

UNCTAD training course on implications of the COVID-19 pandemic for commercial contracts

Frustration and *force majeure* in the sale on contract: of any use for Covid-19?

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If performance is hindered, delayed or rendered impossible by Covid-19, maybe the party whose performance has been affected by the Pandemic can be excused on the basis of 'force majeure' or the general principle of frustration of contracts.²

For a fuller account of the effects of Covid-19 in sale contracts see the UNCTAD briefing note at: ([COVID-19 implications for commercial contracts: International sale of goods on CIF and FOB terms \(UNCTAD/DTL/TLB/INF/2021/2\)](#))

In this session we will look discuss the issue under English law as follows:

1. No force majeure clause
2. The 'carefully drafted' clause
3. Examples from the marketplace: would they protect from a new wave?
4. The ICC force majeure clause 2020
5. Frustration

1. No force majeure clause

If the contract does not contain a *force majeure* clause none of the parties can be excused for non performance by invoking a *force majeure* event, as under English law – unlike most Civil Law jurisdictions – there is no blanket *force majeure* provision.

As a matter of general principle, a *carefully drafted* clause is hence necessary.

Please note that the situation is different under most Civil law jurisdictions which do provide for a general principle of *force majeure*. This however can usually only be triggered by an event which is:

- a. Not caused or contributed by the party who seeks to rely on it; and
- b. Unforeseeable.

Is a future wave of Covid-19 or – more generally – another pandemic truly unforeseeable?

¹ The views expressed are those of the author and do not necessarily reflect the view of the United Nations.

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2. The 'carefully drafted' clause

The approach of English arbitrators and judges to such clauses is rather narrow.

These are clauses designed to excuse one party from total or partial performance of the contract and as such they are interpreted:

- (a) very restrictively; and
- (b) strictly *contra proferentem*.

→ The event which is causing the non performance should come precisely within the scope of the *force majeure* clause.

The Marine Star [1994] 2 Lloyd's Rep 629.

→ **All** other requirements of the Force Majeure clause should be met!

3. Examples from the marketplace: would they protect from a new wave?

Have a look at the following examples:

GAFTA 119 (bags or bulk FOB terms)

19. FORCE MAJEURE:

Example (1)

"The Seller is not to be responsible for any time lost or delays due to Acts of God, breakdown of machinery, or other cause comprehended in the term '*force majeure*' or other circumstances or event beyond the reasonable control of the Sellers at loadport(s) or elsewhere preventing the forwarding of goods to the loadport(s)."

Example (2)

"Neither Seller nor Buyer shall be liable in damages or otherwise for any failure or delay in the performance of any obligation hereunder other than the obligation to make payment, where such failure or delay is caused by force majeure, or any event occurrence or circumstance reasonably beyond the control of that party including without prejudice to the generality of the foregoing (sic), Acts of God, strikes, fires, floods, wars (whether declared or undeclared), riots, boycotts, restrictions imposed by government authorities including allocations, priorities, requisitions, quotas and price controls. The party whose performance is so affected shall immediately notify the other party here (sic), indicating the nature of such cause and, to the extent possible inform the other party of the expected duration of the force majeure event."

The Azur Gas [2006] 1 Lloyd's Rep 163, at [1].

GAFTA 122 (rice in bags CIF terms)

19. FORCE MAJEURE, STRIKES, ETC: Sellers shall not be responsible for delay in shipment of the goods or any part thereof occasioned by any Act of God, strike, lockout, riot or civil commotion, combination of workmen, breakdown of machinery, fire, or any cause comprehended in the term "force majeure". If delay in shipment is likely to occur for any of the above reasons, the Shipper shall serve a notice on Buyers within 7 consecutive days of the occurrence, or not less than 21 consecutive days before the commencement of the contract period, whichever is the later. The notice shall state the reason(s) for the anticipated delay.

If after serving such notice an extension to the shipping period is required, then the Shipper shall serve a further notice not later than 2 business days after the last day of the contract period of shipment stating the port or ports of loading from which the goods were intended to be shipped, and shipments effected after the contract period shall be limited to the port or ports so nominated.

If shipment is delayed for more than 30 consecutive days, Buyers shall have the option of cancelling the delayed portion of the contract, such option to be exercised by Buyers serving notice to be received by Sellers not later than the first business day after the additional 30 consecutive days. If Buyers do not exercise this option, such delayed portion shall be automatically extended for a further period of 30 consecutive days. If shipment under this clause is prevented during the further 30 consecutive days extension, the contract shall be considered void. Buyers shall have no claim against Sellers for delay or non-shipment under this clause, provided that Sellers shall have supplied to Buyers if required, satisfactory evidence justifying the delay or non-fulfilment.

The BIMCO Force Majeure Clause 2022 (general)

(a) Definitions - "Force Majeure" means the occurrence of an event or circumstance as defined in (b) below ("Force Majeure Event") that prevents a party from performing one or more of its contractual obligations ("the Affected Party"), provided that such party proves:

- (i) the existence of a Force Majeure Event;
- (ii) that such Force Majeure Event is beyond its reasonable control;
- (iii) that the Force Majeure Event could not reasonably have been foreseen at the time of the conclusion of the contract; and
- (iv) that the effects of the Force Majeure Event could not reasonably have been avoided or overcome by the Affected Party.

