INTERNATIONAL CONTRACTS

New Trends in International Business and Commercial Law

Ilias Bantekas
Francesca Benatti
Sergio García Long
Filippo Viglione
(eds)

Wolters Kluwer CEDAM

Printed by

GECA - Divisione Libri di CISCRA S.p.A., Via Belvedere, 42 - 20862 Arcore (MB)

CHAPTER III

FORCE MAJEURE AND HARDSHIP CLAUSES

Denis Philippe *

CONTENTS:

1. Force majeure

1.1. Definition

Article 5.226 of the new Belgian Civil Code exempts the debtor in case of "force majeure. This exemption is generally recognised in civil law.

Force majeure exempts the debtor from an obligation when circumstances arise with the following characteristics:

- unaccountability to the party who invokes it;
- unforeseeability and unavoidability [1];
- irresistibly resulting in an impossibility to carry out the contractual obligation.

The force majeure leads to termination the contract if the obstacle is final and to suspension it if the obstacle is temporary [2].

---

* Full Professor of International Contract and Commercial Law at the Catholic University of Louvain.

[1] Unforeseeability is not always a condition as such. See article 5.226, §1, Preparatory works of the new Civil Code in Belgium, Chambre des représentants, exposé des motifs, DOC 55, 1806/01, p. 261.

[2] Cornelis L., *General Theory of Obligation*, Intersentia, 2000, p. 649, no 518; Guiomard

The table hereunder gives the structure of the force majeure:

HYPOTHESIS			REGIME	
Circumstances		Effects	Notification	suspension
Unaccountable	Unpredictable	Impossibility of execution		Dissolution

1.2. The clauses

The main peculiarity of the force majeure clause in international contracts lies in the flexibility and the efficiency given by the clause. Termination or suspension are not always the most appropriate solutions especially in international matters.

I will first give an example of clause in international contracts which did not foresee in renegotiation:

Neither party shall be required to perform any term, covenant, or condition of this agreement, including any payment obligation, so long as such performance is delayed or prevented by force majeure, which shall mean any wars, governmental laws, orders, regulations, requirements or actions, enemy or hostile governmental actions, strikes, lockouts, labor or employment difficulties, acts or threatened acts of terrorism, pestilence or epidemic (including but not limited to the current Covid 19 pandemic), civil commotions, fires, floods, accidents or breakdowns, or any other casualties or conditions which are beyond the reasonable control of either party and not due to the fault or negligence of such party (the "Force Majeure Event").

1.2 The party claiming the Force Majeure Event (the Claiming Party) will not be in breach of this agreement or otherwise liable to the other party (the Non-claiming Party) for any delay in performance or any non-performance of

P., *Influenza, epidemics and force majeure in ten stops*, Dalloz actualité, 2020; Jafferali R., *La réforme du droit des contrats. Les principales nouveautés*, *J.T.*, 2023, p. 44; Antonmattei P.-H., *Ouragan sur la force majeure*, Semaine juridique, 1996 - Doctr. n° 3907; Van Zuylen J., *La force majeure contractuelle revisitée*, Thèse, 2025, n° 84; M. De potter de ten broeck, *Gewijzigde omstandigheden in het contractenrecht,* Intersenti, 2016. When the contract has lost its usefulness during the suspension, the contract may end.

any obligation under this agreement if and to the extent that the delay or non-performance is owing to a Force Majeure Event. This clause only applies if:

(i) the Claiming Party could not have avoided the effect of the Force Majeure Event by taking precautions that, having regard to all matters known to it before the occurrence of the Force Majeure Event, it ought reasonably to have taken but did not take; and

(ii) the Claiming Party has used all reasonable endeavors to mitigate the effect of the Force Majeure Event and to carry out its obligations under this agreement in any other way that is reasonably practicable.

1.3 The Claiming Party must promptly notify the Non-claiming Party of the nature and extent of the circumstances giving rise to the Force Majeure Event.

1.4 The Non-Claiming Party may terminate this agreement or any approved or pending services immediately on written notice if the Force Majeure Event continues for more than thirty (30) days and the Claiming Party shall provide the Non-Claiming Party with [a pro-rata refund for all compensation paid in advance regarding unused services or preparatory work]. The Non-Claiming Party shall have no further liability for any [compensation for unused services if terminated under this clause X].

