Force Majeure in Tumultuous Times: Impracticability as the New Impossibility

It's Not as Easy to Prove as You Might Believe

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Force majeure clauses excuse a party from performance if some unforeseen event beyond its control prevents performance of its contractual obligations. Although the prior standard of "impossibility" to invoke force majeure has effectively been replaced by "impracticability," arbitration tribunals rarely enforce force majeure clauses unless the specific impediment is defined in the clause. As a result, the standard of "impracticability" is not as easy to prove as it might appear to be. Foreseeability, failure to explore alternate performance, and lack of timely notice are common reasons that force majeure defenses fail. Due to tribunals' typically narrow and restricted application of force majeure clauses, they should be detailed, comprehensive, and focus on the particular circumstances of the transaction at issue.

Introduction

Most international business agreements have force majeure clauses. Force majeure means "superior force."[1] These clauses excuse a party from performance if some unforeseen event beyond its control prevents performance of its contractual obligations. Their purpose is to allocate risk and to provide notice of events that may delay or excuse performance.

Parties to a contract expressly allocate their risk when they define what constitutes a force majeure event. Impediments to contract performance frequently occur. Arbitration tribunals, however, rarely enforce force majeure clauses unless the specific impediment is defined in the clause, even though the prior standard of "impossibility" to invoke force majeure has effectively been replaced by "impracticability." The current standard of "impracticability" appears to be relatively easy to prove, but it is not. International business people are presumed to be aware of the risks they face. They are held accountable if they fail to protect themselves specifically in their contract.

There is no universally accepted definition of the requirements to successfully invoke force majeure. Different laws and jurisdictions take different approaches.[2] Moreover, the focal point of analysis is on the wording of the specific clause at issue. A definitive summary of the law of force majeure is beyond the scope of this paper. Instead, we focus on what we believe are the legal and contract drafting points of greatest practical significance in light of the challenges faced when relying on a force majeure clause.

The law of force majeure has evolved to reflect "...the needs and common practices of the international business community...."[3]

There is an emerging consensus about force majeure legal requirements that your authors believe is represented in the International Chamber of Commerce's ("ICC") Force Majeure Clause 2003 ("ICC Clause").[4] The ICC Clause incorporates an "impracticability" standard. It provides that an event must be (1) beyond the party's control, (2) not foreseeable at the time the contract is signed, and (3) an event that could not reasonably have been avoided or overcome. These principles and their corollaries are discussed below.

Recent dramatic events have caused widespread commercial loss and business interruption. These include the events of September 11, 2001; Hurricane Katrina in 2005 in the area of New Orleans, Louisiana; and the 2010 volcano in Iceland that disrupted flights and impacted businesses at airports and those reliant upon air freight. Most recently, the devastating earthquake and tsunami in Japan destroyed factories and interrupted the supply chain for Japanese and international businesses.

One author notes that, although past man-made catastrophes (Bhopal, the Exxon Valdez, and even Chernobyl) had devastating local consequences, their national and international impact was relatively limited.[5] He goes on to point out, on the other hand, that a global failure of the Internet from cyberterrorism or a prolonged power grid failure in the U.S. would have national and international commerce ramifications.[6] These extraordinary and difficult-to-predict events bring home the need for an effective force majeure clause.

Published arbitral awards suggest that a large majority of all force majeure defenses are rejected. The difficulties are demonstrated in an ICC case[7] where a dispute arose when the seller did not deliver the goods promised in the contract, arguing that non-delivery by a supplier excused liability under Article 79 of the United Nations Convention on Contracts for the International Sale of Goods ("CISG")[8] or the force majeure clause in the contract. The tribunal, applying the CISG to the contract pursuant to applicable German law, said that the risk of non-delivery by a supplier fell clearly on the seller. The tribunal noted that its decision was in line with the consistent practice of ICC arbitrators who uphold the force majeure defense only in "extreme cases such as war, strikes, riots, embargoes or other incidences *listed*" (emphasis added) in the force majeure clause of the contract. The tribunal further noted that, in cases of impediments to performance related to typical commercial risks, arbitrators uphold the principle of *pacta sunt servanda* (preserve the sanctity of contract).

Similarly, under common law, the burden is upon the contractor to negotiate limitations on his strict liability such as by inclusion of a force majeure clause. Under U.S. law, for example, "[c]ontract liability is strict liability. It is an accepted maxim that pacta sunt servanda, contracts are to be kept. The obligor is therefore liable in damages for breach of contract even if he is without fault and even if circumstances have made the contract more burdensome or less desirable than he anticipated."[9]

To rely on a force majeure clause in most jurisdictions, a party must establish that the event was not foreseeable. This is likely to become more and more difficult as the world sees the far-reaching effects of recent devastating events. Virtually any type of "imaginable" event is arguably foreseeable.

