

Force Majeure Clauses in the Age of Coronavirus and Brexit: A Traditional Instrument for Contemporary Problems

1. Introduction

The present article is aimed at analyzing contemporary events under the light of Force Majeure, offering the reader an overview at critical issues in international business contracts and some remarks for possible solutions to changed circumstances in the complex contemporary legal panorama.

The concept of Force Majeure and changed circumstances to justify non-performance of a contract is rather ancient.¹ The subject is governed by two contrasting general principles: *pacta sunt servanda* on the one hand, and *rebus sic stantibus* on the other. Following *pacta sunt servanda*, the principle preferred by common-law countries, agreements between contracting parties must always be observed and therefore enforced. Quite on the contrary, according to the *rebus sic stantibus* principle, followed in civil-law systems, “[c]ontracts providing for successive acts of performance over a future period of time must be understood as subject to the condition that the circumstances will remain the same.”² It is indeed an established theory that counteracts negative effects from unforeseeable events, both in the national and international realm.

Force Majeure clauses in international commercial contracts are today an invaluable instrument to allocate risks between the parties.³ Generally, these clauses are employed to discharge a party from its obligations after a supervening unforeseeable event has drastically changed the circumstances of the agreement, in most cases impeding performance entirely. Different jurisdictions consider changed circumstances in various fashions, due also to the dissimilarities between the contract laws of each country. Force Majeure claims can be argued either in force of a contractual clause or a legislative provision, if comprised in the applicable law. It must be noted that in most cases these legislative provisions can be derogated from by the parties.

The international practitioner, to navigate this sea of unpredictability, must consider what law will be applicable to the contract and subsequently draft the Force Majeure provision in the most fitting form. As we will demonstrate, courts and arbitral tribunals are more incline to recognize Force Majeure claims when the contractual clause is as specific and precise as possible.⁴ A large number of dissimilar occurrences have been defined as Force Majeure events by parties, legislations and courts: not only wars⁵ or natural disasters,⁶ but also epidemics and virus outbreaks,⁷ the postponement of the coronation of

¹ See Article 48 of the Code of Hammurabi, 1780 B.C.

² Saul Litvinoff, *Force Majeure, Failure of Cause and Theorie de l'Imprevision: Louisiana Law and Beyond*, 46 La. L. Rev. 1 (1985). See also Joseph M. Perillo, *Force majeure and hardship under the UNIDROIT Principles of international commercial contracts*, 5 Tul. J. Int'l & Comp. L. 5 (1997), p 12, and Article 1467 of the Italian Civil Code.

³ Ugo Draetta, *Force majeure clauses in international trade practice*, I.B.L.J. 1996, 5, p. 551.

⁴ Notably in connection with Brexit: Sarah Jones & Simon James, *Brexit and Contracts: What to Do When the Unknown Is Unknown*, 43 Litig. 16 (2017), p. 17.

⁵ *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* (1943) A.C. 32; see also Giorgio De Nova, Rodolfo Sacco, 2004, *Il contratto*, UTET: Torino, pp. 996-997, related to the cases concerning the Second World War.

⁶ *Florida Power Corp. v. City of Tallahassee*, 154 Fla. 638 (Fla. 1944)

⁷ Micheline Maynard, *Citing SARS, Northwest Invokes Clause to Allow Layoffs*, The New York Times (2003). Available at: <https://www.nytimes.com/2003/05/09/business/citing-sars-northwest-invokes-clause-to-allow-layoffs.html>

King Edward VII,⁸ or even a dramatic rise in the cost of performance.⁹ It is now necessary to analyze whether contemporary events, namely the COVID-19 pandemic, economic crises and Brexit can be recognized as Force Majeure occurrences. As most of the times in law, the answer is: it depends.

2. COVID-19

At the time of writing, a pandemic of a new Coronavirus has started in Wuhan, China, and the virus has now spread globally.¹⁰ The 2019 Coronavirus on 30 January 2020 was already declared a “Public Health Emergency of International Concern” by the World Health Organization (WHO). It has caused the lockdown of entire countries and travel bans; moreover, it is the cause of a new major economic crisis. Epidemics are usually included in the list of events of Force Majeure provisions. However, only in some cases will Force Majeure be recognized, even in this major international crisis.

