

ICC case law on force majeure and hardship in international commercial contracts: a brief overview



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General remarks

Pandemic results in a large-scale economic turbulence.

➤ Debtors:

impossibility,

unexpectedly burdensome performance of the contract caused by restrictions on trade and movement, economic crisis, price fluctuations etc.

➤ Force Majeure and Hardship: regular, rather than exceptional remedies?



Purposes of the regulation

- Ensure a balance between stability and flexibility of contractual relations;
 - Allocate the risks deriving from the pandemic equally between the businesses;
 - Restore the economy from the crisis;
 - Preserve legal stability;
 - NOT aggravate the chaos.
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Examples in ICC international commercial dispute resolution practice

Force majeure: contract clauses, then the applicable law.

General principles of international commercial contracts:

- Article 79 of the 1980 Vienna Convention (CISG): impediment beyond the party's control
- Article 7.1.7 (Force majeure) of the UNIDROIT Principles;
- Article 6.2.2 (Definition of Hardship) of the UNIDROIT Principles.

These principles have also been formulated by the courts in various legal systems.



Unforeseen impediments to performance

As a rule, a debtor can be released from liability only if:

- at the time of the conclusion of the contract, the impediment to its fulfillment was not foreseeable and
- this impediment or its consequences could not be avoided or overcome.

The debtor has to prove that he did not assume the corresponding risk.

e.g. that the extent and period of existence of the impediment were unpredictable.



Each party bears the risk that performance of the contract may become more burdensome

! Even if this risk was not foreseeable at the time of the conclusion of the contract.

- The buyer bears the risk that the market price of the goods drops down or that the goods will lose their value.
- The seller bears the risk of a price increase or an increase in the cost of purchase or manufacture.
- The party cannot be relieved of liability due to a lack of money (e.g. loan terminated).



Exceptions

- ▶ an extraordinary depreciation of money, or
- ▶ economic impracticability: extraordinary increase of the seller's expenses;
- ▶ payment in a foreign currency prohibited by a state act, and payment by other means impossible or unreasonable.

The principle of good faith applies.

An economic downturn ≠ force majeure

Economic crisis does not, as a rule, constitute a force majeure event, since it is an ordinary contractual risk.

➤ *Cessna Finance Corporation v Gulf Jet LLC (Final Award), ICC Case 18769 of 2014*

The buyer: economic downturn, market changes, lack of financing for the transaction = “any other reason beyond reasonable control”.

The arbitral tribunal: force majeure releases the buyer from the consequences of an economic risk only if this is expressly indicated in the contract.

Same in UK state court: *Tandrin Aviation Holdings Ltd v Aero Toy Store LLC and another* (failure to pay under aircraft leasing agreements)



Global Tungsten & Powder Corp v Largo Resources Ltd. (ICC case 2011)

The supplier referred to the fact that drought prevented him from making tungsten concentrate: no water.

The buyer objected that the supplier was able to carry water in trucks, although this significantly increased the cost of producing the goods.

The drought was recognized as force majeure, because it made the performance of the contract impossible.

BUT not for the whole period: the seller should have installed a new, more efficient water supply system: “commercially reasonable maximum efforts” to overcome the problem.

- The arbitral tribunal ordered the supplier to pay losses for non-delivery of the goods only in the initial period of the drought.

The conclusions of the arbitral tribunal

- ▶ The party that refers to a force majeure event bears the **burden of proof** that its performance was impossible due to such event.
- ▶ The debtor must use a commercially reasonable replacement (for example, generic goods that differ slightly) or production and delivery methods (e.g., other packaging, other means of transport).
 - ▶ However, unrealistic, impractical and uneconomical extremes cannot be expected.
- ▶ The seller, *by default*, is obliged to find this kind of goods in the market.
 - ▶ UNLESS the contract limits the seller's obligation to deliver to one or more sources.

NB: the seller's risk can be reduced if the contract provides for the seller's obligation to deliver goods from one or more specific sources.



The force majeure event must be the cause of non-performance

If the goods were lost during an unforeseen natural disaster,
but **because of** defective packaging,
the debtor is still liable for non-performance of the contract.

- No causal relationship if the obstacle did not exist at the time the performance was to take place.

However, the parties may agree otherwise in the force majeure clause.

- The debtor does not need to prove that he would be able to fulfill the contract if the force majeure did not happen.



A notice of force majeure is **NOT ALWAYS** necessary to relieve liability

No timely notice – no right to invoke force majeure?

Only if the contract provides so,

or the failure to notify causes **damage** to the other party.

- No need if the party **knew** about the facts underlying force majeure.

ICC Award 19222 2016, General Dynamics United Kingdom Ltd. v State of Libya.



The force majeure event is over when all restrictions are removed

- A force majeure event is over when the fulfillment of the obligations is again completely possible and unlimited.
- The extension of the period for fulfillment of obligations may be longer than the duration of the impossibility of performance:
 - time to restore the business after the removal of force majeure event.

A small probability of new restrictions does not count.

ICC case 18982 (the natural gas transportation agreement)

ICC FORCE MAJEURE AND HARDSHIP CLAUSES (March 2020)

ICC force majeure clause (long & short forms)

- ▶ a general definition (the occurrence of an event that prevents or impedes a party from performing its contractual obligation(s))...; **≠ impossibility**
- ▶ and a list of force majeure events.

Parties may delete or add some events, in accordance with their specific needs.

ICC Hardship clause: if no negotiated solution, two options: adaptation or termination.





Conclusion

Parties are relieved from their obligations only on exceptional basis.

Force majeure and hardship remedies should be applied carefully to avoid an avalanche-like default.

To preserve the legal certainty of international trade:

a party should not, as a general rule, be exempted from liability due to lack of financing or an unexpectedly increased burden of contract performance.

A detailed Force majeure and Hardship clause is important.

Sources and further reading

- ▶ Fabio Bortolotti and Dorothy Ufot (eds), *Hardship and Force Majeure in International Commercial Contracts: Dealing with Unforeseen Events in a Changing World*, *Dossiers of the ICC Institute of World Business Law*, Volume 17 (© Kluwer Law International; ICC 2018).
- ▶ Berger, Klaus Peter and Behn, Daniel, *Force Majeure and Hardship in the Age of Corona: A Historical and Comparative Study* (April 20, 2020). *McGill Journal of Dispute Resolution*, Forthcoming. Available at SSRN: <https://ssrn.com/abstract=3575869>.
- ▶ Davydenko, Dmitry, *Reference of the Parties to Economic Hardship in the Practice of International Dispute Resolution* (May 27, 2020). <https://ssrn.com/abstract=3611706>
- ▶ *Global Tungsten & Powder Corp v Largo Resources Ltd*. Award in ICC Case 19566 of 2011.
- ▶ *Tandrin Aviation Holdings Ltd v Aero Toy Store Llc & Anor* [2010] EWHC 40 (Comm).
- ▶ *Cessna Finance Corporation v Gulf Jet LLC (Final Award)*, Award in ICC Case 18769 of 2014
- ▶ *General Dynamics United Kingdom Ltd. v State of Libya*. Award in ICC Case 19222 of 2016.