Given the narrow and restricted interpretation of force majeure, it is essential to draft a detailed and comprehensive force majeure clause that addresses the particular circumstances of the transaction at issue. Due consideration must be given to the market, the relevant jurisdiction, the location of the project or services, and all external events that may interfere with performance of the contract. This is because unless the type of event is specifically listed in the force majeure clause, virtually no external event will be deemed *unforeseeable* and constitute force majeure excusing contract performance.

We first address the "principles" of force majeure; the ICC's Force Majeure Clause 2003, which your authors believe best summarizes the emerging law of force majeure; and then challenges to successfully invoking the doctrine. We next review contemporary force majeure events and how they may be interpreted in the context of a force majeure defense. We conclude with specific drafting suggestions to deal with these sorts of events.

Principles of Force Majeure

Background

The concept of force majeure originated in the Napoleonic Code.[10] In common law, the concept has

evolved from one of "physical impossibility" to "frustration of purpose" (U.K.) to "commercial impracticability" (U.S.). Initially, the test for impossibility in common law was objective: Was performance rendered absolutely or physically impossible?

Today, most tribunals and courts utilize a standard of commercial impracticability.[11] Performance is excused when it is not practical and could be done only at excessive and unreasonable cost.[12] The U.S. Restatement (Second) of Contracts provides that when, "after a contract is made, a party's performance is made impracticable without [the party's] fault by the occurrence of an event, the non-occurrence of which was a basic assumption on which the contract was made, [the party's] duty to render that performance is discharged as a result, unless the language or the circumstances indicate the contrary."[13] Essentially the same standard is found in U.S. Uniform Commercial Code Section 2–615 involving the sale of goods. Section 2–615(a) sets forth a three-part test: (1) a "contingency" (event or impediment) occurred, (2) which makes contract performance impracticable, and (3) the non-occurrence of the contingency was a basic assumption on which the contract was made.[14]

Force majeure is similar to the doctrine of "necessity," which states may attempt to rely on in the investment context when force majeure-type circumstances arise. The International Law Commission Articles on State Responsibility provide in Article 25 that a state may invoke the doctrine of necessity as a basis for excusing a wrongful act only when (1) the act is the only means for the state to safeguard an essential interest against a grave or imminent peril, and (2) the act does not seriously impair an essential interest of the state or states towards which the obligation exists, or of the international community as a whole.[15] Argentina has widely invoked the necessity defense in the arbitrations it has faced and is facing in the International Centre for the Settlement of Investment Disputes ("ICSID").[16] As a result of a financial crisis, Argentina repealed the law on which most of its bilateral investment treaties had been negotiated, leading to dozens of arbitrations brought against it.[17] Although different tribunals have reached different outcomes, by and large Argentina has not been able to rely successfully on necessity.

There are a number of similarities between force majeure and necessity in addition to the fundamental similarity that they are both invoked when catastrophe strikes. With both force majeure and necessity, the specific contract or treaty provision, respectively, will effectively "trump" any relevant governing law, whether international or otherwise. Further, the application of a force majeure or necessity defense is often restricted to a limited period of time, instead of allowing a blanket defense.[18] Necessity and force majeure, however, require fundamentally different analyses. Unlike force majeure, the necessity defense does not include any type of "foreseeability" requirement. In addition, necessity requires examining the effect of the state's "wrongful" act on other parties—a requirement wholly missing from the inquiry under force majeure.

It is now generally accepted in common and civil law systems that contractual performance that becomes "impossible" or "commercially impracticable" under certain circumstances may be excused. The issue we address is under what circumstances—recognizing that there is not unanimity of approach in all legal systems.

The ICC Has Developed a Comprehensive Model Force Majeure Clause

The ICC Clause is a model clause that reflects the emerging consensus about what is required to establish a force majeure defense. The "Introductory Note" and Note (a) to the ICC Clause states it "amalgamates" elements of the previous ICC Force Majeure Clause 1985, the CISG, the Principles of European Contract Law ("PECL") and the Unidroit Principles for International Contracts ("UNIDROIT").

The ICC Clause first provides a general force majeure formula: a party relying on the ICC Clause must prove that (1) its failure to perform was caused by an impediment beyond its reasonable control, (2) it could not reasonably have been expected to have taken the occurrence of the impediment into account at the time of the conclusion of the contract, and (3) it could not reasonably have avoided or overcome the effects of the impediment.[19]

The ICC Clause states in Section 3 that, in the absence of proof to the contrary and unless otherwise agreed by the parties, if the

impediment is listed in Section 3(a) to (g), a party "shall be presumed" to have established that (a) its failure to perform was caused by an impediment beyond its reasonable control, and (b) it could not reasonably have been expected to have taken the occurrence of the impediment into account at the time of the conclusion of the contract, provided the impediment is specifically listed therein. The ICC Clause in Section 3 lists dozens of force majeure events, including, but not limited to, war, armed conflict, hostilities, terrorism, acts of God, plague, natural disaster (including violent storm, volcanic activity, and tsunami), explosion, fire, and general labor disturbances such as strike or boycott. The ICC Clause states that successfully invoking force majeure means a party is relieved from liability in damages or other contractual remedy for breach of contract.[20] When the effect of the impediment is temporary, however, a party is only relieved from its duty to perform under the contract as long as the impediment impedes performance.[21]

The Notes to the ICC Clause specify that the mere occurrence of an enumerated event does not automatically afford relief to the non-performing party.[22] That party must prove, in addition, that he could not have avoided or overcome the effects of the event.[23] Even then, the non-defaulting party may prevail by proving the event was within control of the non-performing party or could have been foreseen by it.[24] This is the "balance of evidence to be resolved between the parties"[25] that a tribunal must review and decide.

