



INTRODUCTORY NOTE AND COMMENTARY

1. DEALING WITH UNFORESEEN EVENTS: FORCE MAJEURE AND HARDSHIP

Force majeure and hardship are frequently invoked in international trade in case of the occurrence of unforeseen events which make performance impossible or impracticable (force majeure) or which substantially upset the economic balance of the contract (hardship). In the first case the party successfully invoking force majeure will be relieved from performance, while in the second case the party subject to hardship will be entitled to renegotiate the contract and in certain cases to obtain its adaptation to the changed circumstances.

While in the past the events to be considered for this purpose were mainly “acts of god” (fire, flood, earthquake, etc.), at present the variety of unforeseen events which may prevent performance or which may substantially upset the equilibrium of the respective obligations of the parties, has substantially increased.

Most national legislators provide rules dealing with these issues, but the principles developed in domestic law such as frustration (English law), impossibility of performance (civil law systems) or impracticability (American law) may imply substantial differences¹. It may thus happen that the same circumstances exempt a party from responsibility in one legal system and not in another.

In order to overcome the difficulty of dealing with the relevant provisions of differing legal systems, parties tend to agree on specific force majeure or hardship clauses which are intended to replace the rules provided in the applicable domestic law with uniform contractual provisions. It has become a common practice to include in most international commercial agreements standard clauses on force majeure and/or hardship, which, however, do not always satisfy the actual needs of the parties (especially when copied from other contracts, or from the internet, without verifying their quality).

The purpose of the ICC Force Majeure and Hardship Clauses is precisely to provide traders with balanced and effective standard clauses to be included in international commercial contracts or to be used as a basis for drafting tailor-made clauses.

These ICC Force Majeure and Hardship Clauses 2020 are an improved and updated version of the previous clauses which take into account recent developments in trade and introduce a number of improvements dictated by the experiences had in the intervening years.

2. THE FORCE MAJEURE CLAUSE

The purpose of force majeure clauses is to draw a reasonable compromise between two contradictory needs: the right of a party to be exonerated from its obligations when their fulfilment is prevented by unforeseeable events for which it is not responsible, and the right of the other party to obtain the performance of the contract.

The traditional approach to drafting force majeure clauses tends to be different in civil law and

¹ For a short overview of these different approaches, C. Brunner, *Rules on Force Majeure as Illustrated in Recent Case Law*, in F. Bortolotti, D. Ufot (eds.), *Hardship and Force Majeure in International Commercial Contracts*, Dossier XXII of the ICC Institute of World Business Law, ICC 2018, p. 82 et seq., at p. 84-85.

common law jurisdictions. While civil law lawyers tend to depart from a general definition of force majeure, by specifying the conditions (unforeseeability, event out of the parties' control, irresistibility) required for an event to be qualified as force majeure, common law lawyers tend to list a number of specific circumstances (acts of god, etc.) which qualify as force majeure events.

As will be seen hereunder (infra, § 2.3), the ICC clause intends to draw a compromise between these two approaches by providing a general definition together with a list of typical force majeure events.

2.1 The revision of the Force Majeure Clause 2003

The International Chamber of Commerce has provided for many years a standard force majeure clause. The first standard clause, published in 1985 (ICC Publication 421), was replaced by the ICC Force Majeure Clause 2003².

Several years ago, the ICC Commission on Commercial Law and Practice (the "CLP Commission") was asked to consider the option of publishing a «short form» force majeure clause which could be more easily incorporated within the text of a contract. Some members of the Commission were of the opinion that the existing clause was too long and complex for inclusion within a contract, while the option of incorporating it by reference proved to be not always practicable. It was agreed that a small group would both revise and update the existing clause, which would remain a «long form», and also draft a «short form» to be harmonized with the revised long form. The Commission appointed a Working Group, which met several times in the period between 2017 and 2019 and the final text was approved by the ICC Executive Board in late 2019.

The result is a substantially revised «long form», which can be incorporated by reference in the contract or used as a basis for drafting a tailor-made clause, and a «short form» which can be more easily included as such in the text of a contract.

Since the «short form» is a reduced version of the «long form», there is a close connection between the two versions. Consequently, parties may find inspiration in the «long form» and in this commentary with respect to issues not expressly dealt with in the «short form».