This first clause contains the hypothesis in which the clause applies (act of god, act of the authorities, pandemic). The clause foresees also in the effects of force majeure and a pro-rata-refund in advance regarding unused services.

In certain clauses, the mere threat (of war) qualifies as force majeure. We could give the example of the threat of the war in Ukraine; the Ukraine war was already in our head in December 2021; the war only becomes effective in February 2022.

What is also interesting is that in the recent clauses, *Ukraine war and covid are excluded* from the force majeure or hardship events, as we will see later. The parties considered that parties must assume the risks linked to this event.

The prejudiced party must also notify the force majeure event to the other party; it is recommended to describe the nature and extent of the force majeure event in the notification (this is not always foreseen in the clauses).

The quoted clause prescribed also a duty to mitigate in the shoulders of the claiming party and the creditor non claiming party (not the debtor) has the right to terminate the contract. This clause does not foresee in renegotiation.

In certain cases, an anticipated notification can be more appropriate. Let us take again of the war in Ukraine. We could imagine that in such a hypothesis, an anticipated notification (in December 2021) could have been more effective; indeed, this gives time for an eventual notification.

We can also give the following clause as example:

No Party shall be liable for any failure to perform its obligations where such failure is as a result of Acts of God (including fire, flood, earthquake, storm, hurricane or other natural disaster), war, invasion, act of foreign enemies, hostilities (whether war is declared or not), civil war, rebellion, revolution, insurrection, military or usurped power or confiscation, terrorist activities, nationalisation, government sanction, blockage, embargo, labour dispute, strike, lockout or interruption or failure of electricity [or telephone service], and no other Party will have a right to terminate this Agreement under Clause 19 (Termination) in such circumstances.

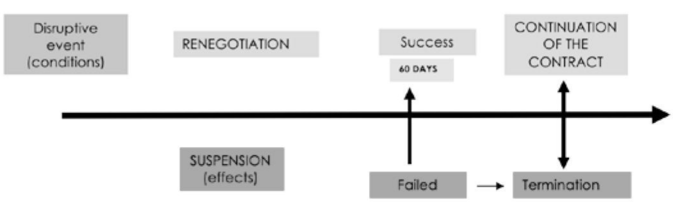
The circumstances are, as usual, given as example only and the list is not exhaustive. Pandemics is not mentioned (maybe the clause was drafted before Covid).

The clause reminds that the mere occurrence of the listed circumstances is not sufficient; a *causal link* must be established.

1.3. The effects of the force majeure in the clauses

We can schematize the effects of force majeure in the following table:

Timeline 1.



- Period of suspension

First, the creditor (buyer for example) can be given more freedom during the suspension of the contract. So the contract can stipulate:

Buyers shall be at liberty to procure from other suppliers any deficiency of deliveries caused by the operation of this clause.

Or in a longer clause:

X (the debtor) will be excused from performing its obligations under this Agreement and/or a specific Work Order to the extent that its performance is delayed or prevented by an event that the Party could not control, could not reasonably anticipate when the obligation was undertaken, and could not avoid through the exercise of due diligence ("Force Majeure"). To be excused, the Party claiming Force Majeure must promptly notify the other and exercise due diligence to avoid, remove or overcome the Force Majeure. In the event that Supplier's performance is excused because of a Force Majeure, the creditor may terminate or replace the part of Supplier's performance that is delayed or prevented from another source. Supplier's compensation will be equitably adjusted.

- Damage and costs

For delays and non-performance of obligations due to force majeure, neither party can claim penalties, interest or any other compensation or participation in the injury suffered by the party because of force majeure.

This clause is maybe too blunt but it avoids any discussion. But, sometimes during the suspension period, costs are incurred; for example, the seller carries out transport or stores goods. It will be useful to predict who will bear the costs of transportation or storage.

