Dealing with Force Majeure events in international trade

The ICC Force Majeure and Hardship clauses 2020

Rome, 14 October 2022

ICC Italia

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"Dealing with Force Majeure events in international trade":
The ICC Force Majeure and Hardship clauses 2020
ICC-UNIDROIT Conference, 14 October 2022

Establishing Appropriate Rules on Force Majeure and Hardship: the UNIDROIT Principles

Prof. Anna Veneziano
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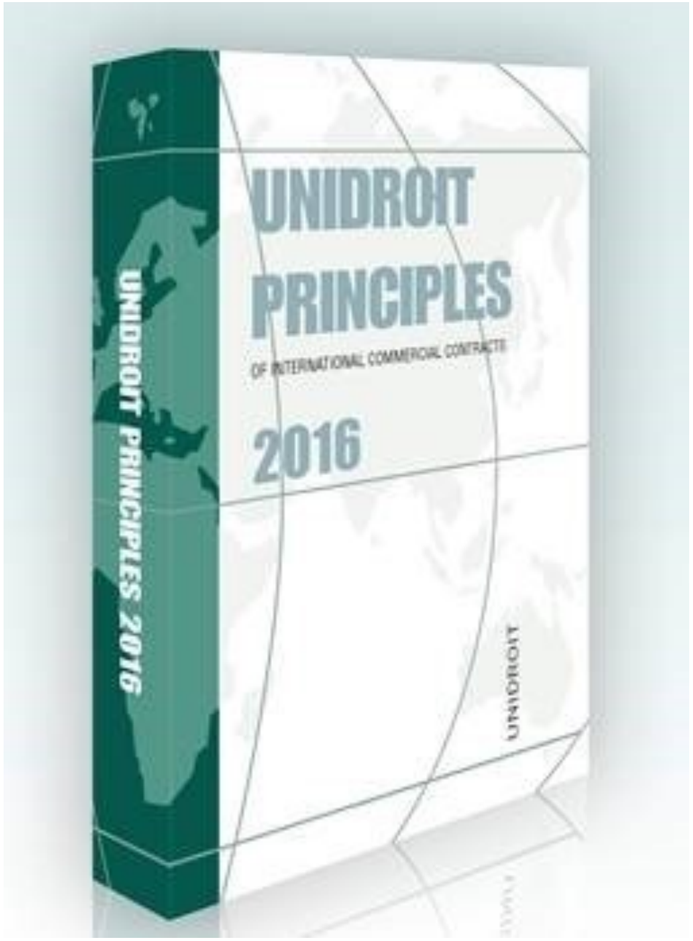

Black-letter rules and comments in various languages available on-line at:
https://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2016

UNIDROIT Note on the UNIDROIT Principles and the Covid-19 Health Crisis (July 2020):
https://www.unidroit.org/english/news/2020/200721-principles-covid19-note/note-e.pdf

Force Majeure in the UNIDROIT Principles

ARTICLE 7.1.7 (Force majeure)

(1) Non-performance by a party is excused if that party proves that the non-performance was due to an impediment beyond its control and that it 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.

(2) When the impediment is only temporary, the excuse shall have effect for such period as is reasonable having regard to the effect of the impediment on the performance of the contract.

(3) The party who fails to perform must give notice to the other party of the impediment and its effect on its ability to perform. If the 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.

(4) Nothing in this Article prevents a party from exercising a right to terminate the contract or to withhold performance or request interest on money due.

Hardship in the UNIDROIT Principles

ARTICLE 6.2.1 ***(Contract to be observed)***

Where the performance of a contract becomes more onerous for one of the parties, that party is nevertheless bound to perform its obligations subject to the following provisions on hardship.

ARTICLE 6.2.2 (*Definition of hardship*)

There is hardship where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished, and (a) the events occur or become known to the disadvantaged party after the conclusion of the contract; (b) the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract; (c) the events are beyond the control of the disadvantaged party; and (d) the risk of the events was not assumed by the disadvantaged party.

ARTICLE 6.2.3 (*Effects of hardship)*

(1) In case of hardship the disadvantaged party is entitled to request renegotiations. The request shall be made without undue delay and shall indicate the grounds on which it is based.

(2) (The request for renegotiation does not in itself entitle the disadvantaged party to withhold performance.

(3) Upon failure to reach agreement within a reasonable time either party may resort to the court.

(4) If the court finds hardship it may, if reasonable, (a) terminate the contract at a date and on terms to be fixed, or (b) adapt the contract with a view to restoring its equilibrium.

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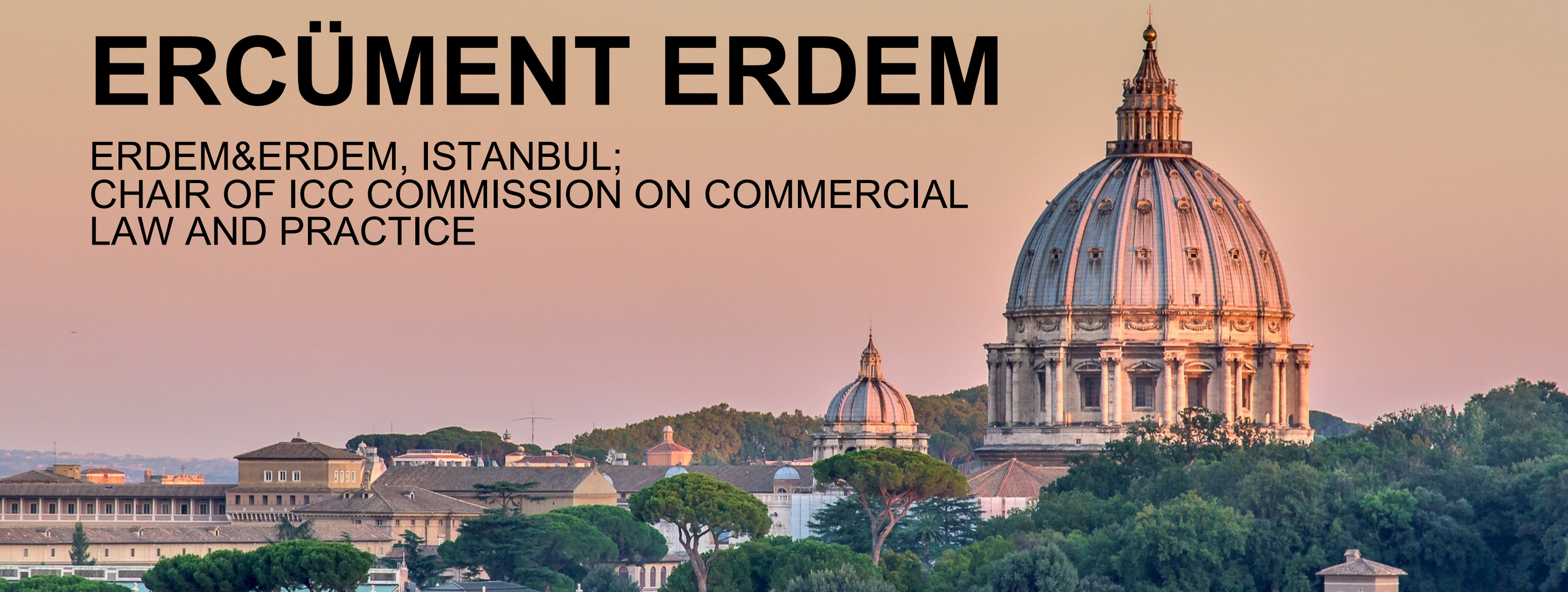

The 2020 ICC Force Majeure and Hardship Clauses: An Essential Tool for Business

Dealing with Force Majeure Events in International Trade, Unidroit, Rome

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14 October 2022

The 2020 ICC Force Majeure and Hardship Clauses: An Essential Tool for Business

Introduction

- Why did ICC revise the Clauses?
  - To shorten and simplify the Clauses for easier use by the SMEs
  - A short form of the FM Clause was needed for easier incorporation in the contracts instead of inclusion by way of reference
- How was the revision made?
  - CLP Commission formed a Working Group («WG»)
  - While drafting the short form, revision of the Clause itself has been suggested
  - It was important to find the right length – too short or too general clause would not be helpful to judges or arbitrators
  - Main principles have not been changed – Clauses are already generally accepted throughout the world
  - Recent trends in the comparative law have been taken into consideration

New Force Majeure Clause

- Main characteristics of the New FM Clause
  - The structure of the 2003 FM Clause is mainly maintained
  - The Clause now includes definitions of «Force Majeure» and «Affected Party»
  - Paragraph headings have been added
  - Explanatory paragraphs are drafted in bold (to better distinguish the main text from them)
  - No difference between the 2003 Clause and the New Clause in establishing the conditions of force majeure
    - ✓ In line with Art. 79 of the CISG, Section 8:108 of the PECL and Art. 7.1.7 of the UNIDROIT Principles

New Force Majeure Clause (Cont.)

- Presumed Force Majeure Events
  - If any of the listed events occurs, the affected party does not need to prove that the conditions of being beyond the relevant party's reasonable control and reasonably unforeseeable are fulfilled
  - Whether or not to keep the presumptions has been discussed by the WG in depth, and have been decided to keep, in order to provide predictability for users who are not familiar with drafting this type of clauses
  - Upon review of dozens of court decisions and arbitral awards, most common force majeure events have been determined and changes have been made to the listed events :
    - ✓ In the New Clause, the following events are not listed: armed conflict or serious threat of the same, civil commotion or disorder, mob violence, act of civil disobedience, curfew restriction, and compulsory acquisition
    - ✓ New events: currency and trade restrictions, as well as embargos and sanctions
    - ✓ Simplification as «plague, epidemic, natural disaster or extreme natural event»
  - Parties may add or delete events

New Force Majeure Clause (cont.)

