

# Frustration and *force majeure*: any use for Covid-19?



**Professor Filippo Lorenzon**

Institute of Maritime Law, Dalian Maritime University (PRC)

Training course on Implications of the COVID-19 Pandemic for Commercial Contracts

# Table of Contents

1. No force majeure clause
2. The 'carefully drafted' clause
3. Examples from the marketplace
4. The ICC force majeure clause 2020
5. Frustration



# 1. No force majeure clause

## English law

No general principle of force majeure: a FM Clause is necessary

## Civil law

There is a general principle but usually only available if the event is:

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

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

## 2. The 'carefully drafted' clause

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

- very restrictively; and
- 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

#### 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, 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.”

### 3. Examples from the marketplace

#### 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 be 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 be 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.

### 3. Examples from the marketplace

*The BIMCO Force Majeure Clause 2022*

<https://www.bimco.org/contracts-and-clauses/bimco-clauses/current/force-majeure-clause-2022>

*The BP Oil GT&Cs for Crude Oil and Petroleum Products, section 65*

<https://www.bp.com/content/dam/bp/business-sites/en/global/bp-trading-and-shipping/documents/bp-oil-gtc-2015-version-1.2.pdf>

Let's see whether they help in cases of Covid-19...

## 4. The ICC force majeure clause 2020

The newest edition of the well known ICC FM Clause can be found here:

<https://iccwbo.org/content/uploads/sites/3/2020/03/icc-forcemajeure-hardship-clauses-march2020.pdf>

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



## 5. Frustration

Under English law 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.”

Case law shows a great deal of scrutiny of what was the promise made by the defaulting party and the threshold of impossibility is truly high!

Can Covid-19 really trigger frustration?

Now in 2022?

# Thank you!



UNITED NATIONS  
UNCTAD