prepare for and perform the contract; he is particular responsible for adequate storage facilities. In such cases exemption under Article 79 can only be considered if the operational disruption was caused by external impediment (natural catastrophe, epidemic, etc.).[59]

In turn, when paying attention to the PECL, the following official comment is found on its article 8:108:[60]

> First, the obstacle must be something outside the debtor´s sphere of control. The risk its own activities it must bear itself. Thus, the breakdown of a machine, even if unforeseeable and unpreventable. The same is true of the actions of persons for whom the debtor is responsible, and particularly the acts of the people it puts in charge of the performance. The debtor cannot invoke the default of a subcontractor unless it was its control —for instance because there was no other subcontractor which could have been employed do to work; and the impediment must also be outside the contractor's sphere of control.[61]

In a legal system such as the Spanish one, whose design of the *force majeure* resembles the Chilean one,[62] Pantaleón is the first author to use the concept of "sphere of control of the

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[59] SCHWENZER (2016), p. 1138. In similar terms, Atamer, referring to the "typical sphere of control of the debtor", states that: "In order to exempt the obligor, the impediment has to be an objective one, having its roots outside the sphere of influence of the obligor. It is expected that the obligor organizes his business in such way that the production or intra-firm processes are not disrupted even by events which occur very seldom. Any endogenous impediment, such as death or severe illness, cuts in the energy supply, breakdown of the machine, failure of production or accounting systems or data processing equipment or internal labour disputes will not suffice for exoneration even if they were unforeseeable or uncontrollable. The parties have to take all precautions to ensure that production is not hampered by such malfunctions. They are responsible for choosing qualified workforce and running the organization in a professional and appropriate manner so that conforming performance is assured." ATAMER (2018), p. 1056.

[60] Article 8:108 PECL provides that: "Article 8:108: Exemption for impossibility of performance

(1) A party is relieved of its duty to perform if it proves that it is unable to perform its obligation due to an impediment beyond its control and that it cannot reasonably be claimed that such impediment should have been taken into account at the time of conclusion of the contract or that the party should have avoided or overcome such impediment or its consequences.

(2) When the impediment is only temporary, the exemption provided for in this article takes effect for the duration of the impediment. However, if the delay results in a fundamental non-compliance, the creditor may treat it accordingly.

(3) The non-performing party must ensure that, within a reasonable time after it knew or should have known of those circumstances, the other party receives notice of the existence of the impediment and its effect on the party's ability to perform its obligation. The other party is entitled to damages for losses that may result from not receiving such notice."

[61] LANDO & BEALE (2000), p. 380.

[62] The text of article 1105 reads as follows: "Except in cases expressly mentioned in the law, and in those in which the obligation so declares, no one shall be liable for those events that could not have been foreseen, or that, foreseen, were inevitable."

debtor" to objectively interpret Article 1105 of the Spanish Civil Code (which defines the *force majeure*). In the words of the author:

> It is obvious that the highly desirable result of the provisions of Article 1105 coinciding with the provisions of Article 79.1 of the United Nations Convention, a true *ius commune* in the matter at hand, can be achieved by simply interpreting the word 'event' in that article as an 'event beyond the debtor's sphere of control', to maintain that the unforseeability of the event causing the non-compliance is an autonomous requirement of the *force majeure* (not the mere logical premise of its inevitability) and to refer to the foreseeability or unforseeability at the time of entering into the contract. It will suffice to read Article 1105 as follows: 'except in the cases expressly mentioned in the law, and in those where the contract so declares, no one shall be liable for impediments beyond their sphere of control that could not have been foreseen at the time of contracting [and thus avoided by not contracting], or that [foreseen subsequently] were unavoidable.'[63]

Also noteworthy is the opinion of Díez-Picazo, who proposes an interpretation of the aforementioned article 1105, recognizing a sphere of control of the debtor, and maintains that:

> The term 'events', used in that article, allows it to draw a dividing line between 'what rightly understood should mean external events or facts that are beyond the scope or framework of the debtor's control'. However, he admits that 'the framework or scope of control of the debtor is evidently related to the type of diligence that is required of him, and will differ depending on whether the diligence is that of an average person or that of a professional or businessman, as there are different spheres of control in each case.'[64]

Finally, recently, Carrasco Perera explains that:

> The more specific a contingency is to the debtor's productive system or the closer it is to the debtor's capacity for possessory control, the less likely it is that this contingency will be considered a *force majeure*. The difficulties in proving that an unforeseeable or irresistible contingency has occurred *within the control system itself* lead to the denial of the condition of *force majeure* to such contingency. It will be almost impossible for the debtor to prove that in this reserved space he has not caused or favoured the occurrence of the contingency, that he has not suffered an oversight, negligence of employees, lack of adequate maintenance. What begins as a statistical certainty caused by strict burden of proof, ends up becoming a rule of law by which the debtor is imputed as his own risk the production of adverse contingencies that take place in the possessory or productive system over which he exercises effective control. Business *risk* is not a *force majeure*.[65]

The materials deployed should be sufficient to corroborate what we have proposed. In this sense, we have aimed to show that one of the requirements of the *force majeure* is externality. Next, we have pointed out that the most appropriate way to conceive it corresponds to those risks that are outside the debtor's sphere of control. Thirdly, when consulting the opinions referred to in relation to the CISG or the PECL, it is discovered that a frequent

[63] PANTALEÓN (1991), p. 1064.
[64] DÍEZ-PICAZO (2008), p. 727.
[65] CARRASCO PERERA (2021), pp. 1073-1074.

example of what is usually within the debtor's sphere of control are the people who provide him assistance for the performance of the obligation.

The importance of noting the above is that if the *force majeure* is the limit of liability for non-compliance caused by the third parties that the debtor employs to perform the obligation, it will not be sufficient for him to be released from such liability by proving that the act of the third party was unforeseeable and irresistible, but, in addition, he must prove that it was external. In other words, which should now be easily understandable, he will need to show that the third party's act was beyond his sphere of control.

And by framing the issue this way, the following question naturally arises: Which third parties are inside, and which are outside the debtor's sphere of control?

3.3 Inside and outside of the sphere of control

As mentioned before, María Graciela Brantt is the only author in Chile who has been concerned with identifying the third parties that the debtor may employ to the perform his obligation. The same author has also considered, with respect to them, the issue of the sphere of control, indicating that all these third parties would fall within it[66].

Despite the authority of her opinion, we believe that it is possible to add some nuance and conclude that not all third parties fall within the debtor's sphere of control. To justify this assertion, we present below the CISG's response to the question of which third parties fall inside and which are outside the debtor's sphere of control.

It will be appropriate to begin by considering the text of paragraphs 1) and 2) of article 79 of the CISG, which reads as follows:

> (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.
> (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.

As can be seen, if third parties are within the debtor's sphere of control (paragraph 1), he cannot invoke a *force majeure* because its requirements are not met. Conversely, if they are outside of the sphere, he can claim it, provided that (a) such non-compliance was unforeseeable and irresistible to the debtor, and (b) that the requirements of the *force majeure* are met with respect to the third party.

In this way, if the impediment comes from a dependent (let us imagine that he is absent due to illness and that this condition was neither foreseeable nor resistible for the dependent), the debtor cannot invoke *force majeure*, because he guaranteed to have enough dependents to comply with the obligation.

In the case of dependent third parties, if the non-compliance originates from their conduct or activity, whether or not they are at fault, the debtor will not be able to benefit from

[66] BRANTT (2010), pp. 94-95 and 107.

the excuse of *force majeure*, as it is a risk that is part of his sphere of control. Schlectriem indicates that "the obligor is always responsible for his own personnel, as long as he organized and controls their work. Deficiencies and poor performance caused by individual workers, therefore, do not exempt the seller from liability."[67]

In the same sense, Schwenzer:

> The promisor is responsible for his own personnel. Their conduct falls within the promisor 'typical sphere of control, which is why they are not third persons 'within the meaning of Article 79 (2). The promisor cannot avoid liability by showing that he exercised due care selecting and supervising them. Neither can scape liability by showing that the impairment to performance was caused by the fact that persons were acting contrary to it his instructions, had committed criminal acts, or were not deployed at all to perform the contract. This also applies to acts of sabotage carried out the promisor´s own personnel.[68]

For its part, in Opinion No. 7 on Article 79 of the CISG, it is indicated that:

> Article 79(1) remains the controlling provision even if a contracting party has engaged a third person to perform the contract in whole or in part.
>
> (a) In general, the seller is not exempted under Article 79(1) when those within its sphere of risk fail to perform; for example, the seller's own staff or personnel and those engaged to provide the seller with raw materials or semi-manufactured goods. The same principle applies to the buyer in relation to the buyer's own staff or personnel and those engaged to perform the obligations of the buyer under the contract.
>
> (b) In exceptional circumstances, a contracting party may be exempted under Article 79(1) for the acts or omissions of a third person when the contracting party was not able to choose or control the third person.[69]

And further on: "No one disputes that under Article 79(1) the seller bears the risk of non-conformity owed to its own personal circumstances and to those employed by him to perform the contract and whose work the seller is to organize, coordinate, or supervise."[70]

The reason for this solution —the deprivation of the benefit of the *force majeure*— is that the debtor, given that he controls or should control the behaviour of the dependents he chooses, guarantees the creditor that his action will be in accordance with the contract. If this is the case and it leads to non-compliance, the debtor will be liable in absolute terms.

On the other hand, if it is a subcontractor (third party in charge), whose factory was affected by an unforeseen and irresistible flood, the debtor can invoke a *force majeure* because (a) the third party is outside his sphere of control and its non-compliance was unforeseeable and irresistible, and (b) with respect to the subcontractor, the impediment is outside his sphere of control and is unforeseeable and irresistible.

This third party is not part of the debtor's organization in any way, as it owns its own organization and, therefore, is outside its sphere of control. This is what Schwenzer notes, in the following terms: "The provision's history shows that this is intended to cover only persons

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[67] SCHLECTRIEM (1986), p. 104.
[68] SCHWENZER (2016), p. 1138.
[69] CISG-AC (2007).
[70] CISG-AC (2007).

who acting independently and not within the promisor´s organizational sphere but under his responsibility."[71]

The same view is expressed in the Digest of rulings applying Article 79 (2) of the CISG, which states: "The seller's employees and suppliers are not considered third parties according to the CISG, though they are subjects who, autonomously or as independent parties, fulfil a part or the whole of the contract."[72]

Finally, the aforementioned Opinion No. 7 reads the following:

> The second group of "third persons" identifiable under Article 79(2) is composed by those who are "independently" engaged by the seller to perform all or part of the contract directly to the buyer. It is not easy to ascertain the precise meaning of "... a third person whom [the party claiming exemption] has engaged to perform the whole or part of a contract ...", but the expression seems to point to those third persons who, unlike third-party suppliers or subcontractors for whose performance the seller is fully responsible, are not merely separate and distinct persons or legal entities, but also economically and functionally independent from the seller, outside the seller's organizational structure, sphere of control or responsibility.[73]

Thus, in principle, the debtor is liable for the non-compliance originating, in turn, from the non-compliance of the third party. However, the provision of Article 79 (2) allows the debtor to invoke the *force majeure* if he proves that the third party's non-compliance itself satisfies the requirements of Article 79 (1) and that, in addition, the third party, if the CISG were applicable, could excuse himself by invoking an impediment that meets the requirements of Article 79 (1). The limit of the debtor's liability for the act of the independent third party is the *force majeure*.

Having considered the situation of dependents and subcontractors, it remains to pay attention to that of suppliers. They are independent third parties from the debtor, therefore, resembling subcontractors in this regard. Notwithstanding the above, its non-compliance is borne by the debtor.

The explanation for this solution is that, with exceptions, the contract assigns the procurement risk to the debtor, making this procurement part of its sphere of control. To the foregoing, it must be added that, in fact, in the case of suppliers, their activity is not relevant, but rather the things they supply to the debtor for the preparation of the obligation. The debtor guarantees the creditor to have the things necessary to comply with the contract.

In this sense, Schwenzer sates the following:

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[71] SCHWENZER (2016), pp. 1143-1144, In the same sense: PICHONAZ (1997), par. 1695; and VIDAL (2006), pp. 277-278.

[72] UNCITRAL (2016), p. 378.

[73] It should be noted that Opinion No. 7, referring to providers, states the following: "There is a consistent line of decisions suggesting that the seller normally bears the risk that third-party suppliers or subcontractors may breach their own contract with the seller, so that at least in principle the seller will not be excused when the failure to perform was caused by its supplier's default.[20] Article 79(1) remains the controlling provision to ascertain the liability of the seller for the acts or omissions of that type of 'third persons' whose default cannot be invoked by the seller to excuse his own failure to deliver conforming goods. An exception should be allowed, however, for those very exceptional cases in which the seller has no control over the choice of the supplier or its performance, in which case the supplier's default may be established as a genuine impediment beyond the control of the seller." CISG-AC (2007).