- Notification requirement
  - An explicit paragraph regarding the notification requirement added
- Consequences of force majeure: remain essentially the same, with a few modifications
  - Clearly regulated that the non-invoking party is entitled to suspend the performance of its obligations from the date of notice
    - ✓ Principle of *exceptio non adimpleti contractus*
    - ✓ In line with Art. 97 of Turkish Code of Obligations; Art. 82 of the Swiss Code of Obligations; for the sale contracts, Art. 1612 of the French Civil Code; Section 320 of the BGB; Art. 7.1.3 of the UNIDROIT Principles
  - Possibility to terminate the contract if the impediment exceeds 120 days
    - ✓ Priority to certainty and foreseeability
    - ✓ Aim to follow the common commercial practices
    - ✓ Differing opinions of the WG members
    - ✓ New option to the formula exercised with Art. 25 of the CISG; Section 8:103 of the PECL; Article 7.3.1 of the UNIDROIT Principles

New Hardship Clause

- Fundamental changes have been made
- Main characteristics of the New Hardship Clause
  - Provides for the intervention of a judge or arbitrator
    - ✓ 2003 Clause: the only option was the termination
    - ✓ Fear that the judge or arbitrator would adapt the contract in such a way that neither party would prefer played a role in shaping this drafting
  - Revision in line with the global trend towards attempting to maintain the contract where possible (*favor contractus*)
  - 3 alternatives are provided

New Hardship Clause (cont.)

- Option 3A
  - the same as the existing solution of the 2003 Clause
  - the party invoking the Clause is entitled to terminate the contract
- Option 3B
  - the party invoking the Clause may request the judge or arbitrator to adapt the contract or declare its termination
    - ✓ The new norm. In line with Art. 6.2.3 of the UNIDROIT Principles; Art. 138 of the Turkish Code of Obligations; Section 313 of the BGB; Art. 1195 of the French Civil Code
- Option 3C
  - a modified version of the 2003 Clause and the new Option 3A
  - either party may request the judge or arbitrator to declare its termination
  - termination by the invoking party may be arbitrary and could be misused
  - WG preferred that the judge or the arbitrator assess conditions of termination of the contract
  - termination should be the last resort

Conclusion

- Most significant changes to the FM Clause
  - Simplification of the list of presumed force majeure events
  - Separate paragraph for the notice requirement
  - Suspension of the performance by the non-affected party when the affected party invokes force majeure
  - Fixing a time period of 120 days for the duration of the force majeure after which the contract may be terminated
- Most significant changes to the Hardship Clause
  - Introduction of an option for adaptation by a judge or arbitrator, aside from termination
- Drafting of the Short Form of the FM Clause
- The New Clause entered into force in March 2020 – however, it will not abrogate the 2003 Clause; parties may continue to use the 2003 FM Clause by making clear reference to that Clause

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Thank you
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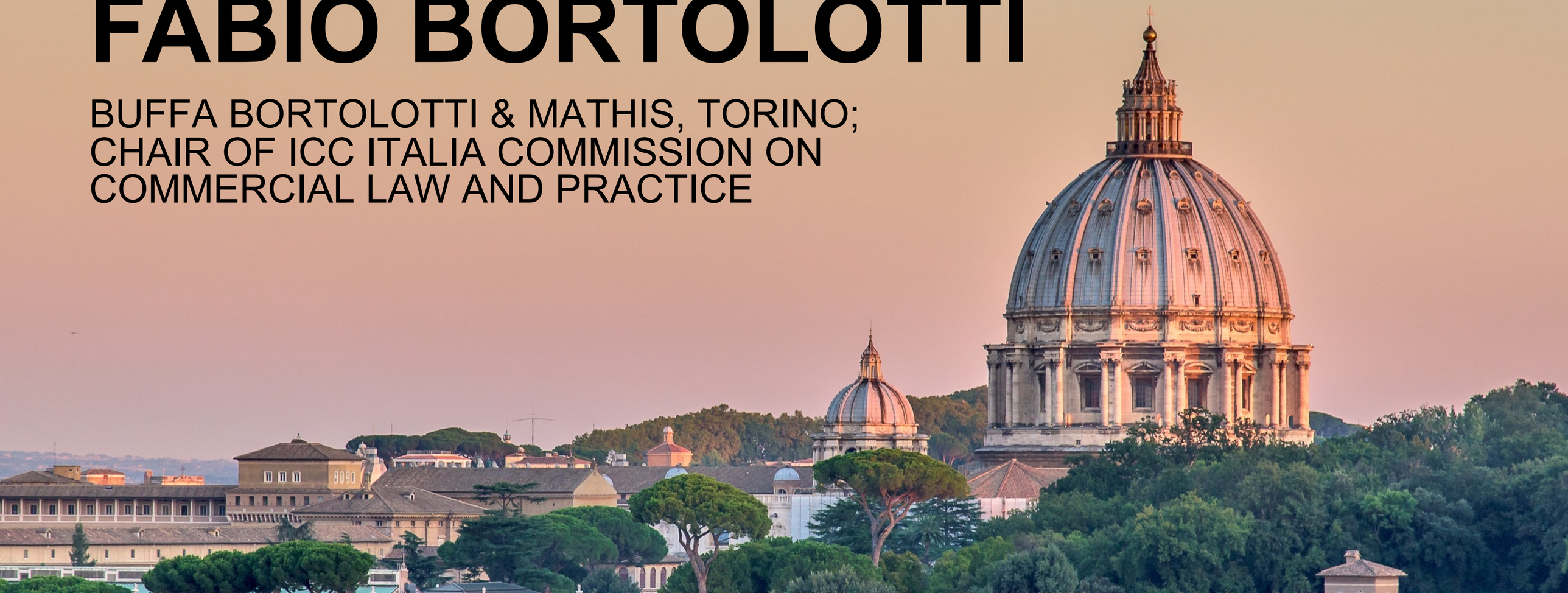

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Buffa, Bortolotti & Mathis

COMMON TRENDS EMERGING IN ARBITRAL CASE LAW ON FORCE MAJEURE

Prof. Avv. Fabio Bortolotti

Dealing with Force Majeure Events in International Trade
The ICC Force Majeure and Hardship Clauses 2020

Rome, Unidroit, October 14, 2022

THE VARIETY OF APPLICABLE RULES

When in a dispute a party invokes force majeure, the first issue that must be decided is to identify the rules governing this issue, which may be:

- a domestic law
- the CISG (Vienna sales Convention)
- general principles of law (lex mercatoria)
- a force majeure clause agreed between the parties

In the cases I have examined all these situations can be found, but the most common one is that where the parties have agreed on a specific FM Clause

THE RELATION BETWEEN FM CLAUSES AND APPLICABLE LAW

If the FM clause deviates from the rules on FM of the governing law, which rules will prevail?

- The FM clause if the domestic rules are not mandatory
- Provisions of domestic law or generally accepted rules, where the clause is contrary to the basic principles applicable to FM clauses

ICC Award 19299/2015 dated 10 July 2015, *Gujarat State Petroleum Corp.* v. *Republic of Yemen*

Gujarat State Petroleum Corp. v. *Republic of Yemen*

ICC 19299/2015

"*Force Majeure*" within the meaning of this Agreement, shall be any order, regulation or direction of the GOVERNMENT, or (with respect to the CONTRACTOR) of the government of the country in which any of the entities comprising the CONTRACTOR is incorporated, whether promulgated in the form of law or otherwise, or any act(s) of GOD, insurrection, riot, war strike (or other labor disturbances), fires, floods or any cause not due to the fault or negligence of the Party invoking *Force Majeure*, whether or not similar to the foregoing, provided that any such cause is beyond the reasonable control of the Party invoking *Force Majeure* »

Respondent: No mention of unforeseeability and impossibility → Yemeni law to apply

Arbitrators: «... the provision does not mention unforeseeability and/or Impossibility, and, as a result, there is no reason to add these requirements into Article 22.2 …» « ... The PSAs provide a self-contained definition of *Force Majeure* »

Gujarat State Petroleum Corp. v. *Republic of Yemen*

ICC 19299/2015

The arbitrators decided nevertheless that the FM events were actually unforeseeable and irresistible.

Unforeseeability: the impact of disturbances and security attacks, which had drastically increased after the conclusion of the agreements, made it impossible to continue performance.

According to the arbitrators, this significant increase in risk would in any case have been unforeseeable and would therefore have justified *force majeure*, even if the requirement in question had been deemed applicable.

Impossibility/irresistibility: the arbitrators reintroduced, when interpreting the clause, such apparently missing require- ment, arguing that, although not expressly mentioned, it must have been implied by the parties, since the *force majeure* clause required that the non-performance should have been **caused** by circumstances of *force majeure*

National Oil Corp. (Libya) v. Sun Oil (USA)

ICC 4462/1985,1987.

«**Excuse of Obligations.** Any failure or delay on the part of a Party in the performance of its obligations or duties hereunder shall be excused to the extent attributable to *force majeure*. *Force majeure* shall include, without limitation: Acts of God, insurrection, riots, war, and any unforeseen circumstances and acts beyond the control of such Party. »

Lybian party: The clause does not mention impossibility → Libyan law must be applied in order to reintroduce the lacking condition

Arbitrators: The clause is incomplete; arbitrators must fill the gap.