(b) Force Majeure Events – For the purpose of this Clause the following shall be Force Majeure Events:

- (i) actual, threatened or reported war, act of war, civil war or hostilities; revolution; rebellion; civil commotion; warlike operations; laying of mines;
- (ii) act of piracy and/or violent robbery and/or capture/seizure; act of terrorists; act of hostility or malicious damage;
- (iii) blockade, generally imposed trade restriction, embargo;
- (iv) act of government or public authority whether lawful or unlawful, compliance with any law or governmental order, expropriation, seizure of works, requisition, nationalisation;
- (v) plague, epidemic, pandemic;

- (vi) act of God, natural disaster or extreme natural event such as earthquake, landslide, flood, or extraordinary weather condition;
- (vii) explosion; fire; destruction of equipment; destruction of port facilities; obstruction of waterways; cyber security incident; break-down of transport, communication, information system or power supply; in each case unless caused by negligence of the Affected Party;
- (viii) ionising radiation or contamination by radioactivity, chemical or biological contamination;
- (ix) general labour disturbance such as boycott, strike and lock-out, occupation of factories and premises; in each case unless limited to the employees of the Affected Party or a third party engaged by it; or
- (x) any other similar event or circumstance unless caused by negligence of the Affected Party.

(c) Notices and Mitigation – The Affected Party shall:

- (i) give written notice of the Force Majeure without delay to the other party identifying the relevant Force Majeure Event and its anticipated effect on the performance of one or more of its contractual obligations;
- (ii) exercise reasonable endeavours to minimise the effect of the Force Majeure Event upon its performance of the contract and provide any relevant information and documentation to the other party in relation to the Force Majeure and the measures taken; and
- (iii) notify the other party as soon as the Force Majeure Event ceases to prevent performance of its contractual obligations.

(d) Cooperation – The parties shall cooperate to minimise the effects of the Force Majeure on performance of the contract and shall discuss in good faith alternative ways in which the contract can be performed and/or the effect of the Force Majeure can be minimised.

(e) Non-liability for breach – Neither party shall be considered in breach of contract nor liable in damages for delay in or for non-performance of one or more of its contractual obligations to the extent caused by the Force Majeure from the time a valid notice under subclause (c)(i) was given.

(f) Continuing payment obligations – Nothing in this Clause shall impact on either party's payment obligations under the contract unless those payment obligations are directly affected by the Force Majeure.

(g) Termination – Where a valid notice has been given in accordance with subclause (c)(i) above and the Force Majeure has the effect of:

- (i) rendering the performance of the contract impossible, illegal or radically different from what was intended at the time of the conclusion of the contract; or
- (ii) substantially affecting the performance of the contract as a whole and the duration of the Force Majeure exceeds [.....] days from the time notice was given (if this space is left blank then this subclause (g)(ii) shall not apply), either party has the right to terminate the contract by written notification within a reasonable period to the other party.

Where a party terminates under this subclause (g) both parties shall be discharged from future obligations only and neither may claim damages for the other's future non-performance. The parties must perform all obligations not affected by Force Majeure up to the date of the termination with any sums paid in advance and not earned or due being refunded, save where the contract or applicable law provides otherwise. Nothing in this Clause shall impact on any separate rights of termination under this contract or at law.

The BIMCO Clause is a great example of a very widely drafted post-Pandemic *force majeure* clause which – in its unamended form – is highly unlikely to be of use for another wave of Covid-19.

4. The ICC force majeure clause 2020

Now read the ICC version of the clause available for incorporation in all sale contracts.

- a. What kind of clause is it: generic or specific?
- b. Does it cover epidemics and pandemics?
- c. Would it protect a party whose performance has been affected by Covid-19?

5. Frustration

In general terms, frustration discharges the contract of sale and both Buyer and Seller are immediately and automatically released from all obligations still to be performed after the frustrating event occurs although accrued rights remain effective.

Cfr Benjamin's Sale of Goods:

"A contract of sale may be frustrated where, after the contract has been entered into, but before property in the goods has passed to the Buyer, without default of either party, the contract has become impossible of legal performance, or incapable of being performed because the circumstances in which performance is called for render it a thing radically different from that which was undertaken by the contract."

And when they say 'impossible' they mean 'really impossible'!

But what is the effect of frustration in sale contracts?

Also, it must be remembered that the fact that supply of goods has become unprofitable for the Seller **does not** amount to frustration.

Is it not better to 'grow' the force majeure clause as to include expressly events which might otherwise amount to frustrating events? (e.g. prohibition/strikes...)

A simple example will help understanding the way English courts approach frustration:

Cti Group Inc v Transclear SA [2008] EWCA; Civ 856 [2008] 2 C.L.C. 112

The case was about an attempt by the Buyers to import substantial quantities of cement into Mexico in breach of a cartel then operated by a local company, Cemex. The Seller's supplier

however had become aware that the cargo was destined for Mexico and was unwilling to allow the transaction to proceed and refused to ship.

In holding that the contract was **not frustrated** Moore-Bick LJ said at [27]:

“In my view it is impossible to hold that the contract in this case was frustrated. As the decided cases show, the fact that a supplier chooses not to make goods available for shipment, thus rendering performance by the seller impossible, is not of itself sufficient to frustrate a contract of this kind. In order to rely on the doctrine of frustration it is necessary for there to have been a supervening event which renders the performance of the seller’s obligations impossible or fundamentally different in nature from that which was envisaged when the contract was made. In the present case, however much pressure Cemex put on suppliers, the nature of the performance called for by the contract remained the same. Whether the suppliers chose to succumb to that pressure was a matter of choice. Indeed, if the sellers had entered into a binding contract with PT Semen Padang, it would have been impossible for that company to argue that the contract had been frustrated as a result of commercial pressure from Cemex since it would still have had the choice between performing the contract and breaking it. Even if one were to regard the arrangements between the sellers and PT Semen Padang (or subsequently Sumitomo and China Rebar) as tantamount to a contract for these purposes, the operative cause of the failure to ship the goods was still the supplier’s decision to succumb to pressure from Cemex. In those circumstances for the reasons given earlier the sellers bore the risk of a refusal on the part of the supplier to make goods available.”

Can Covid-19 really trigger frustration?

Now in 2022?