Although this evidentiary burden appears to be easy to meet, in practice, tribunals rarely agree with a party claiming that a force majeure event occurred.

The ICC Clause, reflecting developments in the law, adopts a lower threshold test for invocation of force majeure than "impossibility" of performance. Note a) to the ICC Clause points to use of the phrase "beyond its reasonable control" in Section 1(a) and "could not reasonably have avoided" in Section 1(c). In short, a balancing approach is adopted—not a hard and fast rule.

Section 2 of the ICC Clause addresses the problems that can arise when a third party fails to perform its contractual duties. In this case, the contracting party may only invoke the protections of the force majeure clause when it establishes first the general force majeure requirements that (1) its failure to perform was caused by an impediment beyond its reasonable control, (2) it could not reasonably have been expected to have taken the occurrence of the impediment into account at the time of the conclusion of the contract, and (3) it could not reasonably have avoided or overcome the effects of the impediment. The contracting party must also prove that those same requirements apply to the third party, *i.e.*, that the third party was also subject to a force majeure event. Note b) to the ICC Clause explains that, without these requirements for both the contracting party and the third party, the contracting party would "find it too easy" in most situations to invoke force majeure simply by demonstrating that the third party did not fulfill its contractual obligations.

The Three Major "Impediments" to Invoking Force Majeure Successfully

The three primary reasons tribunals find that a force majeure defense fails are that the party invoking the event (1) should have foreseen it, (2) should have determined an alternate way to perform the contract, or (3) did not comply with the notice requirements in the force majeure clause. Further, even when an arbitral tribunal allows a force majeure defense, it usually limits the defense to a certain period of time, so a force majeure clause does not necessarily excuse performance indefinitely.[26]

1. Tribunals strictly interpret foreseeability

In civil and common law legal systems, the event must have been unforeseeable at the time of contracting for a force majeure defense to be successful. Tribunals and courts reason that failure to protect oneself against a foreseeable event is an assumption of the risk of that event.[27] Foreseeability is a question of fact for the decision maker.

Because the interpretation of a force majeure clause turns on the language in the contract at issue, an arbitration tribunal or court determining whether reliance on a force majeure clause was permissible must make a fact-specific inquiry in light of the governing law of the contract. In many of the decisions where tribunals reject a force majeure defense, the party asserting the defense could and should have identified the problem that led to

non-performance and specifically allocated its risk before entering into the contract. For instance, in *ICC No. 12112/2009*,[28] the State partner of a joint venture for cultivating agricultural products did not perform its contractual obligations because it failed to make available the land, equipment, and facilities that it was to contribute to the venture. This was because it made all of the land available to an international organization to accommodate refugees from a neighboring country. The tribunal concluded that force majeure did not excuse the State partner's failure to perform because the State partner, as a regional public entity, must have known about the social climate and forces in its region that made ensuring performance difficult. The tribunal noted that "[b]efore entering an obligation, everyone must, before, be certain that he has the ability to perform it. If he has or must have the slightest doubt about his ability to perform at the given time, he must make all necessary verifications before promising performance."

In *ICC Nos. 3099 and 3100/1979*,[29] two companies entered into a contract for sale of petroleum-based products. The respondent sought to avoid payment because its central government agency imposed currency exchange controls that, through no fault of the respondent, prevented it from obtaining the necessary foreign currency to make payment. The contract included a clause that listed as force majeure events impediments arising from legislation or regulation by Algeria—but not from the respondent's government. The tribunal found that the restrictions imposed by the respondent's government did not amount to force majeure, because the imposition of exchange controls was "certainly not unforeseeable" in that those very regulations were already in force when the contract was formed.

In *ICC Case No. 2216/1974*,[30] the market price for petrol fell dramatically after the parties entered into the contract. The respondent refused to take delivery, arguing that the fall in price was so large it excused respondent's performance, and also that intervention of government financial authorities to prevent currency losses constituted force majeure. The tribunal found that the change in market price risk was foreseeable and its risk could have been allocated. The tribunal also found that the respondent was generally aware of the legislation allowing the financial authorities to intervene, and indeed had received a letter from the relevant authority, so the change in circumstances was foreseeable. The tribunal noted that the respondent could have negotiated clauses in the contract that took into account the effects of the legislation allowing financial authorities to take such action, and that no doctrine or case law precedent held that such legislation could constitute force majeure.