« … it would be unjustified, in the absence of any specific provision to such effect in Art. 22, to construe such article as revealing an intent of the parties to waive an essential rule of Libyan common law according to which *force majeure* is only established when the event invoked by the defaulting party created an impossibility to perform whether on a temporary or a permanent basis »

THE BASIC CONDITIONS REQUIRED FOR THE FM EXEMPTION

Arbitral jurisprudence essentially confirms the classic notion of *force majeure*, based on the following **three requirements,** *i.e.* that the event invoked must be:

- **unforeseeable,**
- **irresistible, and**
- **beyond the control of the parties.**

A further very important requirement, currently recognised in arbitral case law, is the **non-assumption of risk**, i.e. the requirement that the impediment must not fall within the **sphere of risk** of the party suffering the event.

Typical example: procurement risk

THE FIRST REQUIREMENT: UNFORESEEABILITY - I

The FM impediment must be an event that the affected party could not have reasonably foreseen, and could not have taken the necessary countemeasures.

AAA Award 10-03-2016, Miller v. Recom

Revocation of licenses for importation of solar panels from Taiwan by U.S. Government.

Foreseeable, because he relevant law, enacted after signing the contract, was in discussion and known before.

Centro de Arbitraje de Mexico (CAM) Award, 30-11-2006

Mexican grower does not supply pumpkins to US distributor, invoking as FM torrential rains caused by El Niño.

The event, occurring eight times since 1974 cannot be considered unforeseeable.

THE FIRST REQUIREMENT: UNFORESEEABILITY - II

ICC Award 8486/1996 - Dutch seller-Turkish buyer

Turkish buyer of a sugar production plant, refuses to perform the contract of sale invoking as FM the fall of the market price of sugar.

The arbitral tribunal considers that this event was foreseeable and, in any case in the area of risk of the buyer.

ICC Award 12112 - EU Investor – African state-owned company

Establishment of a joint venture with a state-owned company in an African country. The JV fails to achieve its objectives due to social unrest in the country. The state-owned company invokes FM.

The arbitrator holds that the change in the social climate was foreseeable and should therefore have been taken into account when negotiating the agreement.

THE SECOND REQUIREMENT: IMPOSSIBILITY/IRRESISTIBILITY - I

The prevailing principle: **no absolute impossibility** but a more flexible notion of irresistibility, to be assessed on the basis of reasonableness

ICC Award 5195/86 - Construction of airport in Africancountry

The foreign contractor abandons the site due to action of insurrectionary movement. Local government objects that performance is not impossible.

The arbitrators reject and state that:

« Where events beyond the control of either side supervene which merely render performance financially more onerous for a contracting party he will not, under most systems of law, be excused from further performance or (in the absence of some special contractual or statutory provision – nowadays not infrequently to be found) entitled to insist upon extra compensation.

But events which go beyond merely increasing the financial burden on the party performing, and which reach a point where they render performance unacceptably hazardeous to the lives and safety of those performing, are in a different category altogether.»

THE SECOND REQUIREMENT: IMPOSSIBILITY/IRRESISTIBILITY - II

The prevailing criterion for assessing the irresistibility of the impediment invoked is to see **whether reasonable alternative solutions can be found to overcome it.**

Procurement risk

A party that, having undertaken to supply certain products, is unable to obtain them from its usual suppliers, but would be able to procure them (although on less advantageous terms) from other sources, cannot invoke FM (procurement risk).

And since the impediment is within his sphere of risk, if rthe seller cannot overcome the impediment, he will have to bear the consequences of his non-performance.

ICC 4462/1985,1987 - *National Oil Corp. (Libya) v. Sun Oil (USA)*

US contractor (Sun Oil) suspends performance invoking travel ban to Libya imposed by US Government. Arbitrators deny FM arguing that Sun Oil could have procured non-US personnel and used (through affiliated companies or third parties) technology not subject to the US export ban (as other US companies operating in Libya had apparently done).

THE THIRD REQUIREMENT: EVENT BEYOND THE PARTY'S CONTROL (I)

This condition has a substantive impact, which goes far beyond what most companies imagine.

In order to be exempted under *force majeure*, the impediment must be **beyond the sphere of control and risk of the party invoking *force majeure*. A party cannot invoke force majeure for events which are within its sphere of risk and control.**

Procurement risk: a supplier who does not obtain the goods from its supplier due to FM of the latter, cannot invoke FM.

Art. 79(2) CISG: If the party's failure is due to the failure by a third person whom he has engaged to perform the whole or a part of the contract, that party is exempt from liability only if: *(a)* he is exempt under the preceding paragraph; and *(b)* the person whom he has so engaged would be so exempt if the provisions of that paragraph were applied to him.

This provision applies only where the producer/seller has delegated the execution of all or part of the contract to a third party.

THE THIRD REQUIREMENT: EVENT BEYOND THE PARTY'S CONTROL (II)

ICC Award 9978/1999 - Procurement risk

« … in cases of impediments to performance related to the typical commercial risks involved in the transaction, [ICC arbitrators] uphold the principle of "pacta sunt servanda", thus preserving the sanctity of the contract as the magna charta of international contract law ».

ICC Award 98128/1996 - Procurement risk

« ... le défendeur, qui a choisi [le fournisseur] pour l'exécution de son contrat avec le demandeur, doit être tenu pour responsable du comportement de celui-ci.»

The third condition overlaps with the other two requirements

- an event must be considered **foreseeable** for the party which has assumed, even implicitly, the risk that the same may occur in the future, and
- an impediment cannot be considered **insurmountable** if the affected party bears the risk of its non-occurrence.

THE THIRD REQUIREMENT: EVENT BEYOND THE PARTY'S CONTROL (III)

ICC Award 18769/2014 - Cessna/Gulf Jet

A Dubai company, Gulf Air, failed to pay the lease instalments of aircrafts supplied by Cessna and invoked as FM the seriousa economiìc crisis which prevented it from carrying its business and collecting the income needed to pay the lease. The arbitrator rejected the FM exception, because Gulf Jet assumed the risk to generate revenue from its business.

CIETAC Award 15-12-1998 – Shirt case

Chinese seller had undertaken to transmit the **export license** to the US buyer before the shipment of the goods. Failure to comply with this obligation prevented the buyer from taking delivery of the goods on arrival causing him additional costs.

The seller invoked *force majeure*, but the court did not uphold the claim, considering that **the timely obtaining of the document was within the seller's control,** and ordered the seller to pay damages (storage costs, *etc.*) resulting from the delay.

THE OBLIGATION TO TIMELY NOTIFY THE EVENT (I)

ICC FORCE MAJEURE CLAUSE 2020

In case of delayed communication, the exemption does not take effect until the information is received by the other party.

ARTICLE 79(3) CISG (VIENNA SALES CONVENTION)

The party who fails to perform must give notice to the other party of the impediment and its effect on his ability to perform. If the 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, he is liable for damages resulting from such non-receipt.

THE OBLIGATION TO TIMELY NOTIFY THE EVENT (II)

ICC Award 2478/1972

The sales contract could not be carried out due to the revocation of the export license; the *force majeure* clause provided an obligation to notify the event, but did not indicate the consequences of its vio- lation. The arbitrators decided that, since there had been no timely notification of the impediment, the seller lost the possibility of taking advantage of the *force majeure* with regard to the period between the event and its late notification.

ICC Award 19566/2014 - Global Tungsten/Largo

« ... the requirement in Section 15 that the affected party expressly declare *force majeure* is to be considered not as a condition precedent to the right to invoke *force majeure*, but as giving rise to a contractual duty, breach of which will only deprive the affected party of that right if the breach is a material breach – namely, one that causes harm or prejudice to the other party. There being no evidence of any harm (...) the Tribunal concludes that Largo's failure to do so cannot be characterized as a material breach. Accordingly, Largo is not deprived of its right to invoke *force majeure* as a result. »

THE PRINCIPLE OF «PERPETUATIO OBLIGATIONIS» - I

Parties challenging the *force majeure* exemption, sometimes invoke the principle, recognized in most civil law systems, that the debtor in default cannot avail himself of the *force majeure* event occurred when he was already in default. International arbitrators have shown little sympathy for this theory.

ICC Award 19222/2016 - General Dynamics/Libya

the Libyan party invoked the civil war and foreign military intervention in 2011 in order to justify the non-payment of sums due to General Dynamics for services already rendered, the latter objected that the Libyan party was already in arrears before the *force majeure* events occurred, invoking Article 103 of the Swiss Code of Obligations (which was applicable in this case). The arbitrators, however, did not accept this plea, arguing that the *force majeure* clause stipulated by the parties provided for the exemption from liability in general terms, without mentioning the possible pre-existence of the non-performance, and that the clause therefore prevailed over the non-mandatory rule of Article 103 of the Swiss Code of Obligations

THE PRINCIPLE OF «PERPETUATIO OBLIGATIONIS» - II

ICC Award 8873/1997 - Delay in construction of a road in Algeria

The defendant invoked Article 1096(3) of the Spanish Civil Code, according to which the debtor in delay in the performance of its obligations assumes the risk of fortuitous events.

The arbitrators, however, decided not to apply the rule in question because,

« ... par la prévision d'une clause de *force majeure*, détaillée, inspirée de la pratique courante des contrats internationaux, comme celle prévue à l'article 18 du contrat, les parties ont montré qu'elles désiraient se soumettre à une réglementation relativement autonome de la *force majeure*, ce qui implique la volonté tacite d'exclure l'application de normes de la loi nationale applicable, contenant des principes qui ne correspondent pas à la pratique usuelle dans le commerce international, comme l'article 1096(3) du code civil espagnol. »

CONCLUSIONS

The analysis of arbitral case law on FM shows a certain uniformity in the approach to the main issues arising in this context.

This cannot give us any certainty about the possible outcome of a case . Each arbitrator will decide independently without being bound to previous case law.

