ICC updates its force majeure and hardship standard clauses

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The utility of force majeure and hardship clauses has been thrown into sharp relief in the wake of the COVID-19 pandemic, where they have provided relief to commercial counterparties unable to perform their contractual obligations because of events outside their control. In view of the current uncertainty created by COVID-19, the International Chamber of Commerce has recently updated its “off the shelf” force majeure and hardship clauses. This article explains the relief that these two clauses offer and the main changes that the ICC has introduced in its standard clauses.

ICC standard clauses

The ICC has standard documents available on its website, which include standard clauses and their explanatory notes. In 2003, the ICC revised its force majeure and hardship clauses. In March 2020, as a result of the uncertainty created by COVID-19, the ICC updated these clauses again.

Force majeure clause

In general, a force majeure clause is a contractual clause that alters the parties’ obligations when an extraordinary event or circumstance beyond the parties’ control occurs and prevents or precludes the party (or parties) from
performing the contract.

Under English law-governed contracts, a typical force majeure clause includes a closed list of events or circumstances. Therefore, if the extraordinary event or circumstance occurring is not one of those listed in the force majeure clause, the affected party cannot rely on the force majeure clause for relief. This force majeure formulation reflects the parties’ freedom to contract and provides predictability, ensuring that a party won’t be able to rely on events other than those listed in the force majeure clause.

Unlike the typical force majeure provision under English law, the standard ICC force majeure clause provides both a list of events as well as a force majeure formula, intended to catch circumstances that fall outside the listed events. Specifically, the ICC force majeure clause provides a list of “presumed” force majeure events in respect of which, to qualify as force majeure, an affected party only needs to prove that it could not reasonably have avoided or overcome the effects of the event. Other events (not listed in the ICC force majeure clause) will also be considered force majeure when they prevent or impede a party from performing one or more of its contractual obligations, to the extent that the party affected by the impediment proves that:

- it could not reasonably have avoided or overcome the effects of the impediment (i.e. the same requirement as is needed in respect of the listed force majeure events);
- the impediment is beyond its control; and
- it could not reasonably have foreseen the event at the time of the contract.

In terms of relief, the ICC force majeure clause allows a party who has successfully invoked the clause to:

- be relieved from its obligations under the contract, and to pursue other contractual remedies for breach of contract, including damages from the time the impediment caused the party’s inability to perform (provided that notice has been served without delay);
- terminate the contract provided that the inability to perform has exceeded 120 days; and
- when the contract is terminated as per the second bullet point above, recover the equivalent benefit the other party has derived from the party’s performance before termination, avoiding one of the parties unjustly enriching itself from the other party’s performance.

The March 2020 revisions to the ICC force majeure clause include the following:

- There is now a long-form and a short-form force majeure clause. The short-form clause includes only some essential provisions and it is said to be particularly suited for small and medium-sized enterprises, although admittedly it does not provide the same level of protection as the long-form force majeure clause.
- As stated above, the new ICC force majeure allows either party to terminate the contract if the duration of the impediment exceeds 120 days. This contrasts with the “reasonable period” required by the 2003 version of the clause, the explanatory notes of which highlighted that “it was felt that it would be difficult to establish a single period, which would be appropriate for all sectors of industry and in all circumstances.” Clearly, COVID-19 has challenged the reasonable period formulation.

**Hardship clause**

Hardship clauses seek to protect a disadvantaged party when an event (beyond the disadvantaged party’s control) renders its performance more onerous than could reasonably have been anticipated at the time the contract was concluded. English law-governed agreements do not usually include hardship clauses, as parties often prefer the predictability of the effects that the parties expressly agreed when negotiating the contract. This is not necessarily the approach of many European jurisdictions, whose civil codes often provide differing legal consequences for hardship. It is common, therefore, for parties to include their own hardship clauses in their contracts.

A party will be able to rely on the relief provided for in the ICC hardship clause when it can prove:

- continuing to perform its contractual duties would be excessively onerous, due to an event that was unforeseeable at the time of the conclusion of the contract and that is beyond the party’s control; and
- it could not have avoided or overcome both the event itself or its effects.

In terms of relief, the ICC hardship clause enables a party successfully invoking the clause to negotiate...
alternative contractual terms, which reasonably allow the party to overcome the consequences of the event.

The March 2020 revision also introduced a major change to the ICC’s hardship clause by expanding the options available in the event that the parties are unable to agree alternative contractual terms. In its 2003 version, the ICC hardship clause only provided for termination of the agreement. However, in its 2020 March revision, it provides for three alternative courses of action, which the parties need to choose from when negotiating their contract, being:

- allowing the party invoking the clause to terminate the contract (as per the 2003 version);
- requesting a judge or arbitrator to adjust the contract to re-establish the equilibrium of the contract, or to terminate it, as appropriate; or
- requesting the judge or arbitrator to declare that the contract is terminated.

Comment

The ICC standard clauses can provide parties with a good starting point when drafting force majeure and hardship provisions, particularly in international contracts where parties come from different legal traditions. Nonetheless, we recommend parties to consult with their legal advisors before agreeing their force majeure and hardship clauses. Accordingly, even if parties wish to use the ICC clauses as a base, they should seek legal advice and adjust the ICC standard clauses as required, to suit their particular needs and circumstances.

\[1\]In these circumstances, parties will need to rely on other contractual (e.g. material adverse change) or common law (frustration) remedies.

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