When revising the «long form», the Working Group decided to maintain the substance of the previous clause, but to simplify its wording in order to facilitate its understanding for SMEs and generally for non-lawyers. At the same time, the Working Group decided to replace the commentary annexed to the clause, with short explanatory text interspersed with the text of the clause.

The reader who needs a more detailed information on specific issues, may find some further information in this introduction/commentary.

2.2 The general definition of force majeure

The ICC Force Majeure Clause 2020 provides the following general definition of force majeure:

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

- a) that such impediment is beyond its reasonable control; and*
- b) that it could not reasonably have been foreseen at the time of the conclusion of the contract; and*

2 See, F. De Ly, *Analysing the ICC Force Majeure Clause 2003*, in Bortolotti, Ufot, supra, note 1, p. 113 et seq..

- c) *that the effects of the impediment could not reasonably have been avoided or overcome by the Affected Party.*

This definition requires three conditions, all of which must be fulfilled in order to relieve a party of its duties. However, as regards the two first conditions, (a) and (b), they are presumed to be fulfilled in case of listed events (infra, § 2.4), while the third one must be proved in any case by the affected party.

The conditions are worded in such a way as to provide a lower threshold than impossibility in order to relieve a party from its duties, by introducing the criterion of reasonableness. Thus, for instance, when it would be in theory possible to ship by plane a large quantity of iron when shipment by sea (as agreed in the contract) is prevented, the force majeure defence will nevertheless apply if the affected party can prove that shipment by air is not a reasonable way to overcome the impediment.

The parties may of course modify the clause by making it more restrictive (e.g. by cancelling the reference to reasonableness) or more flexible (e.g. by excluding the unforeseeability requirement). However, they are advised to always keep in mind, when changing the balance of the force majeure conditions, that the clause can benefit both parties. If a supplier wants a very extensive definition of force majeure in order to be able to benefit more easily from the clause, the supplier should always remember that the clause may also be invoked against it by the buyer³.

2.3 Non-performance by third parties

Paragraph 3 of the clause deals with a specific issue, i.e. the case of force majeure invoked because of non-performance by third parties (sub-contractors). This provision states, in conformity with Article 79(2) of the Vienna Convention on the International Sale of Goods (CISG) of 1980, that the affected party may invoke force majeure only if the requirements of force majeure are established both for that party and the third party. In other words, the affected party must prove that the third party as well was subject to force majeure.

It should be noted that this provision refers to “third parties engaged to perform one or more contractual obligations” of the affected party, i.e. subcontractors, and does not extend to those who supply products or services to the affected party. Non-performance by simple suppliers will normally not amount to force majeure for the buyer, since they will normally be part of buyer’s risk and consequently under its control.

The explanatory text under paragraph 3 specifies that the presumptions of paragraph 3 apply also to the non-performance of the third party/subcontractor.

2.4 The listed events and the general definition of force majeure

The working group had to decide a difficult issue concerning the relationship between the general definition of force majeure and the typical examples of force majeure (listed events) and in particular whether the listed events should be considered as force majeure independently of the requirements of the general definition, or whether the party invoking force majeure would be required to prove, regarding events of this kind, that the three conditions of the general definition were fulfilled. A third, more drastic, solution would have been not mentioning at all the typical events in the clause.

³ Thus, for instance, the seller of a machinery to be installed at the buyer’s premises, may discover that a too wide force majeure clause, intended to favour the seller in case of unforeseen events (like strike, non-performance by subcontractors), may be invoked by the buyer in order to delay the installation and consequently, warranty period and payment.

The first solution is clearly to be rejected. The existence as such of a typical force majeure event cannot be sufficient: war, fire, explosion, pandemic, might actually have been caused by the affected party itself and need not have prevented performance of the contract.

The second solution is certainly more appropriate, but, if all the requirements of the general definition must be met, there is no reason to mention specific events in the clause, since the affected party must in any case prove the existence of all three force majeure conditions.

The third solution, although reasonable Force Majeure Clause 2003 through a compromise solution, by introducing a presumption regarding the listed events, worded as follows:

«In the absence of proof to the contrary and unless otherwise agreed in the contract between the parties expressly or impliedly, a party invoking this Clause shall be presumed to have established the conditions described in paragraph 1[a] and [b] of this Clause in case of the occurrence of one or more of the following impediments:»

Considering the complexity of this approach, the Working Group was at first inclined to overcome the problem by simply requiring that all requirements of the general definition should be fulfilled even for the listed events. However, upon reflection it became clear that this would have made the list useless and that the solution of the 2003 clause should be maintained, with new wording and a clear explanation.