Nevertheless, experienced arbitrators are aware of the general trend regarding the interpretation and application of the basic principles on force majeure in international trade. Moreover, counsels will have the opportunity to mention previous cases regarding crucial isses in discussion.

This is why I believe that a general overview of the main trends in arbitral case law is also useful for parties who draft FM clauses and/or who have a litigation involving it.

Thank you for your attention

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FORCE MAJEURE AND HARDSHIP IN THE CONTEXT OF PRICE INCREASES OF RAW MATERIALS AND OIL AND GAS

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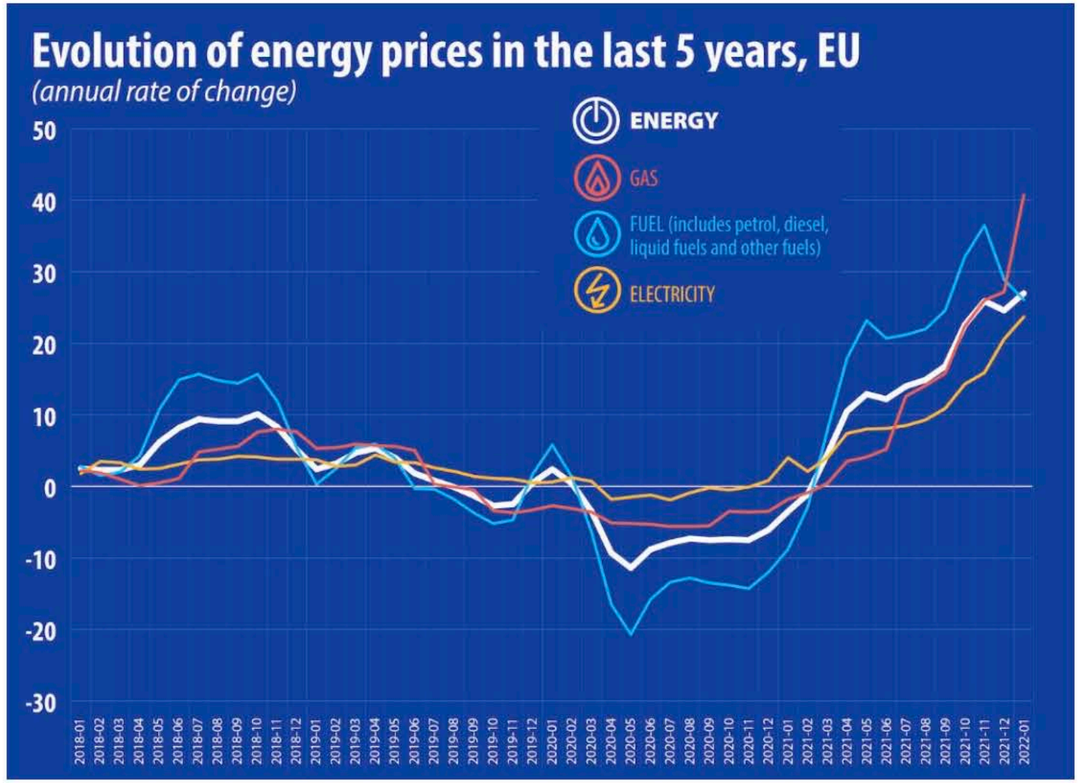
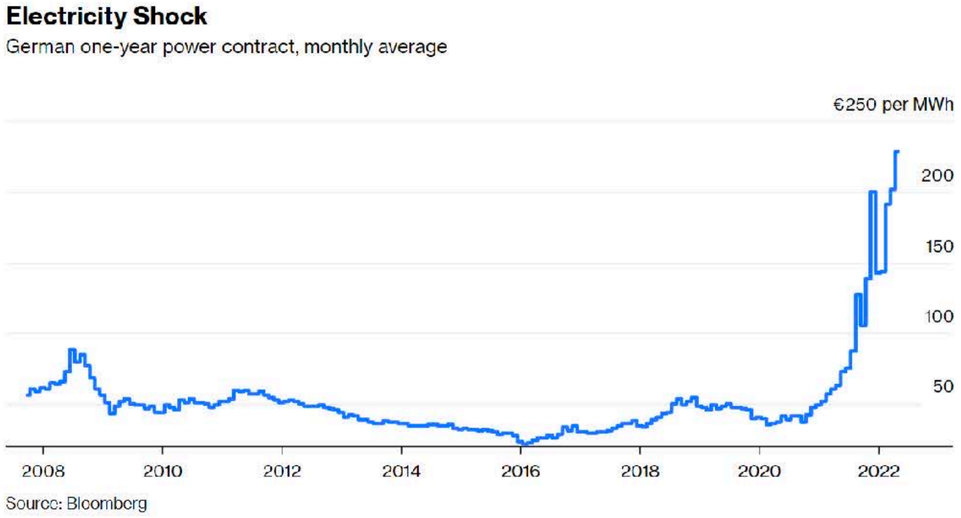
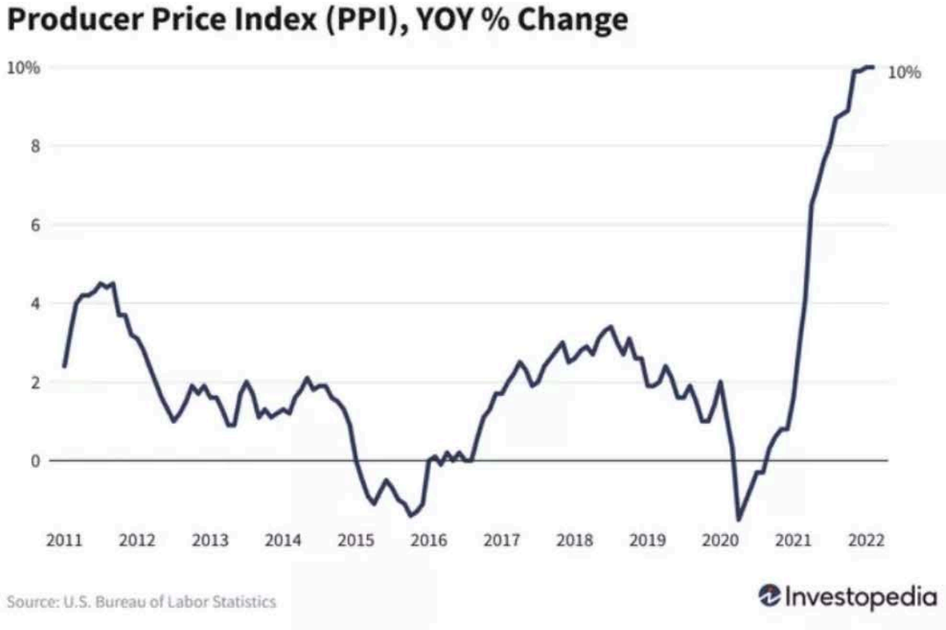
EMILIANO BERTI
EUROPE HEAD OF LEGAL & COMPLIANCE, NOKIA

Some facts & figures…







Eurozone Inflation 9.1% (August ‘22)

+350% Crude Oil Price from April ‘20 to April ‘22

In 2021 the cost of ocean freight increased fivefold vs pre-pandemic prices

Electricity Shock … Eur 250 per MWh

According to KPMG most companies face supply risk in the short term (63%) as well as in the long term (75%)

This is not *new* anymore!

- The worldwide market is experiencing severe supply issues, higher demand, strong price inflation, transport & trade additional costs and export control constraints

- This is the “new normal” whose consequences must be taken into account when parties enter into a contract today

- Most likely, FM and Hardship clauses and not equipped to protect the contractual interests whenever the affected events are foreseeable and somehow “priceable”

- Companies must develop a comprehensive strategy focusing on non-legal aspects (*e.g.* pricing, supply chain forecasting, improved delivery schedule, “plan B” logistics) with the aim of developing resilient and fast-adapting contracts, capable to minimize the impact of high-dilutive events and neutralize the X-factor of unpredictability

- Don’t rely (only) on FM and HS clauses
- Draft LDs/penalties to protect extended deliveries, negotiate grace period, back-to-back with subcontractors
- Instead of a “*time to remedy*”, agree a “*time to start to remedy*”
- Delivery … protect yourself from “*unforeseeable in foreseeable*” … describe carefully the starting point for contractual assumptions
- Insert inflation, price flexibility and export control clauses
- Secure an independent judicial body and suitable governing law
- Negotiate and agree a termination clause whose terms do not excessively penalize the affected party … create a win-win situation
- Before termination, plan to include an *interim* period of suspension to “wait-and-see”
- Whenever the parties have no visibility on future event, to the extent possible set an “*agreement to agree*”
- Avoid to take responsibility for event out of your direct control
- Early identify the best second option in advance for critical contractual aspects

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MARINA MERCANTE

HEAD OF INTERNATIONAL LEGAL ASSISTANCE,
ENI PLENITUDE S.P.A. SOCIETÀ BENEFIT

14 October 2022

The view of business on the 2020 ICC FM and Hardship clauses

plenitude

A few premises

- Eni and Plenitude are involved in a wide range of agreements
- We may find ourselves in different contractual positions
- Today’s focus is on some practical recent cases we faced in the procurement sector, mainly referred to the procurement activities (e.g. Engineering Procurement Construction agreements «EPCs» , Module supply agreements) as well as Power Purchase Agreements (PPAs)
- In such sector, we are still in the process of customising our standards to the renewables market practice, it is a continous evolution.