In *ICC Case No. 112253/2002*,[31] a Romanian company entered into a contract for the sale of scrap metal to a German company. The contract provided that the seller would obtain an export license, which it failed to do. The contract further provided that force majeure was to be understood as described in Incoterms 1990—pre-determined contract terms published by the ICC. The tribunal noted that Incoterms defined force majeure as non-performance arising out of causes beyond either party's control and without any fault or negligence by the non-performing party. The seller claimed that its failure to obtain the export license was for reasons beyond its control and constituted force majeure. The tribunal disagreed, concluding that the regulation upon which the seller relied to justify its failure to obtain the export license had been in effect for four years. Accordingly, it could not be compared to an event such as a sudden change in the economic or political situation in Romania. The seller was expected to know national export regulations and procedures in Romania. Lastly, the tribunal noted that obtaining the export license was part of the seller's contractual obligations, and thus the seller had full responsibility for not obtaining the license. See also *ICC No. 9466/1999*[32] (concluding that a "loss" of ships by their owner when impounded by a creditor did not qualify as a force majeure event under the contract because there was no unforeseeability).

Under different circumstances, in *ICC No. 8790/2000*,[33] the tribunal concluded that the seller's temporary suspension of deliveries was justified based on force majeure. The seller had procured a certificate from the local Chamber of Commerce stating that a drought led to a decrease in raw material yield, and that those circumstances were "beyond human control" and prevented the seller from fulfilling

its contractual obligations. The force majeure provision at issue there did not specify drought as a force majeure event, but the tribunal concluded that the provision's inclusion of "natural catastrophes" and "other circumstances outside control" entitled the seller to invoke force majeure.

It is because most impediments are *foreseeable* that force majeure clauses should allocate these risks specifically according to the economics of the transaction and to the party best able to manage the risk.

2. Exploring alternate performance—and demonstrating its impossibility—is critical

It is a generally accepted principle of law that a party seeking to excuse nonperformance must demonstrate it could not have avoided or overcome the impediment or its consequences.[34] The CISG Secretariat Commentary to Article 79 (i) states:

> Even if the non-performing party can prove that he could not reasonably have been expected to take the impediment into account at the time of the conclusion of the contract, he must also prove that he could neither have avoided the impediment nor overcome it nor avoided or overcome the consequences of the impediment. This rule reflects the policy that a party who is under an obligation to act must do all in his power to carry out his obligation and may not await events which might later justify his non-performance.

This approach is also found in the ICC Clause at Section 1(c).

In other words, when asserting force majeure as a defense, a party must show that there were no reasonable alternate arrangements that would have allowed it to perform under the contract. Tribunals often require a party claiming force majeure to prove it attempted alternate performance before accepting its force majeure defense.

For instance, in *Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier*,[35] the respondent was performing a turn-key contract for the supply of a factory when hostilities broke out in the region. These hostilities led to conflict between the governments of the two parties (the claimant was a state-controlled enterprise), and the respondent's personnel were required to leave the country. At the end of the hostilities, the claimant asked the respondent to continue carrying out the contract. Respondent refused on grounds of impossibility, claiming that it was not able to ensure the safe return of its employees to the country, and that its own government cancelled the financial backing it had previously given. The tribunal found that, due to the conditions arising from the hostilities, the respondent was excused from performance under the contract and the relevant law, but only for the one month of hostilities. After that month, because it did not appear that the respondent made any effort to obtain the required visas for its personnel or explored other staffing alternatives, force majeure was not a valid defense. In addition, the tribunal noted that the respondent could have obtained alternate financing from claimant as provided in the contract.

The tribunal in *Macromex Srl. v. Globex Int'l Inc*.[36] reached a similar result. The contract there was for the purchase of chicken leg quarters to be delivered into Romania. After the contract was signed, an avian flu outbreak prompted the Romanian government to bar all chicken imports not certified by a particular date. The seller raised a defense under CISG Article 79. Because the contract contained no force majeure clause, the arbitrator applied the CISG to fill the "gap." The tribunal concluded that the seller satisfied the first two and possibly the fourth elements of force majeure under the CISG—there was an impediment beyond a party's control, that was unforeseeable by that party, and that the party's nonperformance was due to that impediment. However, the tribunal found the seller did not meet the third element—that the impediment could not be reasonably avoided or overcome. The tribunal relied on the substituted performance provision in the U.S. Uniform Commercial Code to analyze the third element and concluded that the seller could have shipped to another port in a neighboring country, as the buyer had proposed.