- Renegotiation of the contract

In principle, renegotiation is not foreseen by the law but clauses can organise it and we welcome this possibility:

If, due to force majeure, one of the parties is prevented from fulfilling its contractual obligations for a period of more than three months, the contracting parties meet to determine the conditions for the continuation of the contract or the termination of the contract.

Professors Fontaine and de Ly wrote that renegotiation of contract in case of force majeure was a rule of the *lex mercatoria* [3].

- Duty to mitigate

This is the second part of the second clause we quoted here above:

Any Party asserting Force Majeure as an excuse shall have the burden of proving that reasonable steps were taken (under the circumstances) to minimize delay or damages caused by foreseeable events, that all non-excused obligations were substantially fulfilled, and that the other Party was timely notified of the likelihood or actual occurrence which would justify such an assertion, so that other prudent precautions could be contemplated.

---

[3] Fontaine M. and de Ly F., *Le droit des contrats internationaux,* 2003, Émile Bruylant, p. 475; Philippe D., *Force majeure, contrats internationaux et arbitrage: recommandation dans la rédaction des clauses*, in *Liber Amicorum Xavier Dieux* (Larcier 2022), 899.

Duty to mitigate can be combined with renegotiation: you have an embargo of Russian goods; the seller can invoke force majeure but he seeks alternative solution and finds the possibility to acquire the same goods in Argentina but at a higher price; he mitigates the damage but it is important that he meets the buyer to discuss the price of the Argentinian goods how to share the additional costs, the way of delivery etc...

- Cessation of the force majeure event

This occurrence can also be organised:

The Contractor shall forthwith notify the Buyer as soon as the said Special and Excepted Risks have ended.

The termination of the force majeure shall similarly be notified.

The affected Party shall also provide notice to the other Party of

(i) with respect to an ongoing Force Majeure Event, the cessation of the Force Majeure Event, and

(ii) the affected Party's ability to recommence performance of its obligations under this Agreement

as soon as possible, but in any event, not later than seven (7) days after the occurrence of each of (i) and (ii) above or, where the affected Party has (acting reasonably) vacated the Site, or its relevant property, as the case may be, as a result of such Force Majeure Event, not later than seven (7) days after the date it becomes or should have become aware of such occurrence.

The consequences of the restart of the contract can also be organised. Especially in complex construction contracts; are the workers or materials always available to perform their services at the same economical conditions?

2. Hardship or unforeseen circumstances

2.1 Definition

The doctrine of unforeseen circumstances is intended for having the adjustment of the contract admitted when circumstances with the following characteristics arise:

- unaccountability to the party that invokes it;
- unpredictability and unavoidability;
- inevitably leading to an upheaval in the contractual economy [4].

[4] See for a comparative analysis, Philippe D., *Changement de circonstances et*

Hardship leads to renegotiation of the contract and not to termination. Hardship can be schematized as follows:

Hypothesis			REGIME	
Circumstances		Effects	Notification	Renegotiation
Unaccountable	Unpredictable	Frustration of purpose Excessively expensive Disruption of the contractual economy		Dissolution in case failure of the Negotiations

For the application of this doctrine, we can refer to what we have outlined on the unaccountability and unpredictability in terms of force majeure. The upheaval of the contractual economy is different from the impossibility that finds application in force majeure. Indeed, execution should not be impossible but excessively onerous to apply hardship.

2.2. The clauses

Once more, the drafting of the clause is more complex due to the volatility and complexity of our world; performance of the obligations can be first suspended, then become excessively burdensome; and at the end termination can be envisioned.

A short clause can be put forward:

In the event of a fundamental change in circumstances that place an unfair burden on one of the parties arising from this Protocol, the parties will consult with each other to jointly find fair adjustments to that agreement.

Or:

In case of hardship, a party can require a renegotiation of the contract. If

bouleversement de l'économie contractuelle, Bruylant, 1986; Hondius E. and Grigoleit H. C. (eds), *Unexpected circumstances in European contract law*, Cambridge University Press, 2011, France and related jurisdictions by Phillippe D., p. 144. Imprévision is now recognised in Belgium (article 5.74 Code and article 1195 French civil code.

the definitive adaptation of the contract cannot be found rapidly, parties will in a period of one week, proceed to a temporary adaptation of the obligations until a definitive adaptation is agreed upon.