The Presumed Force Majeure Events and the FM general definition

The Ukraine crisis - A recent case

- **No prompt notice (as at 7 June 2022 – more than 100 days after the inception of the crisis)**
- **Vague notice (i.e. no event's details provided + no evidence of the contractual obligations affected)**

They say *"… the unprecedented events and the impacts triggered by the ongoing attacks, widely described as a war, in Ukraine have had a profound impact in the countries bordering Ukraine, as is the case of Kazakhstan, which are affecting the Seller's spare parts deliveries as well as the logistics operations under the Contract at various tiers, due to transport delays and additional costs associated with using different transport route, at a scale that could not have reasonably been predicted."*

- **The war being in a country different from that where the obligations had to be performed**
- **The contractual obligations do not involve the choice of a specific route to deliver the good or carry out other logistics operations**
- **The mere cost increase cannot be sufficient to claim FM**
- **[*According to the ICC standard clause, even recognising the war as a FM event, the condition under c) would not be met*]**

The choice of events in or out the list

«Compliance with any law or governmental order» **– possible overlap with change in law/hardship**

«General labour disturbances»

As per our EPC standard: *«national strikes (excluding those limted to the Contractor's Group)»*

The Covid 19 pandemic: no FM in our standard, with possible negotiated exceptions

[«(…) *the mere quarantine of one or more workers shall not be considered as FORCE MAJEURE unless either party is prevented from complying with the obligations of this CONTRACT, including through so called lockdown, implemented by order of an Authority"*]

plenitude

The conditions for terminating the contract

- Timing of the notice
- Intermediate step?
- The duration of the impediment (our standard); the possible impact on other related contracts

The hardship clause and the alternatives to a negotiated solution

In our past and current experience:

- Change in law (es. PPA) or *de facto* application of the renegotiation solution
- Alternative: referring to an expert rather than a judge/arbitrator
- No parties' right of termination

Thank you

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The view of business on the 2020 ICC Force Majeure and Hardiship clauses

Force majeure or hardship?

Specific clauses to be carefully tailor-made and included in contracts help the parties in dealing with unforeseeable events in a continuously changing world

Pacta sunt servanda vs. adjusting and adapting the contract

- Force Majeure => makes contract performance impossible or impracticable
- Hardship => produces a substantial disbalance of the contract equilibrium

Most national legislators provide rules dealing with these issues, but solutions adopted under various domestic laws differ substantially from one country to another

To deal with the impact of unforeseen circumstances, parties need to (i) analyze the nature and features of events defined as force majeure and hardship; (ii) draft contract clauses to regulate these issues in conformity with their needs; (iii) consider international soft law instruments for harmonization of contract law

The UNIDROIT Principles and the 2020 ICC clauses

The UNIDROIT Principles

Art. 1.7 Principle of good faith

Art. 5.1.3 Obligation of the parties to cooperate to remedy/mitigate the consequences

Arts. 6.2.2 /3 Hardship, with renegotiation of the contract and possible subsequent intervention by the judge

Art. 7.1.7 Force Majeure

The 2020 ICC Force Majeure and Hardship Clauses

The 2020 ICC Force Majeure and Hardship Clauses are balanced models for use in international contracts in any jurisdiction, created to help parties negotiate and draft contracts and increase legal certainty. They feature explanatory guidance notes throughout, giving users practical context and flagging issues to be considered when drafting such clauses.

Force majeure or hardship? An Enel case during the pandemia

What measures has Enel put in place in order to reduce the impact of the pandemia on the execution of long – term contracts?

Ad hoc clause to be included in all long – term contracts with suppliers and contractors which provides for:

1. acknowledgement by the parties that the contract was concluded during the pandemia
2. monitoring of any consequences arising from the pandemia
3. immediate notification of any impacting event to the other party
4. obligation of cooperation between the parties to mitigate/remedy the consequences thereof
5. if the effects of pandemia cannot be removed, renegotiation in good faith of the contract

A Force Majeure clause in a renegotiated supply contract

In case Enel for exceptional reasons requests Alfa to modify the original annual plan of supply, Alfa undertakes to evaluate Enel proposal in good faith

To the extent Alfa accepts the new plan of supply, Alfa waives any and all rights to apply liquidated damages to Enel in case of delays in the delivery

Furthermore, liquidated damages shall not apply as regards all unforeseeable circumstances (e.g. (i) events that cause damages to production plants and machinery or prevent access by personnel, such as fires, floods, earthquakes, tsunami, wars and conflicts, epidemics, riots, insurrections, blackout strikes and also legal and regulatory decisions, (ii) unavailability of components or materials due to exceptional market conditions that disrupt or interrupt their availability)

What about Italian legislation?

The “Delegation to the Government for the revision of the Civil Code" (Senate 1151 of 2019), provides that the legislature of the proposed reform should introduce and regulate: 'the right of the parties to contracts which have become excessively onerous for exceptional and unforeseeable reasons, to demand their renegotiation in good faith or, in the event of non-agreement, to request the adjustment of the contractual conditions in order to restore the economic balance originally agreed by the parties’

- Change of the rules on the circumstances referred to in Articles 1467-1469 of the Italian Civil Code, as "general" rules ?
- Amendment to Article 1374 of the Italian Civil Code on the integration of the contract, which provides as possible additional elements the law or uses without making any reference to the decisions of the judicial authority (unlike what happens in international arbitration where awards are often a source of integration of international contracts) ?

Dealing with Force Majeure events in international trade

The ICC Force Majeure and Hardship clauses 2020

Rome, 14 October 2022

ICC Italia

UNIDROIT
INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW
INSTITUT INTERNATIONAL POUR L'UNIFICATION DU DROIT PRIVE

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The ICC Force Majeure and Hardship Clause 2020
Dealing with Force Majeure events in International Trade
ICC Italia – UNIDROIT
Rome - 14 October 2022

The Need to Adapt Hardship Clauses to the Circumstances of the Case

Drafting Tailor-Made Clauses

Dr. Pascale Accaoui Lorfing

Hardship: Drafting tailor-made clauses

- Introduction

- Why

- When

- How

- Conclusion

I. Introduction to Hardship

- Hardship is a civil law concept (common law concepts may seem similar but they are different)

- Hardship has various names:
  - change in circumstances
  - fundamental alteration of the equilibrium of the contract

- Hardship is an exception to the performance of the contract

A. The qualification of a situation of hardship: criteria

event:

a) beyond the reasonable control of the burdened party (not reasonably expected to have considered at the conclusion of the contract)

b) Not reasonable have avoided or overcome the event or its consequences

→

Impact:

The **performance** of the contract is rendered **more onerous that could reasonably have been anticipated** at the time of the conclusion of the contract

→ Parties are still **bound to perform the contract**

B. The renegotiation of the contract by the parties

The parties are **bound** within a reasonable time of the invocation of this Clause, to **negotiate alternative contractual terms** which reasonably allow to **overcome the consequences of the event**

C. Intervention of the arbitrator?

- **Party invoking the clause** entitled to terminate the contract, but could **request the arbitrator** to adapt the contract **with the agreement** of the other party (*Option 3 A*)

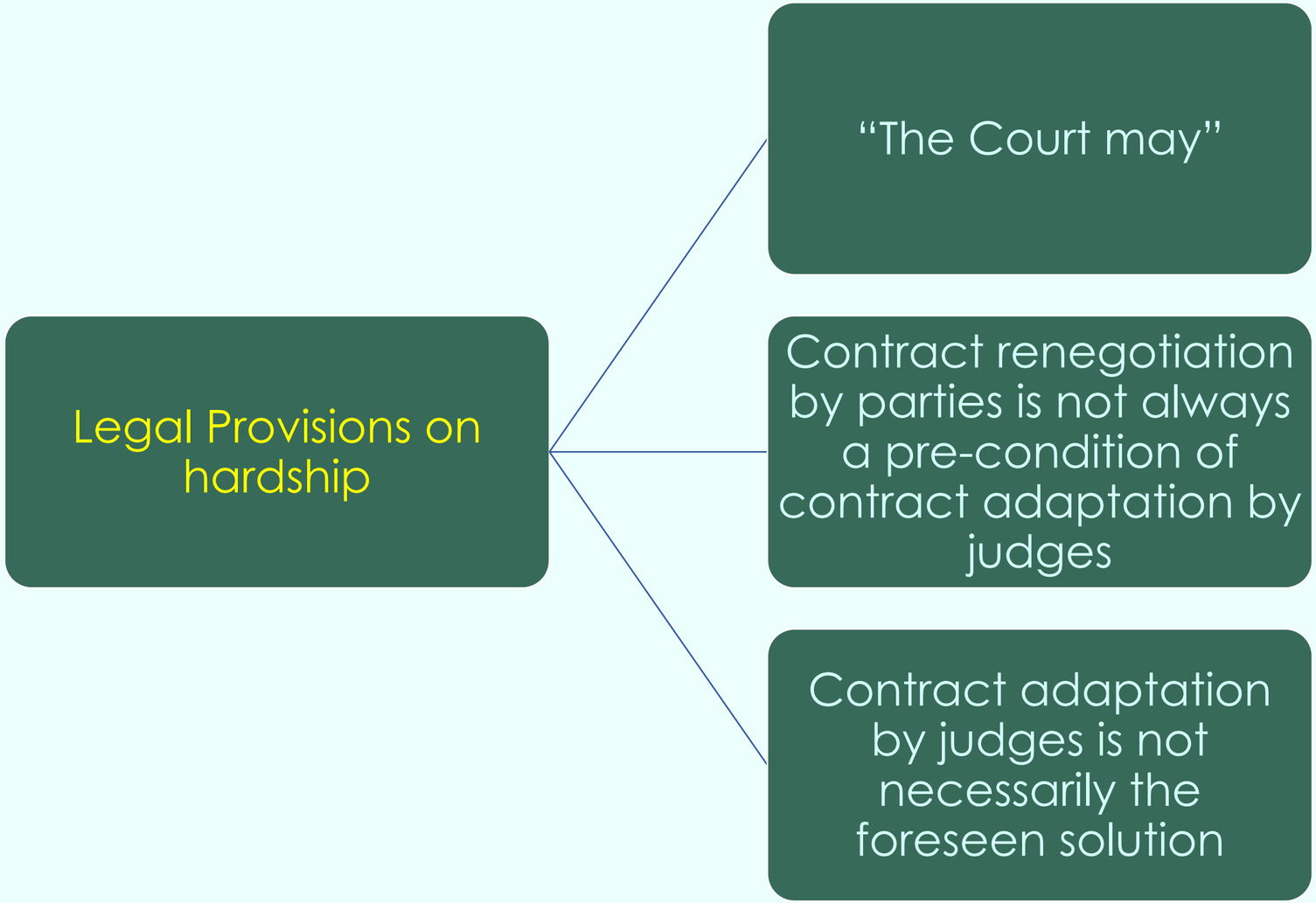
- **Either party** is entitled to request the arbitrator to declare the termination of the contract (*Option 3 C*)

