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Force majeure in international contracts: current trends and how international arbitration practice is responding

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[...]

6.1 Economic hardship

Over the life span of a contract, a wide spectrum of factors from the rise in costs to depreciation of a mutually specified currency might affect the economics of contractual arrangements. This, as seen in common cases of economic force majeure or hardship, might at times lead to a sharp increase in the cost of performance to the detriment of one of the parties. As a matter of principle, in the event of such economic hardship, the parties must adhere to the terms of their agreement and the affected party, therefore, cannot claim the right to refuse performance, merely since contract becomes unprofitable. The underlying premise of this principle lies in the assumption that, whatever its magnitude, economic fluctuation is a foreseeable risk, which should have been, in one way or another, allocated by contracting parties, who possessed, or expected to possess adequate knowledge of the complexity of commerce. As Dalhuisen rightly puts it, the unwelcoming attitude of courts and tribunals towards claims of force majeure by professional merchants arises from the fact that the concept of force majeure is theoretically intended to protect weaker parties and in the case of professionals such a protection is not needed.

[...]

7. CONCLUSION

Through review of a number of international arbitration cases, arising from man-made events, including war, revolution, strike, supervening illegalities, and economic crises, the article sought to critically examine the practice of international arbitration tribunals, vis-à-vis the concept of force majeure. As it was found, in the event of an interfering subsequent event, the same as in national jurisprudences, here also the starting point would be that the parties to international contracts should take the risks of performing contract upon themselves, unless a different mechanism for allocation of risk is expressly provided for in the text of contract. However, here too, should a contracting party successfully show that the occurrence of an external, unforeseeable, and insurmountable event, has rendered the fulfillment of a contractual obligation impossible, international tribunals would excuse that party from liability for the non-performance. The proportionately small number of accepted claims of force majeure, however, suggests that international tribunals have been more disinclined to entertain claims of force majeure, particularly where a contract was concluded between businessmen, ie professional merchants who are supposed to be far more knowledgeable about the complexity of international contracts. The element of ‘professionalism’ is taken into account, particularly in relation to cases of economic change. That means, whatever its degree, such a change in the economics of contract is usually held to be a foreseeable risk, which should have been, in one way or another, allocated by contracting parties. A similar reluctance could also be seen as to force majeure claims raised by states and state-owned enterprises. As shown earlier above, the rigorous application of the test of attributability in most cases led to the rejection of force majeure claims made by states that had relied on the occurrence of wars, revolutions, supervening illegalities, and macroeconomic crises. The point that
also should be made here is that in the application of the imputability test to cases, in which a state or a state-owned company is a party, international tribunals might also cast an eye on international law aspects of investment cases, ie what was seen in some strike-related cases.

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Referring Principles:
- VI.3 - Force majeure
- VIII.1 - Definition