The new paragraph 3 has been worded as follows:

Presumed Force Majeure Events. In the absence of proof to the contrary, the following events affecting a party shall be presumed to fulfil conditions (a) and (b) under paragraph 1 of this Clause, and the Affected Party only needs to prove that condition (c) of paragraph 1 is satisfied.

After paragraph 3, the following explanation has been added:

The Presumed Force Majeure Events commonly qualify as Force Majeure. It is therefore presumed that in the presence of one or more of these events the conditions of Force Majeure are fulfilled, and the Affected Party need not prove the conditions (a) and (b) of paragraph 1 of this Clause (i.e. that the event was out of its control and unforeseeable), leaving to the other party the burden of proving the contrary. The party invoking Force Majeure must in any case prove the existence of condition (c), i.e. that the effects of the impediment could not reasonably have been avoided or overcome.

This solution is a reasonable compromise between the need for a general definition of force majeure and the current practice of including a list of typical events. The Working Party has made a substantial effort to simplify the wording of the provision compared to the 2003 clause, and to include an explanatory note drafted in the simplest possible way.

2.5 The listed events

The Working Group has tried to limit the listed events to the most important circumstances which may amount to force majeure.

This list may or may not satisfy the specific needs of a party, since these may vary according to the legal and economic context of each contract. In some cases, a party would like to include strikes affecting only its enterprise (while the list refers only to “general labour disturbances”), or, a party may exclude acts of authority in a context where there is risk that these may be influenced by the other party.

As explained by one of the members of the Working Party and Chair of the CLP Commission, Ercüment Erdem, in his presentation made at the 38th Annual Conference of the ICC Institute of World Business Law on “Hardship and Force Majeure in International Commercial

Contracts” (Paris 19-12-2018)⁴:

«While adding to or removing from the list of such presumptions, the Working Group has consulted with those who have overseen the development of various ICC model contracts, including other working groups of the ICC and National Committees, and obtained their sector-specific opinions. Dozens of court decisions and arbitral awards have been reviewed in order to determine the most common force majeure events that have led to disputes between contracting parties in the past.

In the New FM Clause, the following events are not listed, contrary to the 2003 FM Clause: armed conflict or serious threat of the same (including but not limited to hostile attack, blockade, military embargo), civil commotion or disorder, mob violence, act of civil disobedience, curfew restriction, and compulsory acquisition.

On the other hand, taking the recent global developments into account, currency and trade restrictions, as well as embargos and sanctions, are now included in the list. Certain other changes have also been made, such as the rewording of “act of God, plague, epidemic, natural disaster, such as, but not limited to, violent storm, cyclone, typhoon, hurricane, tornado, blizzard, earthquake, volcanic activity, landslide, tidal wave, tsunami, flood, damage or destruction by lightning, drought” as “plague, epidemic, natural disaster or extreme natural event” for simplification purposes.»

The parties may of course modify the list by adding other events or excluding some of them.

Of course, the events not included in the list may nevertheless qualify as force majeure, but the affected party will need to prove all three conditions. Thus, for instance, a party affected by a strike amounting to “general labour disturbance” need not prove that the event was unforeseeable and out of its control, but only that its effects could not be avoided or overcome. On the contrary, in the case of a strike regarding only the affected party, the latter must also prove that the event was unforeseeable and beyond its reasonable control.

2.6 The consequences of force majeure

Paragraph 5 of the clause states that:

«A party successfully invoking this Clause is relieved from its duty to perform its obligations under the Contract and from any liability in damages or from any other contractual remedy for breach of contract .. »

Consequently, the affected party is not responsible for damages, penalties, etc. due to impediments falling under the definition of force majeure. It is important to stress that the force majeure event relieves a party from the duty to perform its obligations, but does not entitle the party to claim for the extra-costs sustained or damages suffered as a consequence of the force majeure event⁵.

As provided in the second part of paragraph 5, the effects of the force majeure occur «[...] from the time at which the impediment causes inability to perform, provided that the notice thereof is given without delay». The obligation to timely notify the force majeure event, as reiterated in paragraph 4 (Notification) is an essential feature of the Force Majeure clause: If notice of the event has not been given timely, the relief will only be effective when the

⁴ E. Erdem, *The Revision of the ICC Force Majeure and Hardship Clause*, in Bortolotti, Ufot, supra, note 1, p. 123 et seq.

