Expecting the Unexpected: the Force Majeure Clause

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[...]

Drafting a force majeure clause

Definition

The traditional criteria of force majeure are unforeseeability, unavoidability and the effect of rendering performance impossible.39

Long-term international contracts predominately contain one of three types of force majeure clauses: some clauses expressly define the concept of force majeure; others refer to an external source of law; and still others contain no definition at all.

The most robust types of force majeure clauses expressly define the concept of force majeure. For example:

'In this Clause, "Force Majeure" means an exceptional event or circumstance:

(a) which is beyond a Party's control,

(b) which such Party could not reasonably have provided against before entering into the Contract,

(c) which, having arisen, such Party could not reasonably have avoided or overcome, and

(d) which is not substantially attributable to the other Party.'40

Clauses that define the concept of force majeure often exclude some of the traditional criteria - most often unforeseeability- and routinely apply a less rigorous standard.41 For example, many force majeure clauses do not require

performance to be absolutely impossible.42 Instead these clauses merely require that performance be 'hindered', 'delayed' or 'negatively affected'.43 Moreover, the criteria are often conditioned by 'reasonableness',44 mostly applied either to unforeseeability or unavoidability.
Other force majeure clauses do not expressly define the concept of force majeure but rather reference an external source such as 'generally recognized force majeure causes' or 'cases of force majeure admitted by case law of [insert country]'\textsuperscript{45}. However, caution must be exercised when using vague formulations; for example, the former phrasing does not specify \textit{by whom} the force majeure causes are 'generally recognized'. In addition, where a clause references the definition of force majeure in a specific law, drafters should ensure that it is the same law of the contract; otherwise it might later create difficult conflict of laws issues for an international arbitral tribunal\textsuperscript{46}.

In ICC Case No 11265, the contract did not expressly define force majeure and instead merely referred to a list of events qualifying as force majeure.\textsuperscript{47} The arbitral tribunal considered that the force majeure provision in the contract should be read in light of the UNIDROIT (International Institute for the Unification of Private Law) Principles, which contain a general definition of force majeure.\textsuperscript{48} Based on that definition, the tribunal concluded that the respondent's failure to perform did not constitute force majeure.\textsuperscript{49}

Finally, the least common type of force majeure clause is one that contains no definition. For example:

'If, as a result of \textit{Force Majeure}, any Party is rendered unable, wholly or in part, to carry out its obligations under this Agreement... then [inclusion of description of consequences].'

Under this clause, the law applicable to the contract will ordinarily determine whether the criteria for force majeure have been satisfied. As explained above, it is therefore recommended that contract drafters carefully research the law applicable to the contract before including a force majeure clause in a contract, especially if the clause contains no definition.\textsuperscript{50} But note that some domestic courts and international arbitral tribunals may try to give effect to the force majeure clause in accordance with the parties' reasonable intentions, regardless of the law applicable to the contract.

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\textsuperscript{39}See Marcel Fontaine and Filip de Ly, \textit{Drafting International Contracts: An Analysis of Contract Clauses} (Brill Academic 2006), 403.

\textsuperscript{40}\textit{Conditions of Contract for Construction}, International Federation of Consulting Engineers, Art 19.1; see also United Nations Convention on Contracts for the International Sale of Goods, Art 79(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.').

\textsuperscript{41}See Fontaine and de Ly, n 39 above, 403; Konarski, n 4 above, 425 (noting that 'more and more clauses stipulate that the event need not be unforeseeable, but simply beyond the reasonable control of the parties').

\textsuperscript{42}See Fontaine and de Ly, n 39 above, 405; but see \textit{Hess Corp v Eni Petroleum US, LLC & Eni USA Gas Marketing LLC}, 435 NJ Super 39 (App Div, 9 January 2014). In \textit{Hess}, the parties had entered into a contract for the sale of natural gas that did not require that the gas be produced from a specified field or be transported to the delivery point via a specified route. In 2008, a leak in a pipeline resulted in the seller being unable to ship gas from its production fields in the Gulf of Mexico to the delivery point via the pipeline. The seller claimed force majeure on the basis that the contract included as a force majeure event an interruption and/or curtailment of firm transport by a pipeline transponder. The buyer disputed the force majeure claim, and the US court agreed, ruling that the seller's performance should not be excused by force majeure because nothing in the contract obliged the seller to ship the gas to the delivery point via a specific route, or for the gas to have been produced from a specific source. The delivery point itself was unaffected and alternative sources of natural gas were available at the delivery point at such time. The court reasoned that there was nothing in the contract that prevented the seller from purchasing natural gas from other sources and supplying it to the buyer at the delivery point.

\textsuperscript{43}Under English law, clauses that refer to performance being 'prevented', 'hindered' or 'delayed' by force majeure may of course be subject to different interpretations. See, eg, \textit{Tennants (Lancashire) Ltd v CS Wilson & Co Ltd} [1917] AC 495.

\textsuperscript{44}See, eg, \textit{ICC Force Majeure Clause 2003}, n 6 above, Art 1 (requiring a party to prove '(a) that its failure to perform was caused by an impediment beyond its reasonable control; and (b) that it could not reasonably have expected to have taken the occurrence of the impediment into account at the time of the conclusion of the contract; and (c) that it could not reasonably have avoided or overcome the effects of the impediment').
45 See Fontaine and de Ly, n 39 above, 406; see also Al Qurashi, n 9 above, 280 (providing the following example of a clause in an agreement entered into by Brazil: 'In accordance with the provisions of Article 1058 of the Brazilian Code, neither Party shall be liable for losses resulting from a fortuitous event or force majeure.

46 See Fontaine and de Ly, n 39 above, 407.

47 ICC Case No 11265.

48 Ibid s 128.

49 Ibid s 129.

50 See 'Force majeure and the applicable law' above.

Referring Principles:

VI.3 - Force majeure