COVID-19
and
International Contracting

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Overview

- Force Majeure Provisions
- Contract Theories of “Frustration” and “Impossibility”
- The Adjustment of Payment Terms
- Practical Considerations
- Questions and Answers
Force Majeure

**Purpose**

- Force Majeure clauses (sometimes called “Excusable Delay” clauses) typically identify certain scenarios outside the control of the contracting parties that would excuse delayed performance or non-performance.

**Applicability**

- While these clauses may seem to provide broad coverage, they are often interpreted more narrowly.
- The exact scope of coverage will depend on the language of the clause, the interpretation of the adjudicator, and the laws of the applicable jurisdiction.

**Common Law v. Civil Law**

- Understanding the distinctions between common law interpretation (e.g., US, UK, Canada, Australia), civil law interpretation (e.g., France, Germany), and mixed systems (e.g., China and the UAE) are particularly important for international agreements.
Civil Law Interpretations

• Under the French Civil Code, which is influential across many civil law systems, the applicability of a force majeure clause depends on three factors:

1. Was the force majeure event beyond the control of the affected party?

2. Could the relevant event reasonably have been foreseen at the time the contract was executed?

3. Could the effects of such event be avoided by appropriate mitigation measures?

• **Take away:** a major event that causes inconvenience or additional costs of performance in and of itself may NOT be enough to trigger a force majeure clause in a civil law jurisdiction.
Common Law Interpretations

• Interpretation will be rooted in contract law principles.

• Most common law courts will consider whether an event is expressly stated in the clause, as well as the nature of the performance required under the contract. If, for example, the contract allows the supplier to supply material from any source, the unavailability of a particular source is likely not enough for a successful force majeure defense.

• Causation is a key consideration:
  ➢ Was the event the direct reason for delayed performance or non-performance, or was delayed performance or non-performance caused by a chain of events, of which the event was merely one component.

• Example: while a force majeure clause might reference an epidemic, the actual cause of non-performance could be a government ordered quarantine.

Neither Party shall be liable for failure to perform all or any part of its obligations pursuant to this Agreement, if such failure is without fault or negligence of such Party and is caused by natural catastrophe, fire, war, terrorism, civil strife, labor unrest or strike, or governmental action or inaction. If such force majeure condition(s) persists for more than sixty (60) days, either Party shall be entitled to cancel this Agreement.
“Force Majeure” shall mean any event or condition, not existing as of the date of acknowledgment of this Agreement, not reasonably foreseeable as of such date and not reasonably within the control of either Party, which prevents in whole or in material part the performance by the Parties of its obligations hereunder or which renders the performance of such obligations so difficult or costly as to make such performance commercially unreasonable. Without limiting the foregoing, the following shall constitute events or conditions of Force Majeure: acts of State or governmental action, orders, legislation, regulations, restrictions, priorities or rationing, riots, disturbance, war (declared or undeclared), strikes, lockouts, slowdowns, prolonged shortage of energy supplies, interruption of transportation, embargo, prohibition of import or export of goods covered by this agreement, and epidemics, fire, flood, hurricane, typhoon, earthquake, lightning, and explosion. If by any of the above-mentioned causes, an allocation of supplies must be made, the Parties hereby agree that such allocation will be fairly made. It is in particular expressly agreed that any refusal or failure of any governmental authority to grant any export license legally required for the fulfillment by the Seller of its obligations hereunder shall constitute an event of Force Majeure, provided said refusal or failure is not due to the fault or negligence of the Seller.

Additional Contract Defenses

Force Majeure clauses are not always available, but additional defenses can potentially be found in the doctrines of frustration and impossibility (or impracticability).

These legal theories are rooted in the common law of contracts, but are often also codified into statutory or regulatory law.

The exact interpretations will vary between jurisdictions.

Frustration and Impossibility

• **Frustration** = when the purpose of the contract cannot be achieved. Generally applicable when:
  1. an event substantially frustrates a party's principal purpose;
  2. the event was not reasonably foreseeable;
  3. the event was not the fault of the party asserting the defense; and
  4. the party did not assume a greater obligation or risk than necessary.

• **Impossibility** = modern interpretation is not true impossibility, but rather impracticability. Generally applicable when:
  1. an event makes performance of the contract impracticable;
  2. the event was not reasonably foreseeable;
  3. the impracticability was not the fault of the party asserting the defense; and
  4. the party did not assume a greater obligation or risk than necessary.

Hypothetical – Frustration vs. Impracticability

Bart requires a shipper for his widgets. Bart and Art enter into an agreement, Pursuant to which Art will pick up and deliver the Bart’s widgets in exchange for $10,000.

Scenario 1: Frustration

Bart’s widget plant is shut down and he has no items to sell, thus the purpose of the contract cannot be achieved. The purpose of the contract is frustrated.

Scenario 2: Impracticability

The state has issued an ordinance stipulating that truck drivers may not ship widgets. It would be impractical, if not impossible, for Art to fulfil his obligations under the contract while complying with the ordinance.
Payment Terms – Existing Contracts

• Despite the severity of COVID-19, existing payment terms will likely be inflexible.

• However, utilization of force majeure provisions or, in the alternative, the frustration or impossibility doctrines, could shield sellers from penalties for delayed performance or non-performance that are a result of COVID-19.
Payment Terms – Contracts under Negotiation

• Consider using flexible payment terms while the spread and impact of COVID-19 are ongoing.

➢ Seek advance payment wherever possible.

➢ For service providers, conditioning payment on the arrival and availability of personnel overseas can be helpful.

• Documentary letters of credit provide a useful payment framework amidst COVID-19.
Practical Considerations

• Consider the day-to-day realities of the destination and the impacts of COVID-19 quarantine rules and restrictions.
  • Online or virtual transactions and interactions are common in the U.S., but may be far less common in other locations (e.g., the Gulf States) where quarantines will likely remain in effect for at least the near-term.
  • Use of in-country representatives or consultants is very common during international efforts but these personnel may be significantly less useful if in-person meetings are not an option during quarantines.

• Communicate, communicate, communicate!

• Compliance concerns:
  • Avoid engaging new, unvetted partners out of desperation
  • Maintain a proactive anti-corruption posture
Questions?

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