⁵ Thus, for instance, If the party invoking force majeure incurs further expenses or losses due to the force majeure, it will in principle not be entitled to recover such losses or extra expenses from the other party. See, for instance, ICC case 8873/97 (in JDI 1998, 1017-1027) where the arbitrators decided that extra costs due to force majeure (the contractor said that it had used more machinery for constructing a road, due to the difficulty of getting specialised personnel to Algeria) cannot be recovered, unless foreseen by specific contract clauses. See also the comment by K. P. Berger, *Force Majeure clauses and their Relationship with the Applicable Law, General Principles of Law and Trade Usages*, in Bortolotti, Ufot, supra, note 1, p. 133 et seq.

notice reaches the other party. Thus, for instance, if an event causing delay in performance is not notified timely, the affected party will benefit from its effects (relief from performance and possible penalty) only from the date on which the other party has been informed. This is an important means for preventing a party from invoking the existence of an alleged force majeure event only when the other party claims non-performance of its obligations.

Finally, the Force Majeure Clause 2020 has introduced a further clarification, by stating in the explanatory note to paragraph 5 that «[...] the other party may suspend the performance of its obligations upon the receipt of the notice to the extent these obligations result from the obligations impeded by Force Majeure and they are suspendable».⁶

2.7 Temporary impediment and contract termination

In most cases force majeure events are temporary and performance of the agreement can be resumed as soon as the circumstances which prevent performance come to an end. Paragraph 6 provides to this effect: (i) that the consequences of force majeure shall apply «[...] only as long as the impediment invoked prevents performance by the Affected Party of its contractual obligations», and (ii) that « [...] the Affected Party must notify the other party as soon as the impediment ceases to impede performance of its contractual obligations.»

Furthermore, paragraph 8 provides that, when the duration of the force majeure is too long and consequently has the effect of depriving the contracting parties of what they were reasonably entitled to expect under the contract, either party has the right to terminate the contract, by notification within a reasonable time to the other party. While the provision in the 2003 clause did not expressly provide a maximum duration of the period after which parties are entitled to terminate, but only a general criterion (i.e. the period after which parties were deprived of what they could reasonably expect from the contract), the 2020 clause now expressly provides a maximum period of 120 days, which applies unless otherwise agreed by the parties. This means that, if the parties do not agree on a shorter or longer term, they are in any case entitled to terminate the contract if the force majeure impediment lasts for more than 120 days.

2.8 The Short Form

The Short Form is a reduced version of the ICC Force Majeure Clause 2020, which can more easily be included as such in the respective contract.

The Short Form covers the essential issues, but is less complete than the Long Form. It is a fair and balanced standard clause for use in situations where the parties do not have specific preoccupations regarding possible force majeure events and simply wish to include a standard clause without needing to discuss its contents.

Considering the close connection between the Short Form and the Long Form, the more complete Long Form can be a useful tool for interpreting the Short Form and filling possible gaps. This might to a certain extent help to overcome the shortcomings of a more concise text.

⁶ As explained by E. Erdem, in Bortolotti, Ufot, *supra*, note 1, p. 126, «The Working Group considered that the suspension of the obligations by the non-affected party is a legal and logical consequence when the affected party is prevented from performing its obligations due to force majeure. It is also an application of the well-established principle of *exceptio non adimpleti contractus* that finds its place in several national laws.

3. THE HARDSHIP CLAUSE

Several national laws, as well as international instruments like the Unidroit Principles on International Commercial Contracts, deal with the issue of hardship, by establishing rules which intend to protect the disadvantaged party in case of events that have rendered performance more onerous than could reasonably have been anticipated at the time of the conclusion of the contract.

This trend, developed mainly in recent years, has given rise to legal solutions which substantially differ from country to country⁷.

While the basic principle that hardship must imply an unforeseen event that substantially upsets the equilibrium of the contract, the remedies foreseen when such situation arises may be substantially different. The first step in many laws (e.g. France, Russia, Estonia) is to invite the other party to renegotiate the contract, but the most controversial issue arises in case of failure of the renegotiation.

In this case some laws only recognize the right of the aggrieved party to terminate the contract (see, for instance, art. 1467 Italian civil code), while other laws entitle the aggrieved party to request the judge or arbitrator to adapt the contract or to declare its termination.