The China Council for The Promotion of International Trade has already issued more than five thousand Force Majeure certificates for contracts of over 70 billion USD in value¹¹ to national businesses that have had severe consequences from the event, in an attempt to protect them from the negative consequences of possible breaches of contracts. These certificates are not a final determination that the virus constitutes a Force Majeure event, but they are one of the requirements under Chinese contract law to obtain a recognition of Force Majeure by a court or arbitral tribunal.¹² The issuing of thousands of Force Majeure certificates by the Chinese authorities was foreseeable, as the government wishes to protect the national economy. However, even if these certificates will likely have little value outside of China, they could be definitive in national courts.¹³ Cases of Force Majeure claims have already started to emerge: Total SA, the French energy company, has received a Force Majeure claim from China National Offshore Oil Corp., the biggest Chinese liquid natural gas buyer, but has rejected it. A Chinese copper smelter, Guangxi Nanguo, has also declared Force Majeure to avoid receiving a shipment of raw material.¹⁴ Moreover, it

⁸ To cite only some of the famous “Coronation cases” of 1903 and 1904: *Krell v Henry* [1903] 2 K.B. 740; *Chandler v Webster* [1904] 1 KB 493; *Herne Bay Steamboat Co v Hutton* [1903] 2 K.B. 683

⁹ *Aluminum Co. of America v Essex Group, Inc.*, 499 F. Supp. 53 (1980)

¹⁰ World Health Organization: <https://www.who.int/emergencies/diseases/novel-coronavirus-2019>

¹¹ Reuters, *China force majeure certificate issuance pass 5,600 amid virus outbreak - trade body*, (2020). Available at: <https://www.reuters.com/article/health-coronavirus-china-forcemajeure/china-force-majeure-certificate-issuance-pass-5600-amid-virus-outbreak-trade-body-idUSL4N2B43CK>

¹² See Articles 26 and 30 of the Economic Contract Law of China, 1981.

¹³ Sun Yu & Xinning Liu, *China issues record number of force majeure certificates*, *The Financial Times* (2020). Available at: <https://www.ft.com/content/bca84ad8-5860-11ea-a528-dd0f971febbc>

¹⁴ S. Stapczynski, M. Burton, and J. Davalos, *China Reneges on Commodity Deals, Worsens Global Trade Chaos*, *Bloomberg* (2020). Available at:

<https://www.bloomberg.com/news/articles/2020-02-06/chinese-gas-buyer-cnooc-declares-force-majeure-on-lng-contracts>; Bate Felix, Jessica Jaganathan, *France’s Total rejects force majeure notice from Chinese LNG buyer*, *Reuters* (2020). Available at:

<https://www.reuters.com/article/us-china-health-total/frances-total-rejects-force-majeure-notice-from-chinese-lng-buyer-idUSKBN2001XQ>

See also Irene Ang, Max Tingyao Lin and Lucy Hine, *Chinese shipyards declare force majeure on newbuilding contracts in coronavirus fallout*, (2020), available at:

<https://www.tradewindnews.com/shipyards/chinese-shipyards-declare-force-majeure-on-newbuilding-contracts-in-coronavirus-fallout/2-1-749561>

should be remembered that a similar outbreak of a severe acute respiratory syndrome (SARS), was recognized as Force Majeure already in the 2003 epidemic.¹⁵

Parties to commercial contracts that have been impacted by the outbreak should analyze what their agreements provide in such instances, whether any notices are due before a determinate expiration date and consider what actions can the parties take to ensure contractual performance. An adequate due diligence is required by parties who wish to trigger Force Majeure provisions, and most importantly, contracting parties should communicate between themselves and understand which will be the consequences of a potential Force Majeure claim. Parties should also consider the wording of their contractual provisions and may want to adapt them to these new circumstances. Public companies should also ponder the possibility that the COVID-19 has triggered disclosure obligations or other legal concerns with regard to corporate performance or financial stability.¹⁶

Before France was deeply impacted by the virus, the French Finance Minister had already declared that businesses could claim a Force Majeure defense in connection with the (at the time) epidemic of COVID-19 in cases of agreements that involve French small-to-medium sized enterprises (SMEs).¹⁷ At the time of writing there is still no available caselaw recognizing this pandemic as Force Majeure. However, the justice process can take months or years, thus this lack of cases is to be expected. Courts, in general, will possibly consider whether the outbreak was the sole cause of the impossibility / impracticability / frustration, the behavior of the parties, possible performance alternatives, and the exact wording of an eventual Force Majeure provision in the contract.