The above quoted clauses did not mention circumstances, leading to hardship. Let us give a more exhaustive clause:

If owing to changed circumstances such as changes in monetary values or discriminatory Governmental action or regulations, pandemics or differential customs duties unduly discriminating against the origin from which A is then supplying to B, the continued operation of which is causing undue hardship to either party, that party shall have the right to require the other party to participate in a joint examination of the position with a view to determining whether revision or modification of the provisions hereof is required and if so what revision or modification would be appropriate and equitable in the circumstances.

2.3. Force majeure and hardship in the same clause

Let us take the example outlined above. You cannot source from China and you invoke force majeure. There is an alternative source of supply in Argentina but the cost is twice as high, and choosing that source of supply would lead to an important loss for you; you can invoke hardship to renegotiate the contract.

In this case, force majeure and hardship apply at different levels.

We can give another example:

If unknown and/or unforeseeable consequences of the Events adversely affect the ability of a Party to perform this Contract or makes the performance of the Contract excessively onerous for one Party (despite the application of the indexation clause of the Contract Price referred to in clause [●]) without the possibility of remediation by any reasonable means, the affected Party may request that the Parties meet to agree in good faith reasonable revision of the Contract Programme and/or additional Costs (the “Events Request”).

We can consider that “adversely affect the ability of a Party to perform “could qualify also as force majeure.

In the same vein, we can quote the following clause:

a) due to an event (hereafter the “Hardship Event”) beyond its reasonable control and without fault or negligence of the affected Party;

b) which event was unforeseeable at the time of the conclusion of the Agreement; and that

c) the affected Party has not assumed that risk and could not reasonably have avoided or overcome the event or its consequences.

Could not overcome the event or the consequences could also apply in case of force majeure.

But the same clause excludes Covid 19 and the Ukraine war from the scope of application.

The remedies arising under this Clause 1.1 [Russia-Ukraine situation – Coronavirus health crisis] are the sole and exclusive remedies of the Parties for the obligations and the liabilities arising under or in connection with the Events. It is then expressly specified that the Events and/or the consequences of the Events shall not in any case allow a Party to request a renegotiation of the Contract and/or an extension of time and/or an extension of Costs under any other provision of this Contract, including the Clauses [Changes in Law], [Consequences of Force Majeure] and [No Hardship (imprévision)].

We can also advise to introduce some parameters, like a ceiling.

Under extraordinary situations, should the economic or political or sanitary circumstances dramatically impact the transport costs or energy surcharge levels and that their variation exceeds 20%.

Some clauses linked hardship at the profitability of the contract; this longer clause is a good example:

Substantial hardship shall mean if at any time or from time to time during the term of this Agreement without default of the party concerned there is the occurrence of an intervening event or change of circumstances beyond said party's control when acting as a reasonable and prudent operator such that the consequences and effects of which are fundamentally different to what was contemplated by the parties at the time of entering into his Agreement such as, without limitation, the economic consequences and effects of a novel economically available source of products, which consequences and effects place said party in the situation that then and for the foreseeable future all annual costs (including, without limitation, depreciation and interest) associated with or related to the processed oil which is the subject of this Agreement exceed the annual proceeds derived from the sale of said oil notwithstanding the effect of other relieving or adjusting provisions of this Agreement the party claiming that it is placed in such position as foresaid may by notice request the other for a meeting to determine if said occurrence has happened and if so to agree upon what, if any, adjustment in the price then in force under this Agreement and/or other terms and conditions thereof is justified in the circumstances in fairness to the parties to alleviate said consequences and effects of said occurrence.

This clause is very interesting; the profitability is always an interesting criterion but requires a good and not always easy calculation.

2.4. Legal regime of hardship

First, the renegotiation and then after an arbitrator or a national judge.

But some clauses foresee the continuation of the contract:

Each Events Request shall be duly justified and does not release the Parties from their contractual obligations.

Others foresee the possibility to withdraw:

2) Failure to agree about the new applicable conditions will enable the CONTRACTOR to withdrawal from the CONTRACT by giving notice to the CLIENT by registered letter with return receipt or PEC with notice of at least 90 days.