In *National Oil Corp. v. Libyan Sun Oil Co.*,[37] the parties entered into an oil exploration and production sharing agreement in Libya. When the U.S. government then banned oil imports from Libya and severely restricted oil exports to Libya, the defendant invoked force majeure and suspended performance under the contract. Defendant claimed that its personnel, all U.S. citizens, could not enter Libya because the U.S. government declared that U.S. passports were no longer valid for travel to Libya. The tribunal rejected the force majeure defense, concluding that the defendant could have hired non-U.S. personnel to perform

the contract, so the ban did not constitute force majeure.

In *ICC No. 1782/1973*,[38] the respondent contracted to deliver a fleet of trucks to three sites in an Arab country. After defaulting on its obligations, the respondent cited force majeure as a basis for the default, claiming that its Israeli employees would have been unable to obtain visas. The tribunal determined that there was insufficient proof of force majeure, specifically noting that the delay in obtaining visas could not account for default over 26 months, and that the respondent could have hired employees without the alleged restrictions.

As these decisions illustrate, tribunals demand evidence both that the impediment could not have been avoided and that alternate performance options were explored but were not feasible. There is a reasonableness limitation to the dual requirement to "avoid" the impediment and to "overcome" its effects. The test is what a "reasonable person" would have done in like circumstances. As Comment C (iii) to PECL Article 8:108 states:

> One cannot expect the debtor to take precautions out of proportion to the risk (e.g., the building of a virtual fortress) nor to adopt illegal means (e.g., the smuggling of funds to avoid a ban on their transfer) in order to avoid the risk.

"Reasonableness" is a question of fact which can only be determined on a case by case basis. A shipper carrying items such as a Michelangelo painting will be expected to take far more extensive and costly steps to prevent damage to the item than would be the case if the object was not unique and irreplaceable.

3. An otherwise successful force majeure defense can be lost by failing to give timely notice

A duty to notify the other party of the impediment and its consequences "without delay" is found in Section 4 of the ICC Clause. The same requirement is found in CISG Article 79(4); UNIDROIT Article 7.1.7(g); PECL Article 8:108(3); and in both common and civil law. The underlying policy and logic are straightforward—to give the non-defaulting party the opportunity to take all reasonable steps available to it to overcome or mitigate the consequences of the event.

Tribunals will not excuse failure to provide timely notice of asserting a force majeure event. For example, in *ICC No. 2478/1974*,[39] a French company claimed damages against a Romanian company that had not delivered an agreed quantity of fuel because of a change in the price of oil and because the Romanian authorities cancelled the export license concerning the fuel. The Romanian company asserted that the cancellation of the export license constituted force majeure, exempting it from all contractual liability for having stopped deliveries. The tribunal agreed, saying the event "undeniably constitutes a case of force majeure," based both on the "general principle of law" and on the relevant contract. However, the contract and general legal principles required the party invoking force majeure to inform the other party without delay. The Romanian company did not provide timely notice—waiting over six months—and as a result, it lost the opportunity to claim force majeure for a certain time period.

In short, it is essential to provide timely notice of events of force majeure as early as possible to preserve the ability to assert your rights under the doctrine.

Learning from Contemporary Force Majeure Events

ICC Force Majeure Clause 2003 provides a detailed and thoughtful model clause. Nevertheless, a party will be best served by customizing the clause to the circumstances of its contract and business transaction. In addition, of course, there are many other reasons to carefully draft force majeure clauses. For example, these clauses are carefully reviewed by investors and lenders to confirm they are clear, comprehensive and consistent with market practice. Lenders will often not make loans unless the force majeure clause clearly indicates who will bear the risk if the project becomes not feasible so the lender will know to whom to look for repayment of its loan.

As noted above "ordinarily, only if the force majeure clause specifically includes the event that actually prevents a party's performance will that party be excused."[40] Where then to draw the line in terms of identifying and listing specific events of force majeure?

Science fiction writers can envision a time when machines controlled by artificial intelligence might go awry and interfere with commerce. Such an event, although it can be imagined, is not reasonably foreseeable

at this time. Most businessmen and their counsel would agree this risk is so remote as to be currently unworthy of consideration.

There are foreseeable events to consider that, while unlikely, are worth analysis. For example, a "Carrington Event" is a large solar flare—a burst of X-rays spinning out from a sunspot.[41] The largest such event occurred in 1859. A more recent solar event in 1989 caused hundreds of millions of dollars of damage in Quebec, Canada and destroyed huge electric transformers in South Africa. Scientists currently are aware that we are in a two- or three-year period of increasingly frequent outbursts. A Carrington scale event could result in a geomagnetic storm that might take down part of the North American power grid. Indeed, a 2008 *U.S. National Academy of Sciences* report stated that such an event could knock out power in parts of the country for months or possibly years. The report estimated that approximately 135 million Americans could be forced to revert to a pre-electric lifestyle or move to new location: "Water systems would fail. Food would spoil. Thousands would die."[42] The impact on national and international commerce, assuming the study is correct, would be catastrophic.