3. Economic recession

The 2019 Coronavirus could spark a new financial crisis even worse than the Great Recession.¹⁸ To prepare for this likely scenario, we shall take into consideration the prior crisis. The Great Recession of 2008 was the most critical economic and financial crisis since the Great Depression in the 1930s.¹⁹ After the economic downturn, many entities tried to enforce Force Majeure clauses with regards to the Recession. A U.S. Court recognized that even though an economic crisis can be recognized as a Force Majeure event, the clause must contain a specific reference to it: the clause in that case did not specifically

¹⁵ M. Maynard, *Citing SARS, Northwest Invokes Clause to Allow Layoffs*, The New York Times (2003). Available at: <https://www.nytimes.com/2003/05/09/business/citing-sars-northwest-invokes-clause-to-allow-layoffs.html>
See also Mario Nigro, Marianne Smith, *Is SARS an Event That Triggers a Force Majeure Clause*, 27 *Advoc. Q.* 199 (2003). Moreover, on June 11th, 2003, the China Supreme People's Court issued a guideline to the other national courts, in which it described how they could refer to the legal provisions concerning Force Majeure when dealing with the SARS outbreak.

¹⁶ See Anderson *et al.*, *Coronavirus/COVID-19: Implications for Commercial and Financial Contracts*, (2020). Available at: <https://www.skadden.com/insights/publications/2020/02/coronavirus-covid19-implications>

¹⁷ Reuters, *France: "force majeure" can be declared over coronavirus in contracts with smaller firms*, (2020). Available at: <https://www.reuters.com/article/us-china-health-france-economy/france-force-majeure-can-be-declared-over-coronavirus-in-contracts-with-smaller-firms-idUSKCN20M1R8>

¹⁸ Matina Stevis-Gridneff, *As Europe Confronts the Coronavirus, What Shape Will Solidarity Take?*, The New York Times (2020). Available at: <https://www.nytimes.com/2020/04/08/world/europe/eu-coronavirus-aid.html>

¹⁹ International Monetary Fund, *World Economic Outlook — April 2009: Crisis and Recovery* (PDF), April 24, 2009, Box 1.1, pp. 11 – 14. Available at: <http://www.imf.org/external/pubs/ft/weo/2009/01/pdf/text.pdf>

list financial disasters or fluctuations in financial circumstances, and thus the Court ruled that the parties did not intend to cover such kind of events under Force Majeure.²⁰

However, in some cases the Great Recession has been recognized expressly as Force Majeure: In *In Re Old Carco LLC*,²¹ the Recession forced the company to shut down manufacturing plants and declare bankruptcy, thus breaching a number of contracts. Old Carco stated that since the closure of the plants was directly determined by the financial crisis of 2008, and a Force Majeure clause was included in the contracts, the financial crisis excused its performance. The Force Majeure provision explicitly relieved the firm from acts beyond its reasonable control, including “change to economic conditions.” The Court stated that in general, “financial difficulty does not excuse the defaulting party’s performance.” However, “while courts will not presume that a change in economic conditions constitutes an excuse for nonperformance, this does not preclude the parties from negotiating for such an excuse.” Therefore, “Express inclusion of the clause ‘change to economic conditions,’ [...] evidences the intention of the parties to use a broader force majeure concept.” The Court thus ruled that the financial crises excused performance of the debtor, following the Force Majeure provision in the contract.

4. Brexit as Force Majeure

In June 2016 a referendum was held in the UK, and 52% of the voters decided to leave the European Union. The nation thus triggered Article 50 TEU to start the procedures to leave the EU, and formally concluded them on January 31st of 2020. At the time of writing, the UK and the EU are in the midst of the transition period, which will end on December 31st, 2020. In such period they must come to an agreement regarding all the different aspects of the relationship between the two entities.

The consequences of this event are incredibly significant for the international community, and uncertainty regarding the terms of the severance between England and the European Union is still very much present.²² Many arrangements are required for practitioners to adapt their contracts to a post-Brexit future,²³ but we will focus mainly on Force Majeure clauses. After Brexit, free trade between the EU and UK will likely cease; in such case, the frustration doctrine and/or broad enough Force Majeure clauses

²⁰ *Great Lakes Gas Transmission v Essar Steel Minnesota LLC*, No. 16-1101 (8th Cir. 2016), as cited by Kevin Jacobs and Benjamin Sweet, ‘Force Majeure’ In the Wake Of the Financial Crisis; *From The Experts*, Corporate Counsel (Online) January 16, 2014.