2.5. Renegotiation

For the renegotiation**,** I advise to organise it very carefully. I give some thoughts:

You can foresee a first meeting between operational persons, then you escalate at the level of the head of the project and then finally the CEOs. Normally it must successful; in case of failure, then you can go to mediation and eventually to arbitration. But always leave a place to dialogue.

Maybe it could be advisable to provide minutes of the meetings (so we can more easily see whether the negotiators are of good faith or not); the duration of the negotiations (agenda is always important for a good management); eventually the presence of an observer.

Mathematical parameters can be introduced: for instance: you can foresee that in case of increase of costs, the owner bears the costs of the increase except 10% of these costs stay on the shoulders of the contractor; these 10% would represent the risk he assuming in entering into the contract [5].

2.6. Intervention of a third party

If the negotiations between the Parties do not lead to a satisfactory result

---

[5] See in this sense, article 1664 of the Italian civil code.

for all Parties within 60 Days after the request for renegotiation was made by one of the Parties, the Parties undertake, upon the request of one of the Parties, to apply the CEPANI Rules of Adaptation of Contracts.

The third party appointed in accordance with these Rules shall, inter alia, determine (i) whether a Hardship Event exists, and (ii) if so, what changes need to be made to the Agreement in order to amend it fairly and to make it possible to put an end to the imbalance that has emerged between the Parties. The opinion of the third party appointed in accordance with the above Rules shall be final and binding upon the Parties.

The third party shall render his decision within 60 days except if both parties accept to prolong this time limit.

The Cepani rules (Belgian arbitration center) can be binding or indicative at the choice of the parties.

An arbitrator can also be call upon.

If the Seller and the Buyer have not agreed a mutually acceptable solution within (sixty) 60 days after the notice requesting a meeting under the provisions of the Section..., either party may require the matter to be submitted for arbitration in accordance with Section..., the arbitrators shall determine whether the aforesaid occurrence has happened, and if so what adjustment, if any, in the said price or in the other terms and conditions should be made for the purposes of paragraph x having due regard for the interests of the other party, and any revised prices or other conditions so determined by said arbitrators shall take effect on the date when notice of arbitration who did not request arbitration may, not later than sixty (60) days from the date the arbitration award is issued, give notice of termination of the Agreement the termination to be effective either at the end of the next succeeding Contract Year or at the end of the second succeeding Contract Year, which termination date shall be stated in said notice.

The other party shall have sixty (60) days from the date of receipt of said notice of termination to elect by notice to the party giving notice of termination whether to accept said termination of to continue the Agreement under the terms and conditions.

This clause is also interesting; first the arbitrator must determine whether the event did happen (it is more a factual assessment); the arbitrator can then determine the price adjustment but then parties can terminate the contract; and the other party can oppose to this solution. It is a complex clause and not easy to apply.

Referee can also be foreseen.

Failing such agreement the matter shall be referred for decision to three referees who shall be persons fitted by the possession of expert knowledge for such decision. Each of the parties hereto shall be entitled to appoint one referee and the third one shall be nominated by mutual agreement between the parties of failing such agreement by the President for the time being of the International Chamber of Commerce. All such referees shall be deemed to be acting as experts and not as arbitrators, and their decision shall be final and conclusive.

In technical matters, I advise to call upon a referee (for instance, the determination of the price of electricity due to increase of price in the world market). But if you want a decision which is immediately enforceable all over the world, arbitration must be preferred because arbitration awards are enforceable everywhere on the basis of the New York Convention of 1958.

3. Conclusions

We think that the contract must be an instrument of dialogue.

Communication at all stages is essential; notification of force majeure or hardship events must be complete (description of the event, nature and duration); information on the evolution of the force majeure or hardship event must be provided.

In case of force majeure, attention must be paid to the suspension period.

Escalation is also key; application of hardship is the ultimate solution; adaptation of the price is maybe, the first step; then a good organization of the renegotiation can be important.

Also some indication can be given on the thresholds for the application of the hardship (for instance, the clause can only apply in case of increase of the costs of 20%).