- **Either party** is entitled to request the **arbitrator to adapt** the contract

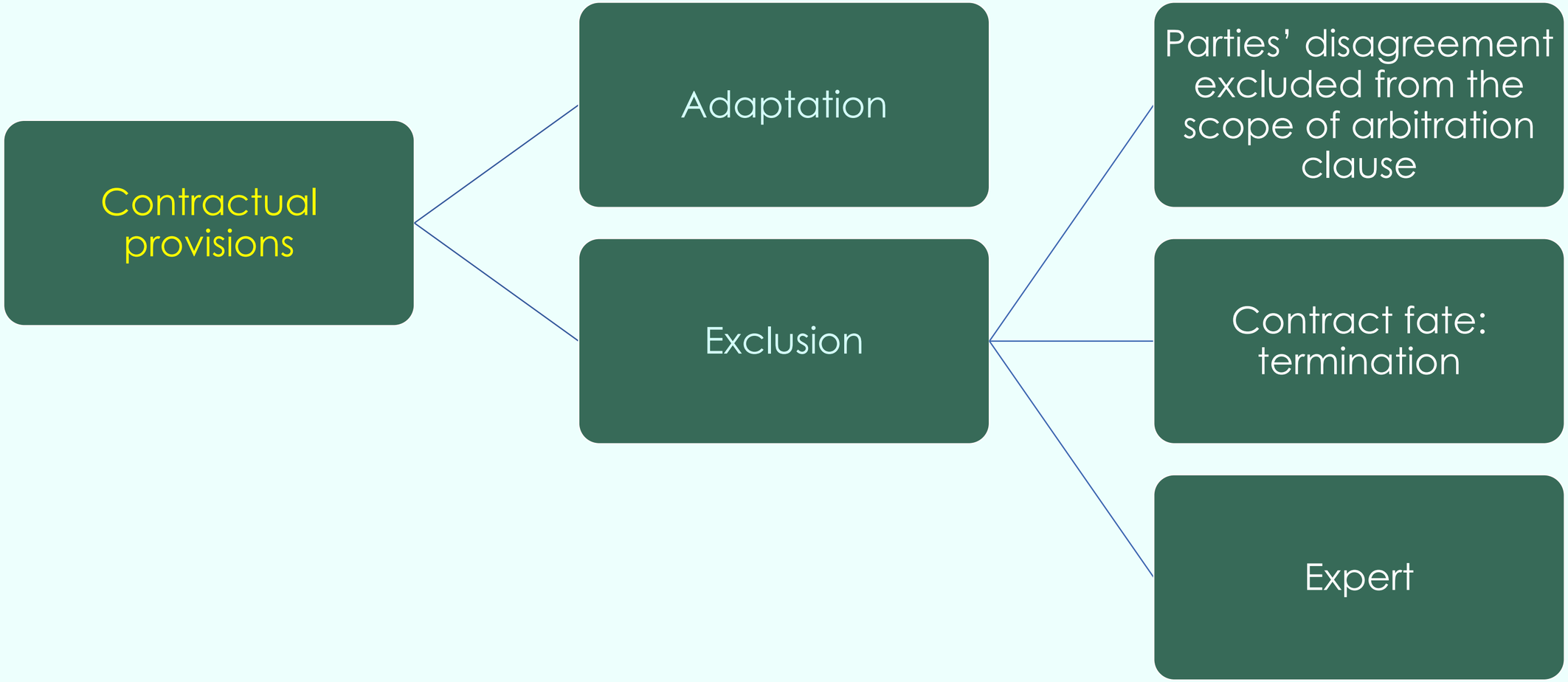
  - with a **view to restoring its equilibrium**, or,

  - to **terminate** the contract, **as appropriate** (*Option 3B*)

II. Why?
A. Legal Provisions on Hardship



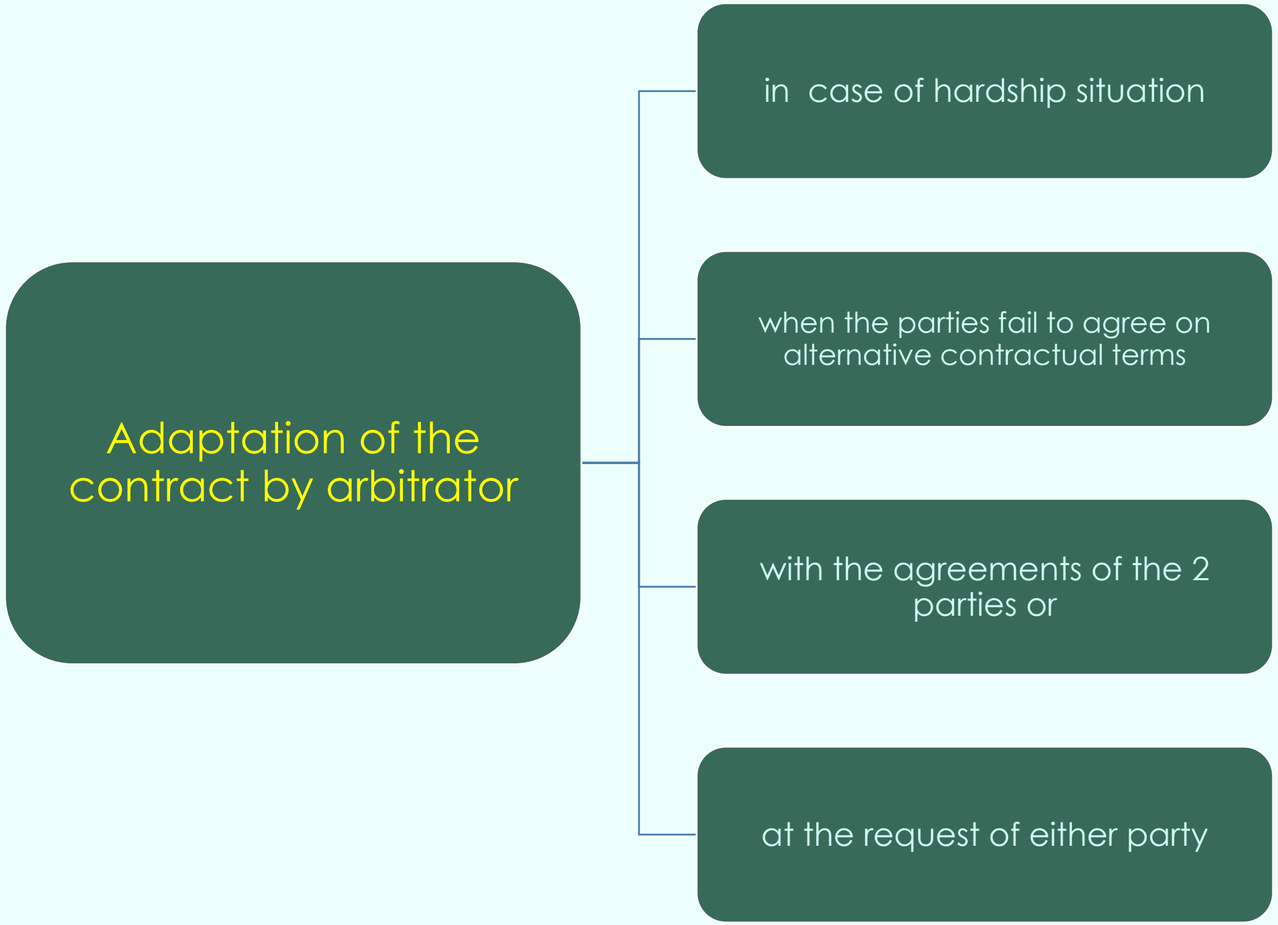
II. Why?
B. Contractual Provisions on Hardship



III. When?

- Assessment of the conditions of hardship
- After renegotiation of the contract by the parties?
- After the disagreement of the parties ?

IV: How?
A. New ICC Hardship Clause



IV. How?

B. Specific circumstances that are likely to affect the balance of their respective obligations

Which criteria ?

- ✓ Unpredictability of the event and **also** of its impact on the contract
- ✓ What is excessive onerosity?
- ✓ Affected party to avoid or overcome the event and its consequences?