²¹ *In Re Old Carco LLC*, 452 B.R. 100 (Bankr. S.D.N.Y. 2011), as cited by Kevin Jacobs and Benjamin Sweet, ‘Force Majeure’ In the Wake Of the Financial Crisis; *From The Experts*, Corporate Counsel (Online) January 16, 2014. Another interesting case in which the economic crisis was claimed as a Force Majeure event was a dispute between Donald Trump and Deutsche Bank, over a loan for the construction of a skyscraper in Chicago: *Trump, Donald J. et al v Deutsche Bank Trust et al*, New York Supreme Court, Queens, 026841/2008. In 2010, Deutsche Bank and Mr. Trump settled their litigation over the Chicago loan. Mr. Trump agreed to repay most of what he owed by 2012.

²² Sam Lowe, *We still don’t know what Brexit means*, The Financial Times (2020), available at: <https://www.ft.com/content/af7ac1d8-441a-11ea-9a2a-98980971c1ff>. See also Adam Payne, *Boris Johnson’s Brexit trade deal threat risks destroying UK trade with the EU, warn British businesses*, Business Insider (2020). Available at: <https://www.businessinsider.com/brexit-business-leaders-urge-boris-johnson-ditch-australia-no-trade-deal-threat-2020-2?IR=T>

²³ See Eric N. Fidel, *Commercial Contracts Post-Brexit*, 2016 Bus. L. Today 1 (2016).

may be argued claimed in defense of nonperforming parties.²⁴ Generally, for the contracts governed by UK law, the requirements for frustration are:²⁵

- a) That the entire contract must be frustrated,²⁶
- b) The occurrence of an event that radically modifies the entire set of duties included in the original contract, or renders the contract completely impossible or illegal to perform,²⁷
- c) Non-performance of the affected party and proof by such party of the condition under b).²⁸

In light of this, it is unlikely for Brexit alone to provide sufficient grounds under UK contract law to discharge the parties from their duties:²⁹ the requirement of radically modifying the entire contractual performance or rendering it completely impossible can hardly be met by a simple tariff on trade, for example. On the other hand, if the contract provides a specific Force Majeure provision which allocates the risks related to certain events, e.g., a rise above a certain percentage in the cost of performance, the clause is more likely to be enforced.³⁰ Even if most Force Majeure clauses include a reference to governmental actions, such clauses are usually written (and interpreted) in a narrow fashion, thus Brexit will likely not be considered by courts unless the parties make specific references to Brexit itself.³¹ Contractual clauses should directly deal with issues like tariffs and VAT:³² in fact, in case of a no-deal Brexit, tariffs could be added to the import of products that had a zero import tax before.³³ If a no-deal Brexit becomes reality, WTO rules would apply: the British government has set out a plan for tariffs in case of such hard Brexit:³⁴ while 87% of imports would be tariff-free, in a minority of cases there could still be drastic changes.

Consequences of Brexit, however, could hypothetically fall in the scope of a Force Majeure/hardship clause, e.g., in cases of new regulatory controls or visa issues for foreign personnel.³⁵ Non-tariff barriers are more likely to constitute Force Majeure, as they could directly impact UK's service sector, which accounts for 80% of the nation's economy.³⁶ Post-Brexit trade checks between the UK and the EU have

²⁴ *Ibidem*, p. 2.

²⁵ See also Law Reform (Frustrated Contracts) Act 1943, Article 1.

²⁶ Barry Nicholas, *Force Majeure and Frustration*, 27 Am. J. Comp. L. 231 (1979) p. 233 - 235.

²⁷ David Thomas, *Frustration and Force Majeure: A Hard Line in English Law*, 6 Const. L. Int'l 21 (2011), p. 21; see also *Davis Contractors Ltd v Fareham Urban District Council* (1956) AC 696.

²⁸ Barry Nicholas, *Force Majeure and Frustration*, 27 Am. J. Comp. L. 231 (1979) p. 237.

²⁹ Sarah Jones & S. James, *Brexit and Contracts: What to Do When the Unknown Is Unknown*, 43 Litig. 16 (2017), p. 17.

³⁰ *Ibidem*.

