II.B. The Problem

The tribunal noted that pursuant to that provision as interpreted by the Supreme Court of Libya, force majeure is established only if an event has occurred that, a) is beyond the control of the parties, b) is unforeseeable at the time the agreement, out of which the parties’ duties to perform arise, is entered into, and c) renders the performance of the obligation of the non-performing party absolutely impossible. These requirements are in fact very similar to the general elements of force majeure clauses in international business contracts. Apart from a definition of eligible force majeure events in a specific or generic way or by way of a combination of both, such clauses typically contain the following requirements for any event that qualifies as force majeure under the definition contained in the clause:

- unforeseeability,
- unavoidability,
- uncontrollability and
- the effect of rendering a party’s obligation impossible.17

These requirements are now also reflected in Art. 1218 (1) of the French Civil Code.18 They are in line with international arbitral practice.19

Art. 1218 was included in the French Civil Code through the reform bill of February 2016 and reads: “In contractual matters, there is force majeure where an event beyond the control of the debtor, which could not reasonably have been foreseen at the time of the conclusion of the contract and whose effects could not be avoided by appropriate measures, prevents performance of his obligation by the debtor”; English text available at https://www.trans-lex.org/601101.

See RSM Production Corporation v Central African Republic (ICSID Case No. ARB/07/2), Interim Award on Jurisdiction and Liability of 7 December 2010, text available at https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/07/2, p. 43, para 179: “The force majeure requirements are defined in Art. 28.2 of the Contract, namely unforeseeability, unavoidability and uncontrollability. In the present case, the two parties are bound by that force majeure definition in the Contract. That definition corresponds to the one developed in arbitral case law” (translation by the author).

Referring Principles:

VI.3 - Force majeure