IV. How?
C. Guidelines and procedures

- for negotiating the revision of the contractual obligations

a) Implementation of contract renegotiation
b) Conduct of the renegotiation
c) Scope of renegotiation

C. Guidelines and procedures
a) Implementation of contract renegotiation

- The burdened party (BP) must inform the other party (*means: email, letter … / does the BP have to ensure receipt of this letter by the other party?)*
- As soon as possible / once it is aware … (*any time limit?)*
- Ask for the renegotiation of the contract (*An important starting point to assist the arbitrator in assessing the conduct of the parties*)

C. Guidelines and procedures
b) Conduct of the renegotiation

Renegotiation to be conducted in accordance with the requirements of good faith in the performance of the contract

The affect party must inform the other party

- what event caused the excessive onerousness,
- what is the impact of the event on the performance of the contract,
- Ask for the renegotiation of the contract

The parties should exchange proposals and counter-proposals

Do the parties necessarily have to succeed in adapting the contract? It is up to the parties to specify this in the clause

C. Guidelines and procedures
c) Scope of renegotiation

- Termination of the contract?

  In favour of the burdened party
- Maintaining the contract with the disequilibrium?
  Favours the other party
- Suspension of the contract?

  How long? Parties' obligations in the meantime?
- Intervention of an expert/ mediator?

  Defining the mission, the scope of the decision rendered

D. The adaptation of the contract by arbitrator

a) What criteria should govern the choice of the arbitrator involved in the contract to adapt it?

- This question must be asked upstream (*nature of the contract*)
- Legal and contractual competence (*arbitrator & engineer for construction contracts)*

b. What power should be given to the arbitrator?

(i) The express powers of amicable composition

- * Mitigate the rigor of the legal rule or contractual clause
- * Have the effect to mitigate the rigor of hardship even without clause

(ii) Power conferred by the parties

c. Methodology

Arbitrator

- ✓ Interpret the meaning of contractual provisions
- ✓ Comply with the intention of the parties
- ✓ Respect the contractual provisions already existing

What arbitrators take into account

- ✓ The balance of parties' interests
- ✓ The surrounding circumstances
- ✓ Reasonableness "if reasonable"
- ✓ Fairness "if justice so requires"

d. Boundaries within which the arbitrator can impose the adaptation for the contractual obligations.

1) Is the arbitrator's power to adapt the contract an obligation? NO it is an option

- « The Court may (…) » (*Legal provisions on hardship*)
- « as appropriate (… » (*ICC Model Clause*)
- « If the court finds hardship, it may if reasonable (…) » (*Art. 6.2.3 UNIDROIT Principles)*

2) Meaning of the terms

(i) Reduction of excessive onerousness

- ✓ « restore the balance of contractual obligations of the parties »
- ✓ « reduce to reasonable limits, by lessening its extent or Increasing its consideration, the obligation that has become excessive »
- ✓ « reduce the oppressive obligation to a reasonable degree either by narrowing its extent or by awarding a balancing of interest »

(ii) Second meaning for Adaptation of the contract by arbitrator?

Indications

- ✓ « Adapt the contract with a view to restoring its equilibrium ».

  ✓ *(Art. 6.2.3 b) UNIDROIT Principles)*

- ✓
- ✓ « Adapt the contract in order to distribute between the parties in a just and equitable manner the losses and gains resulting from the change of circumstances ».

  (Art. 6.111 b) Principles of European Contract Law

3) Scope of contract adaptation by arbitrator

Legal provisions narrows the scope of arbitrators' intervention:

- It is **an adjustment** of contract conditions to a **reasonable level** that allows parties to perform the contract.

- Such adjustment is made according to what parties would have agreed upon at the conclusion of the contract.

Other option

" (…) **arbitrator invites the parties to submit proposals of the required adjustments, which might be taken as starting point for adapting the contract »**

(*ICC FM & Hardship Clauses, p.6)*

Relevant suggestion to the “energy supply” sector

An arbitrator to establish a new price for energy supply where parties cannot agree a new price, the arbitrator would need to apply

- an up-to-date market price for the delivery period in question using
- the same indexes as the supplier were already using,
- + a pass through of network (transportation) prices,
- + a reasonable amount for the supplier’s margin (based on what that uplift was before the disputed period).

(*Suggestion from someone working in the field*)

e. Limits: Challenges against arbitral awards

✓ In the seat of arbitration, for arbitrators' excess of authority

✓ In the place of enforcement of the arbitral award on the same ground

***Gas Natural Aprovisionamientos, SDG, SA v Atlantic LNG Company of Trinidad and Tobago* (2008)**

« **whether** the arbitrator ***had the power***, based on the parties' submissions or the arbitration agreement, to reach a certain issue, ***not whether the arbitrator correctly decided that issue*** »

Arbitrators had to reach a "fair and equitable revision of the contract price"

The Court stated that parties **omitted** in the contract's provisions :

✓ Limitations to arbitrators when adapting the contract, and

✓ "structural limitation on permissible prices revisions"

Conclusion

Bear in mind the interplay between the contract provisions and the applicable law

<u>To exclude contract adaptation by arbitrators:</u>

- ✓ Choose no applicable law to the merits that is of mandatory character
- ✓ Choose a legal provision providing contract termination by arbitrators or by the aggrieved party.
- ✓ Insert a contractual provision excluding contract adaptation by arbitrators

<u>To admit contract adaptation by arbitrators</u>:

- ✓ Choose any applicable law of mandatory character on hardship
- ✓ Choose a legal provision that admits contract adaptation by arbitrators
- ✓ Insert a contractual clause with a precise definition of conditions & consequences of hardship:
  - ➢ Should Parties renegotiate or not the contract?
  - ➢ To what extent may arbitrators adapt the contract?

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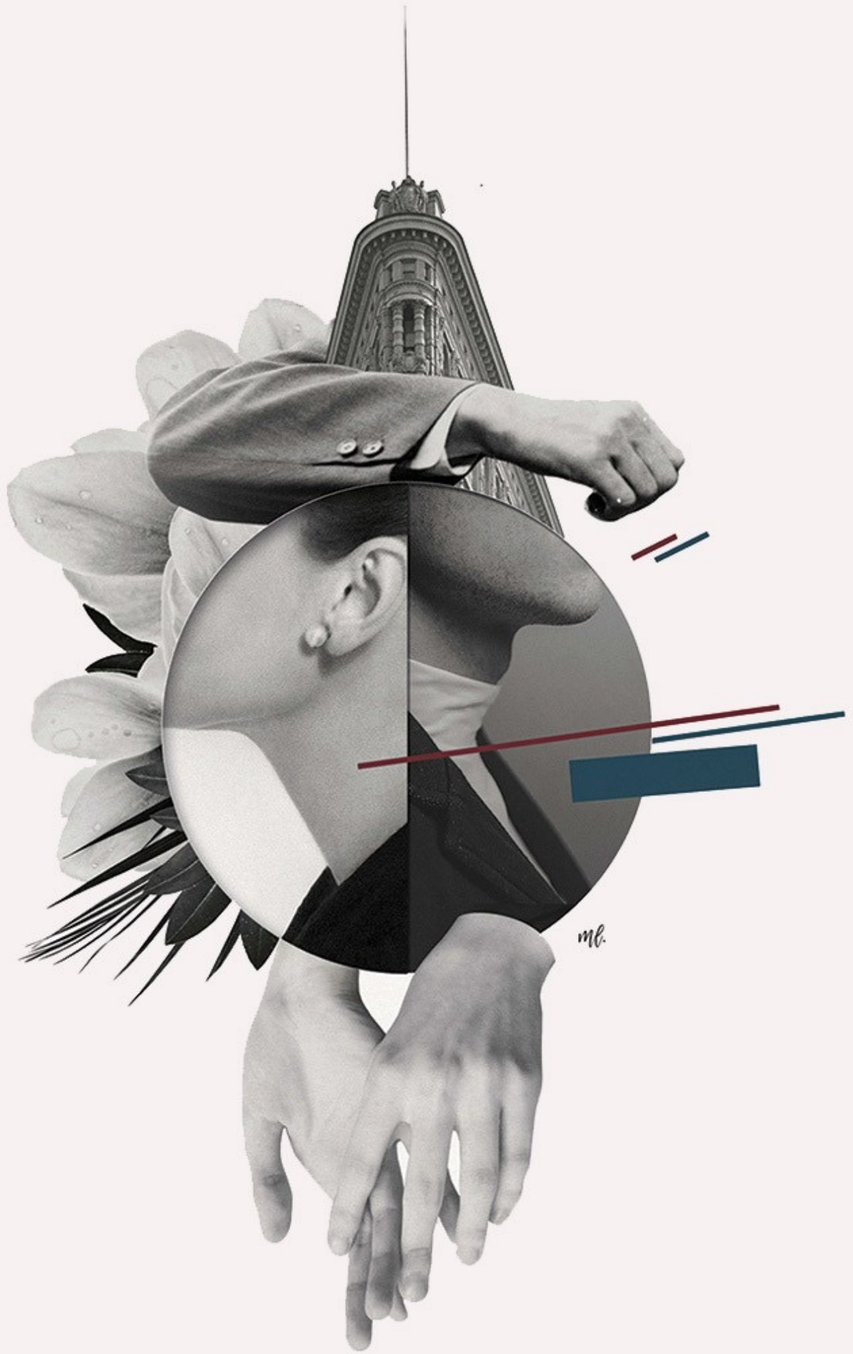

Recent Events Giving Rise to Force Majeure and Hardship Issues: Covid-19 and Economic Sanctions

Giacomo Rojas Elgueta

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Rome

14 October 2022

COVID-19 AS A FORCE MAJEURE EVENT

Elements of Force Majeure

UNIDROIT Principles of International Commercial Contracts (2016)

ARTICLE 7.1.7

(*Force majeure*)

(1) Non-performance by a party is excused if that party proves that the non-performance was due to an impediment beyond its control and that it 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.

