Title:
VI.3 - Force majeure

Content:
No. VI.3 - Force majeure

(a) If non-performance of a party is

i) caused by an impediment which is beyond the non-performing party's typical sphere of control, and

ii) which occurs after the conclusion of the contract and which could not have reasonably been foreseen by the non-performing party at the time of conclusion of the contract, or

iii) which existed at that time but was not known by that party and could not have been known by a reasonable person of the same kind as the non-performing party in the same circumstances, and

iv) the effects of the impediment could not have been avoided or overcome by the non-performing party, and

v) the non-performing party did not assume, explicitly or implicitly, in the contract or otherwise, the risk of the existence or occurrence of the impediment,

then that party's non-performance is excused.

(b) Unless otherwise agreed by the parties expressly or impliedly, impediments as defined in subsection (a) i) above are

i) war, whether declared or not, or any other armed conflict, military or non-military interference by any third party state or states, act of terrorism or serious threat of terrorist attacks, or

ii) civil riot, sabotage or piracy, strike or boycott, or

iii) act of government, requisition, nationalisation, or any other acts of authority whether lawful or unlawful, blockade, siege or sanction, or

iv) accident, fire, explosion, or

v) natural disaster such as, but not limited to, storm, cyclone, hurricane, earthquake, landslide, flood, drought, or

vi) plague, epidemic, pandemic, other viral outbreak, including any acts or orders of governments or public authorities based thereon, or

vii) any event similar to the ones listed under i) to vi) above.

(c) If non-performance caused by an impediment as defined in a) and b) above is temporary, performance of the contract is suspended during that time and that party is not liable for damages to the other party. If the period of non-performance becomes unreasonable and amounts to a fundamental non-performance, the other party may claim damages and terminate the contract.

(d) The party who fails to perform must give notice to the other party of the impediment as defined in a) and b) above and its effect on its ability to perform. If such notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, it is liable for damages resulting from such non-receipt.

(e) Where the obligee has been prevented by an impediment as defined in (a) and b) above from causing a limitation period to cease to run, the limitation period is suspended so as not to expire before one year after the relevant impediment has ceased to exist.

Commentary:
1 Force majeure ("vis major", "Acts of God", "Force Majeure", "höhere Gewalt") protects the debtor from liability for non-performance if his non-performance is caused by an external, unforeseen and unavoidable event. While under the hardship principle, performance remains possible but must have become excessively more onerous for the aggrieved party, performance under the contract must have become physically or legally impossible for the party invoking the force majeure defense. In such a scenario, excuse for non-performance based on the force majeure defence is granted only if the aggrieved party proves the following four requirements:
1. Externality: Occurrence of an external event for which the obligor has not assumed the risk.

2. Unavoidability/Irresistability: The occurrence of the external event was beyond the obligor’s (typical) sphere of control/ordinary organization of his business and was absolute.

3. Unforeseeability: The event and its consequences, i.e. the adverse impact on the obligor’s ability to perform, could not reasonably have been avoided or overcome by the obligor, e.g. by alternative and commercially reasonable (measured against the risk-distribution in the contract) modes of performance, procurement or transportation, or other safety measures. External events are typically unforeseeable.

4. Causation ("conditio sine qua non", "but for"-test): The obligor’s non-performance was, as a “matter of commercial reality” caused by the external event and not by the obligor’s own fault (e.g. self-inflicted production problems, defective goods or packaging or the aggrieved party would not have performed in any event for other reasons unrelated to the force majeure event).

2 Subsection (b) contains a list of typical “external” force majeure events. The reference to “piracy” in subsection (b) i) takes account of the increasing threat of piracy (for a definition see Art. 101 United Nations Convention on the Law of the Sea) to global sea transports, e.g. in the Gulf of Aden, offshore Lagos in Nigeria and in other places of the world. The events “acts of terrorism or serious threats of terrorist attacks” contained in subsection (b) i) are a reaction to a change in the force majeure drafting practice of many companies after 9/11. The wording of the introductory phrase of that subsection ("such as") and of subsection (vii) ("any event of a similar nature") makes it clear that the list of force majeure events contained therein is non-exhaustive unless the parties provide otherwise in their contract. Thus, it may be considered a force majeure event if a mandatory export control law in force in the country of one of the parties prohibits the export of goods from that country under the conditions set forth in the contract.

3 The mere fact alone that performance of a contract becomes economically more onerous or commercially less attractive for one party does not constitute a force majeure event even though the lack of funds may have been caused by a force majeure event listed in subsection (b). A change in economic or market conditions, affecting the profitability of a contract or the ease with which a party’s obligations can be performed, does not constitute a force majeure event under subsection (b). Such scenarios may be considered Hardship events under Trans-Lex Principle VIII.1. Lack of funds may be considered a force majeure event, however, if the economic onerousness of performance comes close to a physical impossibility to perform or if the parties have extended the scope of force majeure to such scenarios in their contract, e.g. in the force majeure clause.

4 If a seller of generic goods has problems with his supplier, that situation does not in and of itself constitute a force majeure event. The seller’s responsibility for its supplier is part of its general procurement risk, unless the seller has included a “delivery-against-supply clause” into the contract, which limits its procurement risk to the supply received, or the other party has assumed the supply risk (e.g. by insisting on a certain supplier or by otherwise identifying the seller’s source of performance more or less narrowly in the contract) or the seller is obliged to deliver specific or identified goods or the seller’s duty to deliver is limited to a fixed stock.

5 The seller is likewise responsible (and may not invoke the force majeure defense absent an external impediment beyond his control) for its employees, subcontractors or other parties in his sphere of control. If the seller engages other independent third parties for the performance of the contract, the force majeure defense is available to him only if that party is exempt under the force majeure Principle and the person whom he has engaged would be so exempt if the provisions of the force majeure Principle were applied to him. The situation may be different if the other party has insisted on the involvement of the third party, thereby assuming the risk associated with the involvement of that third party.

6 No party may derive an advantage from the force majeure event. This "no profit-no loss" rule is expression of an international standard of fairness, which has its roots in the Principle of good faith.

7 The notification requirement in Subsection (d) results from the application of Principle IV.6.9 in the force majeure context. Because the non-performing party’s duty to notify the other side of the impediment is a contractual duty, the other party may claim damages pursuant to Principle VII.1 if the non-performing party violates this duty. The other party must be compensated for every kind of loss it could have avoided if it had been informed on time and in sufficient form and detail of the force majeure event and the aggrieved party’s intention to invoke the force majeure defence.

8 The parties may have, voluntarily or by accident, modified the prerequisites of the force majeure defense, e.g. with respect to the events which may constitute force majeure or with respect to the requirement of foreseeability in subsection...
(a) ii). In such a case, the Trans-Lex Principle can only be applied as modified by the agreement of the parties, typically in a force majeure clause.