Many companies would have to claim force majeure. The party opposing the defense would argue that the non-performing party should both have foreseen the possibility of a Carrington event and taken precautions to protect against its effects. Electric utilities know, for example, how to protect their transformers which are most vulnerable to these solar storms. To date, they have not been willing to invest the $350,000 to $1 million per transformer to protect their equipment and customers against these storms. Legislation passed by the U.S. House of Representatives in 2011 said that 350 such transformers in the U.S. are critical and should be protected.[43]

Severe solar storms are a classic "Act of God" and arguably a "violent storm" listed in Section 3(e) of the ICC clause. Nevertheless, will a utility's force majeure defense fail because (a) the event is foreseeable, and (b) its effects can be avoided for a reasonable cost?

An asteroid strike is an "Act of God" and presumably a "natural disaster" listed in Section 3(e) of the ICC clause. Asteroid strikes are known and foreseeable.[44] The threat of an impending strike is discoverable by scientists, but often only with a few days notice. This would provide enough time to evacuate personnel and equipment that are movable, but not, for example, in place, finished construction. Depending on its size, the strike would likely render the site uninhabitable. Unlike a solar storm's impact on the electric grid, there is no way to "avoid" an asteroid strike or fully overcome its effects. Neither party is in a better position to manage the risk. We assume that is why this rare—albeit foreseeable and real—risk is not listed in any force majeure clause of which we are aware.

Similar questions can be raised for other types of force majeure events. If a company is located in an area where earthquakes, tornadoes, or hurricanes are frequent and not unexpected, will it be held to a higher standard to avoid or overcome the impact than a company located where those types of events are a rarity? Likewise, should a company located in London or New York be better and differently prepared for a terrorist event than a company located in Alaska? With heightened unrest in the Middle East, should energy companies be expected to give more consideration to alternative energy sources and to energy independence? What sort of back-up plan should be in place and ready to be implemented in order to minimize business disruptions when faced with these or other force majeure events?

Practical Drafting Suggestions

The ICC model clause, in our view, is an excellent effort at defining a clear, analytic framework and specific events that should be listed. Nevertheless, we suggest a few modest changes and questions to address. The most important points are to identify and list specifically all risks and to revisit foreseeability in the context of every new contract.

In ICC Clause Section 3(c), we and others suggest adding to "act of terrorism" the words "or threat thereof." The facts in the U.S. case *Sub-Zero Freezer Company v. Cunard Lines Limited*[45] are instructive, even though there was no force majeure clause in the contract. The plaintiff reserved well in advance a cruise ship to sail the Mediterranean the first week in October 2001, which turned out to be three weeks after the events of 9/11. Many of the plaintiff's employees and guests

refused to go because of safety concerns. The defendant refused to reschedule or to return the deposit amount. The court found that the parties could have allocated the risks, but did not, and therefore ruled against the plaintiff's claim of force majeure. We can only speculate whether, if there was a force majeure clause and it did list "act of terrorism" as an event of force majeure, the court would have interpreted it to include "threats" of terrorism under the circumstances. There were threats and real fear of additional acts of terrorism in the period after 9/11. However, there were no "acts." Is the "threat" of an "act of terrorism" an event of force majeure in the absence of the suggested new language?

To deal with Carrington-type events, we suggest adding the words "atmospheric disturbance" to ICC Clause Section 3(e). This will avoid an argument that it is not a "violent storm" listed in 3(e) and the further argument that it was a foreseeable event whose risk was not specifically allocated and therefore is not force majeure.

Another change to consider is whether to add the words "or quarantine" after "plague, epidemic," in ICC Clause Section 3(e). Many believe the threat of biological warfare has increased and the threat of some new more virulent threat of influenza—terrorist or otherwise—cannot be ruled out. We think it preferable to make clear that quarantine in the course of a plague or epidemic, an "effect," but not the event listed itself, is covered.

Climate change has become a big issue for energy vendors and manufacturers (and others). New greenhouse gas laws and regulations are being proposed with regularity. It is important for counsel to help clients anticipate and plan for major changes in applicable environmental laws and regulations.[46] Companies entering into long-term supply contracts have to consider potentially significant new financial (*e.g.*, capital and operating cost) uncertainties resulting from regulatory change. In addition, there are an increasing number of climate change tort litigations being filed. These foreseeable changes are hard to predict and quantify. Nevertheless, they are risks which should be analyzed and allocated, whether in a force majeure, price adjustment and/or termination clause. Many existing contracts allocate risks from increased regulatory costs which might cover some greenhouse gas laws. An issue is whether existing force majeure clauses cover both local and national greenhouse gas regulations as well as international treaty climate change legislation.

There are many situations that are less clear to analyze and resolve. For example, should contract negotiators try to address a situation such as the U.S.'s recent debt ceiling crisis, where Congress failed to act until the last minute to raise the ceiling? This inaction created turmoil and uncertainty in the global economy, including stalled deals and delayed financings. Although government inaction generally is foreseeable, some might argue that the length of Congress's recent inaction over the debt ceiling was not foreseeable.