ICC Force Majeure Clause (2020)

1. Definition. "Force Majeure" means the occurrence of an event or circumstance ("Force Majeure Event") that prevents or impedes a party from performing one or more of its contractual obligations under the contract, if and to the extent that the party affected by the impediment ("the Affected Party") proves:

a) that such impediment is beyond its reasonable control; and

b) that it could not reasonably have been foreseen at the time of the conclusion of the contract; and

c) that the effects of the impediment could not reasonably have been avoided or overcome by the Affected Party.

Burden of Proof

- Burden of proof upon the affected party
- Force Majeure certificates?
  - Factual elements
  - No legal value

Performance Cannot Be Used/Enjoyed

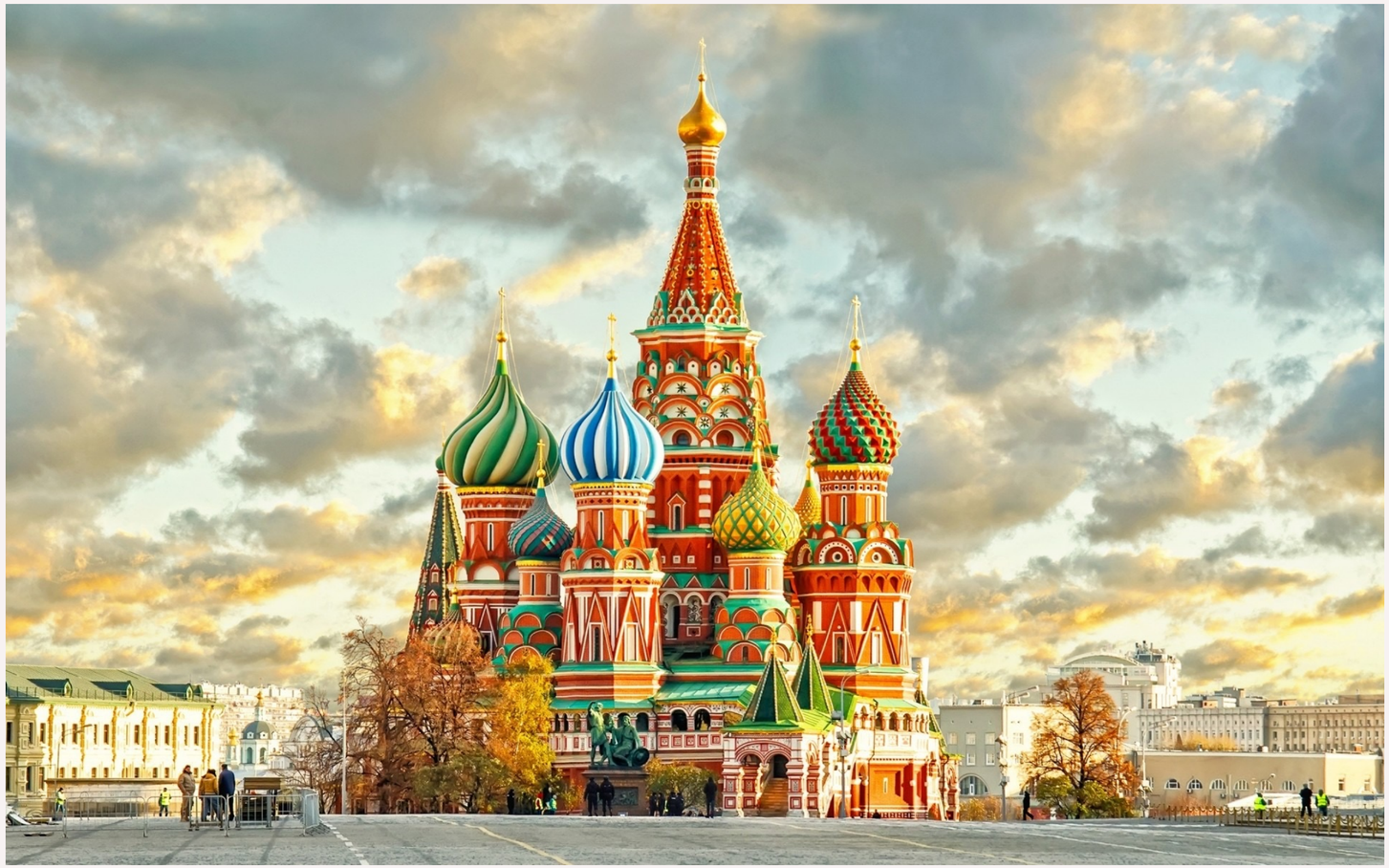
- Hungarian Supreme Court
- Italy: partial and temporary impossibility (*Trib. Milano, sez. XIII civ., n. 4355, 18 May 2021*) / *inutilizzabilità* (*Cass. civ., sez. III, n. 16315, 24 July 2007*)
- Argentina: *imprevisión* (*Cámara Nacional de Apelaciones en lo Civil, sala J [CNCiv.][SalaJ], 14/09/2020, "H.B. de B.A. c. Z.S.A.s /Medidas precautorias", La Ley [L.L.] 28/10/2020, 3*)
- France: Court of Cassation of 30 June 2022 ruled in favour of the lessors (no direct link between the restrictive measures and the intended used of the leased property)

Risk allocation?

Performance risk v. Price risk: risk sharing

Construction Contracts

Economic Sanctions as a Force Majeure Event



COUNCIL REGULATION (EU) NO 833/2014 OF 31 JULY 2014
(AS AMENDED BY COUNCIL REGULATION (EU) 2022/428 OF 15 MARCH 2022)

Article 5aa

1. It shall be prohibited to directly or indirectly engage in any transaction with:

(a) a legal person, entity or body established in Russia, which is publically controlled or with over 50 % public ownership or in which Russia, its Government or Central Bank has the right to participate in profits or with which Russia, its Government or Central Bank has other substantial economic relationship, as listed in Annex XIX;

(b) a legal person, entity or body established outside the Union whose proprietary rights are directly or indirectly owned for more than 50 % by an entity listed in Annex XIX; or

(c) a legal person, entity or body acting on behalf or at the direction of an entity referred to in point (a) or (b) of this paragraph.

Article 11

1. No claims in connection with any contract or transaction the performance of which has been affected, directly or indirectly, in whole or in part, by the measures imposed under this Regulation, including claims for indemnity or any other claim of this type, such as a claim for compensation or a claim under a guarantee, notably a claim for extension or payment of a bond, guarantee or indemnity, particularly a financial guarantee or financial indemnity, of whatever form, shall be satisfied, if they are made by:

(a) legal persons, entities or bodies listed in the Annexes to this Regulation or legal persons, entities or bodies established outside the Union whose proprietary rights are directly or indirectly owned for more than 50 % by them;

(b) any other Russian person, entity or body;

(c) any person, entity or body acting through or on behalf of one of the persons, entities or bodies referred to in points (a) or (b) of this paragraph.

Economic Sanctions as a Force Majeure Event

When can a sanction be given effect in a dispute? Two possible approaches:

- Factual element approach. It is the situation created by the economic sanction that is deemed to constitute a factual impediment.
- Legal norm approach. An economic sanction may only give rise to an impediment of a legal nature, so that the sanction will only be given effect if the norm imposing it applies to the dispute based on a conflict of laws analysis.

Economic Sanctions as a Force Majeure Event

- Once it is concluded that the sanction must be given effect in the dispute at hand, it is still necessary to assess whether it satisfies the requirements to amount to a Force Majeure event.
- E.g., licence regime: sanctions may not constitute a Force Majeure event where it can be shown that a licence could be sought and could be expected to be forthcoming.

Economic Sanctions as a Force Majeure Event

- What remedies?
- Economic sanctions are temporary in nature; the obligation might be suspended, rather than discharged.
  - Article 79(1) CISG (Arbitration Court attached to the Hungarian Chamber of Commerce and Industry, Case No. VB/96074, *Yugoslav caviar case*, 10 December 1996)
  - English law (*Libyan Arab Foreign Bank v Bankers Trust* Co [1989] 1 QB 728 at 772 B-C)

Economic Sanctions as a Force Majeure Event

- Importance of the length of the delay
- If at the time when the sanction is lifted:
  a) the affected party's performance is substantially more onerous, so as to make performance something radically/fundamentally different from what had been originally undertaken, or
  b) the counter-party is no longer interested in receiving the performance,

  the contract may be terminated under the FM clause or under the various doctrines provided by the applicable laws (e.g., frustration-impossibility, commercial impracticability, hardship).
- In case of hardship, the remedy of renegotiation/contract adaptation may also be available (e.g., UPICC).

Indirect Effect of Economic Sanctions on Contract Performance

- Scenario: a party withholds performance not on the ground that it is itself prohibited by Article 5AA, but because of its supplier's default resulting from a sanction prohibiting the supplier from performing its obligations
- Acquisition/procurement risk lies with the seller

Indirect Effect of Economic Sanctions on Contract Performance

- Nonetheless, possible remedies:
  - Frustration of contract (unavailability of a particular source)
  - Commercial impracticability (¶ 2-615(a) UCC, Official Comment No. 4)

    4. But a severe shortage of raw materials or of supplies due to a contingency such as war, embargo, local crop failure, unforeseen shutdown of major sources of supply or the like, which either causes a marked increase in cost or altogether prevents the seller from securing supplies necessary to his performance, is within the contemplation of this section
  - Excessive onerousness
  - Hardship

Force Majeure and the Withdrawing from Russia

- Russia's invasion of Ukraine has prompted many western companies to exit from Russia, as businesses have decided that, even if they are not caught by sanctions, it is no longer appropriate or desirable to maintain a presence there
- Unilateral and early termination of contracts
- Risk of significant claims for damages, including for loss of profits from the full expected term of the contract
- Is force Majeure a viable defense?

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