> According to the now prevailing view, upstream suppliers They merely create the preconditions for the promisor's performance or assist in the preparation for performance; they are not entrusted with performance in whole or in part. They may supply the seller with raw materials or semi-manufactured parts necessary for the manufacture of the goods or, where the seller is only a dealer or a commission agent, even with the goods themselves. Impediments which were caused by the supplier are treated according to the general rule of Article 79(1). The promisor's liability for the supplier is part of his general risk that the goods will actually be procured (cf paragraph 27 above). Consequently, the seller is, as a rule, not exempted if the supplier does not deliver at all or delivers defective goods, even where this was not foreseeable. A different conclusion may be justified if, for example, the supplier is the only available source of supply because he has a monopoly over raw material supplies and supplies are unavailable due to unforeseen events (war, export ban, destruction of plant).[74]

From Schwenzer's opinion, it can be inferred that suppliers do not qualify as third-party contractors under the terms of article 79 (2) and that, as a general rule, their compliance or non-compliance is a risk (that of procurement) that belongs to the debtor (as stated in paragraph 27 of the commentary to the aforementioned provision). In the author's terms, "the debtor's liability for its suppliers is part of the general risk that the goods will actually be supplied to the debtor." The reference to paragraph 27 makes it possible to understand the scope of this assertion.

The paragraph deals in particular with procurement risk, which corresponds to one of the various risks that make up the debtor's sphere of control (paragraph 19, letter c). In what's relevant, the author states that:

> Where the contract involves the sale of generic goods for which there is a ready market (the type most commonly encountered in international trade) the sellers bear risk of procurement the goods. He is, in general, not exempted if his supplier has let him down, if he has incurred significant additional expenses due to higher prices or if the goods that he selected for delivery accidentally were destroyed or perished. As long as substitute goods are available on the market, the seller must exhaust all possibilities which do not exceed the ultimate ´limit of sacrifice (cf. paragraph 31 below) to acquire them. If this is only possible after some delay, the seller was can nevertheless gain relief in regard to the delay by showing that timely performance was prevented by an uncontrollable and unforeseeable event, The seller can pass on the procurement risk to the buyer by using adequate clauses such as eg ´performance is subject to availability of the goods´ or by naming the upstream supplier explicitly.
>
> In the case of a sale of generic goods for which there is no ready market, in particular a sale from batch or stock, the seller, in accordance with the ratio of such contract only bears the risk of being able to procure goods from that batch or stock. The seller is exempted if production of that batch in prevented, or the stock is destroyed as a result of an unforeseeable and unavoidable event.[75]

In the same sense, Salvador Coderch maintains that:

> The provider alone, i.e., a provider who, without any relation to the debtor's obligation, manufactures or supplies the goods which the debtor then has to deliver to the creditor, who does the same with a component or a raw material, etc., prepares the debtor's

[74] SCHWENZER (2016), p. 1145, par. 38.
[75] SCHWENZER (2016), pp. 1140-1141, par. 27.

> performance and the obstacles encountered in their work are judged in accordance with the rule of article 79.1 in the same way as any other obstacles that prevent compliance. As a general rule, the debtor is not exonerated by what may happen to the provider of his choice, no matter how diligent it may have been. Naturally, another solution may be acceptable, as is the case with providers imposed by the authorities or in situations of *de facto* monopolies.[76]

Finally, it should be considered that in the Official Commentary on Article 65 paragraph 2 (current Article 79 paragraph 2) to the 1978 Draft of text of the CISG, it is expressly stated: "The third person must be someone who has been engaged to perform the whole or a part of the contract. It does not include suppliers of the goods or of raw materials to the seller."[77]

In the same sense in the aforementioned Digest of the CISG, in the commentaries on Article 79, states the following:

> Several decisions have suggested that the seller normally bears the risk that its supplier will breach, and that the seller will not generally receive an exemption when its failure to perform was caused by its supplier's default. In a detailed discussion of the issue, a court explicitly stated that under CISG the seller bears the "acquisition risk"—the risk that its supplier will not timely deliver the goods or will deliver non-conforming goods—unless the parties agreed to a different allocation of risk in their contract, and that a seller therefore cannot normally invoke its supplier's default as a basis for an exemption under article 79.[78]