³¹ Auxenfants Marc (M.A.), "Le Brexit n'est pas une excuse"; *Après le 29 mars prochain, date officielle du divorce Royaume-Uni-UE, les règles juridiques continueront à s'appliquer*, Luxemburger Wort, February 25, 2019. See also Matthias Lehmann, Nihal D'Souza, *What Brexit means for the interpretation and drafting of financial contracts*, (2017) 2 JIBFL 101.

³² Kenny Rose, *Comment: Industry must prepare for deal or no-deal Brexit*, Scotsman, August 19, 2019.

³³ E.g., on agricultural and horticultural products. For tariffs on specific products, see the Agriculture and Horticulture Development Board website: <https://ahdb.org.uk/uk-and-eu-import-tariffs-under-no-deal-brexit>

³⁴ BBC, Most imports tariff-free under no-deal plan, 2020. Available at:

<https://www.bbc.com/news/business-47551266>

³⁵ Jean-Pierre Douglas, Henry and Paul Hardy: *No-Deal Brexit: Impact On Dispute Resolution*, Mondaq Business Briefing, September 10, 2019.

³⁶ Chris Morris, *Brexit: What is the 'no deal' WTO option?*, BBC (2019). Available at:

<https://www.bbc.com/news/uk-45112872>

been defined as “inevitable” by minister Michael Gove:³⁷ depending on the severity and the consequences and the foreseeability of such checks, Force Majeure could be considered - or not - in future contracts disputes. In any case, a court or arbitral tribunal are not likely to recognize Force Majeure if the contract was drafted and concluded when Brexit was already public knowledge, since the requirement of unforeseeability must still be proven.³⁸ Interestingly, cases are already starting to appear on the issue. In a landmark case the High Court of London has ruled that a lease contract between a European agency and a construction group was not frustrated by Brexit, as the agency claimed.³⁹ Justice Marcus Smith in that case also pointed out that if any frustration occurred, it was self-induced, since the agency relocated out of London following the EU Regulation 2018/1718 of the European Parliament and of the Council of 14 November 2018.⁴⁰

London is also an important seat for international arbitration. In 2016, when the UK decided to leave Europe, it was the seat of 4,738 international commercial arbitrations, mediations, and adjudications.⁴¹ Since the UK is part of the 1958 New York Convention however, enforcement of arbitration agreements and arbitral awards should not, generally, be an issue.⁴²

5. Conclusions

Force Majeure is multifaced topic with different interpretations all over the world. The intrinsic differences of the matter between legal systems are an expression of how the legal culture of a nation influences every aspect of a contract and its interpretation. It is an instrument that can change the fate of a contract, when the impossible arises. The international practitioner has, in Force Majeure, a strong ally for drafting contracts against a world of fast-paced changes. Every aspect of the commercial relationship comes into fruition in the Force Majeure clause: the intent of the parties to bear or not certain risks, the market in which the contract is placed, circumstances, the obligations and rights of the parties that stem from the agreement, their conduct both in times of contractual peacefulness and in times of hardship or impossibility, the consequences of changed circumstances, the law applicable to the contract: these many aspects must be known before the drafting of the clause, and taken into account. When negotiating a contract, no one wishes to fathom a possible disastrous ending or a potential dispute: for these reasons, arbitration and Force Majeure clauses are called “midnight clauses”. However, a well drafted clause can be extremely more valuable, rather than a generic and imprecise one, or not to have such provision at all. *Verba volant, scripta manent.*

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³⁷ BBC, *Brexit: Border delays ‘could cause fresh food problems’*, (2020). Available at: <https://www.bbc.com/news/business-51453189>

³⁸ McGuireWoods LLP, *Brexit - UK Files for Divorce From European Union: What Should Companies Do Now to Prepare?*, JD Supra, March 30, 2017.

³⁹ *Canary Wharf Group v European Medicines Agency*, London High Court of Justice, [2019] EWHC 335; more specifically, see § 107 and 258.

⁴⁰ Regulation (EU) 2018/1718 of the European Parliament and of the Council of 14 November 2018 amending Regulation (EC) No 726/2004 as regards the location of the seat of the European Medicines Agency.

⁴¹ Rini Agrawal, *The Effect of Brexit on International Arbitration*, 4 Ct. Uncourt 2 (2017), p. 17.

⁴² Fernando Basilio, *Brexit: Implications on U.S. Business Enterprises*, 18 Hous. Bus. & Tax L.J. 292 (2018), p. 313.