One possible solution would be to add as a specified impediment "any failure by a government to act as expected in the normal course of time." Such language, however, may not adequately define the impediment.

Conclusion

It is increasingly important to maximize force majeure protection by carefully drafting—and then preserving—rights under a contract that will excuse performance if faced with unexpected events beyond one's control. The unexpected should be expected.

Endnotes

1 *Black's Law Dictionary* 718 (9th ed. 2009).

2 There are many thoughtful articles that address in detail these different approaches. *See e.g.*, Chengwei Liu, *Force Majeure: Perspectives from the CISG, UNIDROIT Principles, PECL and Case Law* (2d ed. Apr. 2005), *available at* http://www.cisg.law.pace.edu/cisg/bibio/liu6.html ; Catherine Kessedjian, *Competing Approaches to Force Majeure and Hardship*, 25 Int'l Rev. of Law & Econ. 415 (Sept. 2005); Dr. Theo Rauh, *Legal Consequences of Force Majeure Under German, Swiss, English and United States Law,* 25 Denv. J. Int'l L & Pol'y 151 (Fall 1996).

3 W. Laurence Craig et al., International Chamber of Commerce Arbitration 651 (3d ed. 2001).

4 The ICC has also developed the "ICC Hardship Clause 2003." That clause is triggered when the contractual duties have become "excessively onerous" for a party due to an event beyond its control that it could not reasonably have been expected to have taken into account at the time of the contract, and that the party could not reasonably have avoided or overcome the event or its consequences. When such an event occurs, the parties are required to negotiate alternative contract terms that reasonably allow for the consequences of the event. If those negotiations are unsuccessful, the party invoking the clause is permitted to terminate the contract. Int'l Chamber of Commerce, ICC Force Majeure Clause 2003 - Hardship Clause 2003, ICC Publication 650 (2003).

[5] Robert J. Rhee, *Catastrophic Risk And Governance After Hurricane Katrina: A Postscript To Terrorism Rick In A Post - 9/11 Economy*, 38 Ariz. St. L. J. 581, 583–84 (Summer 2006). Another author has quantified the impact and toll from acts of terrorism, pandemics and more routine everyday risks. *See* Patrick J. O'Connor, *Allocating Risks of Terrorism and Pandemic Pestilence: Force Majeure for an Unfriendly World*, 23 Constr. Law 5, 5–6 (2003).

[6] Rhee, *supra* note 5 at 585 n.23.

[7] ICC Case No. 9978/1999 (Extract), 11 ICC Bull. 2000, 117.

[8] The CISG applies to contracts of sale of moveable goods between parties that have their places of business in different countries when those countries have adopted the CISG or when the rules of private international law lead to the application of the law of a country that has adopted the CISG. CISG Art. 1(1). The CISG is essentially an overlay on the national sales code or sales law of each country that has adopted it.

[9] U.S. Restatement (Second) of Contracts, Ch. 11, introductory note (1981).

[10] The Code Napoleon, or, the French Civil Code, Articles 1147 and 1148, 313–14 (Inner Temple translation) (William Benning London 1827). Article 1147 provided that the "debtor is condemned, if there be ground, to the payment of damages and interest, either by reason of the non-performance of the obligation or by reason of delay in its execution, as often as he cannot prove that such non-performance proceeds from a foreign cause which cannot be imputed to him, although there be no bad faith on his part." Article 1148 provided that "[t]here is no ground for damages and interest, when by consequence of a superior force or of a fortuitous occurrence, the debtor has been prevented from giving or doing that to which he has bound himself, or has done that from which he was interdicted."

[11] A helpful brief overview of the evolution of the doctrine of impossibility under common law is found in the discussion of "Force Majeure and Common Law" in Carlos A. Ecinas, *Can A Borrower Use an Economic Downturn or Economic Downturn Event to Invoke The Force Majeure Clause In Its Commercial Real Estate Documents?*, 45 Real Prop. Tr. & Est. L.J. 731 (2011). This is a thought-provoking article that argues that unprecedented economic downturns such as the 2008 credit crisis in the U.S. are a basis for invoking a force majeure clause in a borrower's commercial real estate loan documents. *Cf. Flathead-Michigan I, LLC v. The Peninsula Development LLC*, 2011 U.S. Dist. LEXIS 27045 (E.D. Mich. Mar. 16, 2011). *See also* Jay D. Kelly, *So What's Your Excuse? An Analysis of Force Majeure Claims*, 2 Tex. J. Oil Gas & Energy L. 91, 93–97 (2006).

[12] *Transatlantic Fin. Corp. v. United States*, 363 F.2d 312, 315 (D.C. Cir 1966).

[13] Restatement (Second) of Contracts § 261 (1981).

[14] U.C.C. §2–615(a) (1977).

[15] International Law Commission Articles on State Responsibility Article 25(1), UN Doc. A/56/10, 2001.