When considering the developments of Article 79 of the CISG, it is noticeable that the rule of liability applicable to the debtor depends on the manner in which the third party intervenes in the preparation and execution of the obligation, and it is necessary to distinguish between three types of third parties: dependents, providers, and third parties entrusted with the performance of the contract. Regarding dependents and providers, the rule of liability is the same, that is, the exoneration of the *force majeure* is not applicable, although for different reasons. Conversely, in the case of independent third parties, although the debtor is, in principle, subject to liability, if the requirements of paragraph 2) of article 79 are met, the cause for exoneration of paragraph 1) of the same provision will be applicable.

Presented with the CISG regime, one question remains, which we will consider only marginally, namely, is this solution applicable in the Chilean legal system with respect to the Civil Code?

To answer this question, a brief digression seems appropriate. As is well known, during the past decades Chilean Contract Law has undergone a profound revision, precisely in light of the CISG and other developments that it has enabled. Older texts can be read using newer ones; there are, in principle, no obstacles to interpreting some passages of the Civil Code in light of the CISG, as long as such interpretation does not contradict the provisions of the Code or is inconsistent with the principles underlying its articles.

For as long as it is accepted that the externality of the *force majeure* can be interpreted in terms of sphere of control, the need arises to give content to the sphere of control, as far as

[76] SALVADOR (1997), pp. 649-650.
[77] UNCITRAL (1978), p. 56.
[78] UNCITRAL (2016), p. 376.

this work is concerned, with respect to the third parties who are employed by the debtor to perform the obligation.

In our opinion, the rationale underlying the solutions of the CISG with respect to third parties is consistent with the Civil Code; we do not find any rules or principles opposing it. In addition, the CISG is domestic law in Chile, therefore, a certain requirement of coherence in the private law system, in our opinion, points in the same direction.

By presenting things in this way, a rereading of Article 1679 of the Civil Code allows us to assert that, in our Contract Law, the debtor is responsible for the act of third parties who intervene in the execution of their performance, unless there is proof of the *force majeure*. Thus, since the requirement of externality is not met with respect to employees and providers (as a general rule), the limit of the *force majeure* could only operate in the case of non-compliance by independent third parties or subcontractors.

In other words, the guarantee of the debtor's sphere of control would extend to the dependents and also, in principle, to the providers, but not to independent third parties or subcontractors, with respect to whom the excuse of the *force majeure* could operate.

IV. CONCLUSIONS

We have begun this work by noting, on the one hand, that debtors frequently employ third parties to perform their obligations and that these third parties may concur in different ways. On the other hand, we have added that, in our opinion, the topic has not been sufficiently developed in Chile.

The objective of this work has been to advance this development, in two directions. On the one hand, by strengthening what has already been noted in Chile, namely, (a) that it is possible to anchor the debtor's liability for third parties in provisions of the Civil Code, and (b) that, based on Article 1679, it can be inferred that it is a responsibility (i) that is not exhausted in the *in eligendo vel vigilando* fault, and (ii) that it extends to all third parties, not only to the dependents.

The second direction in which we develop the topic is with respect to the limits of the debtor's liability for third parties relevant to this article. In this regard, our conclusions are as follows. Firstly, in general, the limit of the debtor's liability is the *force majeure* and, therefore, in particular, the debtor is liable for third parties with the limit of the *force majeure*. Second, when considering the physiognomy of the *force majeure*, it is discovered that one of its requirements is externality; in this regard, our conclusion is that the proper interpretation of this requirement is under the notion of "sphere of control", coined in relation to the CISG. Third, we conclude that the CISG provides us with an appropriate model for determining, in domestic law, which third parties are within, and which are outside the sphere of control. When considering this model for a reinterpretation of Article 1679 of the Civil Code, it can be asserted that the debtor is liable for the act of third parties involved in the execution of his obligation, unless there is proof of the *force majeure*. If such a rule such is accepted, it will have to be accepted that, since the externality requirement is not met with respect to dependents and, in principle, providers, the limit of *force majeure* could only apply when it is a question of the non-compliance of independent third parties or subcontractors.

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