The ICC Hardship Clause 2003 recognised, in case of failure of the renegotiation, only the right of the party invoking hardship to terminate the contract, without including the option to request adaptation by the competent judge or arbitrator.

This restrictive position was strongly supported at the time by many businesspeople who feared that this option might leave space for possible abuses, arguing that a third party would never be able to decide a new balance of obligations on behalf of the parties.

This concern is still shared by a great part of business, but it must be recognised at the same time that there are situations (particularly in the context of long-term contracts) where adaptation is the only way to overcome critical situations which cannot be solved otherwise. Moreover, the right to request adaptation of the contract will often be a strong incentive for the other party to agree on a compromise solution.

This is why the Working Group has come to the conclusion that the Hardship Clause 2020 should provide the option to choose between both solutions: contract termination and contract adaptation. As regards the first option (termination), the clause provides two further sub-options: unilateral termination by the party invoking hardship or termination to be assessed by the competent judge or arbitrator.

These three alternative solutions are contained in paragraph 3 of the clause, as 3A, 3B and 3C.

Paragraph 3A provides that, in case of failure of the renegotiation, the party invoking hardship is only entitled to terminate the contract. This means that the aggrieved party can decide on its own whether to terminate or not, and consequently bears the risk that the termination may be found to be unlawful if it appears later that the hardship conditions required under paragraph 2 of the clause were not met.

Paragraph 3C provides that the right to terminate must be assessed in advance by the competent judge or arbitrator and cannot be unilaterally decided by the party invoking hardship. This solution has the advantage that the evaluation of the existence of the conditions of hardship is demanded in advance by the competent authority, which can make sure whether the termination is justified or not. At the same time, the intervention of the judge or arbitrator has the disadvantage of implying additional costs and time.

⁷ For a detailed and up-to-date analysis of the present situation, see M. Fontaine, *The Evolution of the Rules on Hardship. From the First Study on Hardship Clauses to the Enactment of Specific Rules*, in Bortolotti, Ufot, supra, note 1, p. 11 et seq..

Paragraphs 3A further specifies that amendment by the judge or arbitrator is expressly excluded unless with the agreement of both parties. This provision intends to clarify that, even where the applicable law would entitle the parties to request adaptation, such possibility is expressly excluded by the contract, and possible rules of the applicable law to the contrary are derogated⁸. By choosing this option parties make sure that there will be no space for adaptation of the terms of the contract by a third party, unless expressly agreed between them.

Paragraph 3B entitles either party to request the judge or arbitrator to adapt or terminate the contract, as appropriate. Under this provision the judge or arbitrator receives the power to change the contract terms in order to restore the original balance of obligations, or, where this does not appear possible or appropriate, to declare its termination. In order to facilitate the determination of the possible terms of this adaptation, the comment to paragraph 3B expressly states that the judge or arbitrator may invite the parties to submit proposals of modification they would deem appropriate, which can be taken as starting point for the adaptation.

4. CONCLUSION

In drafting these new ICC Force Majeure and Hardship Clauses 2020 the Working Group followed the traditional strategy of the ICC which consists in maintaining the existing standards and introducing changes only to the extent necessary for adapting them to the changing business context.

This is why the substance of the Force Majeure Clause 2003 has been maintained, although simplifying the wording and introducing explanatory comments in the text of the model clause, in order to make it as user-friendly as possible. Also, the new “short form”, which is more appropriate for inclusion as such in the contract, has been kept in line with the revised “long form”.

As regards the Hardship Clause 2020, the main innovation consists in the introduction, as possible option, of the right of the party invoking hardship to request adaptation, while maintaining the traditional option which provides contract termination as the only solution in case the parties cannot agree on alternative contract terms.

With these new standard clauses, the ICC has made a further step towards the establishment of soft law rules for the international business community.

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8 Of course, these provisions will be valid only if the applicable national rules are not mandatory, but this should normally be the case. See, M. Fontaine, *supra*, note 6, p. 36: « [...] legal rules or case law on hardship are in principle not binding » who concludes (page 37) that « [...] the main message is to encourage negotiators to verify the contents of the rules on change of circumstances in the applicable law, and to depart from them in case they are not satisfied. »

ABOUT THE INTERNATIONAL CHAMBER OF COMMERCE (ICC)

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