[16] Amin George Forji, *Drawing the Right Lessons from ICSID Jurisprudence on the Doctrine of Necessity*, 76 Arbitration 44, 47 (2010).

[17] *Id.*

[18] ICC Force Majeure Clause 2003 para. 6; Forji, supra note 16 at 49 (tribunal finding state of necessity for one-and-a-half years).

[19] ICC Force Majeure Clause 2003 para. 1(a)-(c). In drafting the ICC Clause, the ICC Task Force on Force Majeure and Hardship took into account the previous ICC Force Majeure Clause 1985, CISG Article 79, the Principles of European Contract Law ("PECL") Section 8:108, and the Unidroit Principles for International Commercial Contracts ("Unidroit Principles"), Article 7.1.7. For a discussion on how the CISG, Unidroit Principles, and PECL treat force majeure, see Liu, *supra* note 2.

[20] ICC Clause at para. 5.

[21] *Id.* at para. 6.

[22] ICC Clause Note (d).

[23] *Id.*

[24] *Id.*

[25] *Id. See also* ICC Clause Introductory Note ("It should be emphasized that even where a party invoking the clause does so by pointing towards a listed event, that party still needs to prove that it could not reasonably have avoided or overcome the effects of the listed event.").

[26] For instance, in *Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier,* ICC Case No. 1703/1971, Pieter Sanders (ed.), I Yearbook Commercial Arbitration 130–32 (1976), the tribunal found that the respondent was excused from performance only for one month of time in which the defendant claimed a force majeure event prevented performance. *See also* 508 F.2d 969 (2d Cir. 1974) (award enforced in the U.S.).

[27] The U.S. Supreme Court explained, "as Justice Traynor said, [i]f [the risk] was foreseeable, there should have been provision for it in the contract, and the absence of such a provision gives rise to the inference that the risk was assumed." *United States v. Winstar Corp.*, 518 U.S. 839, 905–907 (1996).

[28] ICC Case No. 12112 in Albert Jan van den Berg (ed.), XXXIV Yearbook Commercial Arbitration 77–110 (2009).

[29] I ICC Awards 67.

[30] ICC No. 2216/1974, Award Abstract and Commentary, Digest of ICC Awards.

[31] 21 ICC Bull. 66 (2010).

[32] IV ICC Awards 97.

[33] IV ICC Arbitral Awards 155.

[34] CISG Article 79 (i), UNIDROIT Principle Article 7.1.7 (i), PECL Article 8:108 (i).

[35] ICC No. 1703/1971, Pieter Sanders (ed.), I Yearbook Commercial Arbitration 130–32 (1976). *See also Parsons & Whittemore Overseas Co.*, 508 F.2d 969 (award enforced in the U.S.).

[36] AAA Case No. 50181T 0036406 (Interim Award dated Oct. 23, 2007). *See also* 2008 U.S. Dist. LEXIS 31442 (S.D.N.Y. 2008) (award enforced in the U.S.).

[37] ICC Case No. 4462/1985 and 1987, Albert Jan van den Berg (ed.), XVI Yearbook Commercial Arbitration 54–78 (1991). *See also* 733 F. Supp. 800 (D. Del. 1990) (award enforced in the U.S.).

[38] Award Abstract and Commentary, Digest of ICC Awards.

[39] I ICC Awards 25. *See also* Kyriaki Karadelis, *Thai company wins oil claim against Glencore, Global Arbitration Review,* Oct. 28, 2011, *available at* http://www.globalarbitrationreview.com/ news/article/29919/Thai-company-wins-oil-claim-against-glencore (rejecting force majeure arguments in arbitration of breach of oil sales contract when seller claimed it could not deliver cargo because Venezuela's state-owned oil company had been instructed by the Venezuelan government to stop production and export of the crude oil to be delivered). The tribunal reportedly found the notice of force majeure "invalid and ineffective."

[40] *Kell Kim Corp v. Cert. Mkts., Inc.*, 519 N.E. 2d 295, 296 (N.Y. 1987).

[41] Brian Vastag, *As the sun awakens, the power grid stands vulnerable*, Wash. Post, June 20, 2011, available at http://www.washingtonpost.com/national/science/as-the-sun-awakens-the-power-grid-stands-vulnerable/2011/06/09/AGwc8DdH_story.html.

[42] *Id.*

[43] *Id.*

[44] *See, e.g.*, Steve Tracton, *Asteroid to barely miss contact with Earth*, Wash. Post, June 27, 2011, available at http://www.washingtonpost.com/blogs/capital-weather-gang/post/asteroid-barely-misses-contact-with-earth/2011/06/27/AGseRTnH_blog.html.

[45] 2002 WL 32357103 (W.D. Wis. Mar. 12, 2002).

[46] Dane A. Holbrook and Aileen M. Hooks, *Climate Change Finds Its Way Into Business Contracts, National L.J.*, Oct. 25, 2010.

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