ICC FORCE MAJEURE AND HARDSHIP CLAUSES
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ICC FORCE MAJEURE CLAUSE ("Clause")
(LONG FORM)

The concept of force majeure is known by most legal systems, but the principles developed in national laws may imply substantial differences. In order to overcome this problem parties tend to agree on autonomous solutions, by including in their contracts force majeure clauses containing solutions which do not depend on the particularities of national laws. In order to assist parties in drafting and negotiating such clauses, the ICC has created two balanced Force Majeure Clauses, the "Long Form" and the "Short Form".

The ICC Force Majeure Clause (Long Form) can be included in the contract or incorporated by reference by stating "The ICC Force Majeure Clause (Long Form) is incorporated in the present contract". Parties may also use the Clause as the basis for drafting a "tailor-made" clause, which takes into account their specific needs.

Should the parties prefer a shorter clause, they can include in their contract the "Short Form" of the ICC Force Majeure Clause. The Long Form nevertheless gives guidance on issues in which the Short Form is silent.

As regards the question of what constitutes force majeure, the ICC Force Majeure Clause intends to achieve a compromise between the general requirements of force majeure, which need to be met in all cases and the indication of events presumed to be beyond the control of the parties and not foreseeable at the time of the conclusion of the contract. For that purpose, the ICC Force Majeure Clause provides a general definition (paragraph 1) and a list of force majeure events (paragraph 3) which are presumed to qualify for force majeure (Paragraph 3). Parties are invited to check the list and verify if some events should be deleted from or added to it, in accordance with their specific needs.

The main consequence of successfully invoking force majeure is that the Affected Party is relieved from its duty to perform and from responsibility or damages from the date of occurrence of the event (provided that the other party has been notified timely) and, in case of a temporary impediment, until the impediment ceases to prevent the performance.

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.

   The definition of Force Majeure provides a lower threshold for invoking the clause than impossibility of performance. This is expressed by the reference to reasonableness in conditions (a) to (c) of the clause.

2. **Non-performance by third parties.** Where a contracting party fails to perform one or more of its contractual obligations because of default by a third party whom it has engaged to perform the whole or part of the contract, the contracting party may invoke Force Majeure only to the extent that the requirements under paragraph 1 of this Clause are established both for the contracting party and for the third party.

   This paragraph intends to exclude that non-performance by a third party or sub-contractor can be considered as such as Force Majeure. The Affected Party must prove that the Force Majeure conditions are as well met for the non-performance of the third party, to which also the presumption of paragraph 3 of this Clause will apply.

3. **Presumed Force Majeure Events.** In the absence of proof to the contrary, the following events affecting a party shall be presumed to fulfil conditions (a) and (b) under paragraph 1 of this Clause, and the Affected Party only needs to prove that condition (c) of paragraph 1 is satisfied:

   The Presumed Force Majeure Events commonly qualify as Force Majeure. It is therefore presumed that in the presence of one or more of these events the conditions of Force Majeure are fulfilled, and the Affected Party need not prove the conditions (a) and (b) of paragraph 1 of this Clause (i.e. that the event was out of its control and unforeseeable), leaving to the other party the burden of proving the contrary. The party invoking Force Majeure must in any case prove the existence of condition (c), i.e. that the effects of the impediment could not reasonably have been avoided or overcome.

   a) war (whether declared or not), hostilities, invasion, act of foreign enemies, extensive military mobilisation;

   b) civil war, riot, rebellion and revolution, military or usurped power, insurrection, act of terrorism, sabotage or piracy;

   c) currency and trade restriction, embargo, sanction;

   d) act of authority whether lawful or unlawful, compliance with any law or governmental order, expropriation, seizure of works, requisition, nationalisation;

   e) plague, epidemic, natural disaster or extreme natural event;

   f) explosion, fire, destruction of equipment, prolonged break-down of transport, telecommunication, information system or energy;

   g) general labour disturbance such as boycott, strike and lock-out, go-slow, occupation of factories and premises.

   Parties may add or delete events from the list, according to particular situations, e.g. by excluding acts of authority or export restrictions, or by including labour disturbances affecting only their own enterprise. Parties are reminded that adding new events to the list does not relieve them from proving that condition (c) of paragraph 1 is satisfied.

4. **Notification.** The Affected Party shall give notice of the event without delay to the other party.

5. **Consequences of Force Majeure.** A party successfully invoking this Clause is relieved from its duty to perform its obligations under the Contract and from any liability in damages or from any other contractual remedy for breach of contract, from the time at which the impediment causes inability to perform, provided that the notice thereof is given without delay. If notice thereof is not given without delay, the relief is effective from the time at which notice thereof reaches the other party. The other party may suspend the performance of its obligations, if applicable, from the date of the notice.

The main purpose of this paragraph is to clarify that the Affected Party is relieved from the performance of the obligations subject to Force Majeure from the occurrence of the impediment, provided that a timely notice is given. In order to avoid the Affected Party invoking Force Majeure only at a later stage (e.g. when the other party claims non-performance) where a timely notice is not given, the effects of the Force Majeure are delayed until the receipt of the notice.

The other party may suspend the performance of its obligations upon the receipt of the notice to the extent these obligations result from the obligations impeded by Force Majeure and they are suspendable.

6. **Temporary impediment.** Where the effect of the impediment or event invoked is temporary, the consequences set out under paragraph 5 above shall apply only as long as the impediment invoked prevents performance by the Affected Party of its contractual obligations. The Affected Party must notify the other party as soon as the impediment ceases to impede performance of its contractual obligations.

7. **Duty to mitigate.** The Affected Party is under an obligation to take all reasonable measures to limit the effect of the event invoked upon performance of the contract.

8. **Contract termination.** Where the duration of the impediment invoked has the effect of substantially depriving the contracting parties of what they were reasonably entitled to expect under the contract, either party has the right to terminate the contract by notification within a reasonable period to the other party. Unless otherwise agreed, the parties expressly agree that the contract may be terminated by either party if the duration of the impediment exceeds 120 days.

   This paragraph 8 establishes a general rule for determining in each particular case when the duration of the impediment is unsustainable and entitles the parties to terminate the contract. In order to increase certainty and foreseeability, a maximum duration of 120 days has been provided, which can of course be changed by agreement of the parties at any time according to their needs.

9. **Unjust enrichment.** Where paragraph 8 above applies and where either contracting party has, by reason of anything done by another contracting party in the performance of the contract, derived a benefit before the termination of the contract, the party deriving such a benefit shall pay to the other party a sum of money equivalent to the value of such benefit.

ICC FORCE MAJEURE CLAUSE ("Clause")
(SHORT FORM)

This Short Form is a reduced version of the Long Form, which is limited to some essential provisions. It is intended for users who wish to incorporate in their contract a balanced and well-drafted standard clause covering the most important issues, which can arise in this context.

Users must be aware that this Short Form, by its very nature, has a limited scope and does not necessarily cover all issues, which may relevant in the specific business context. When this is the case, parties should draft a specific clause on the basis ot the ICC Long Form.

1. "Force Majeure" means the occurrence of an event or circumstance that prevents or impedes a party from performing one or more of its contractual obligations under the contract, if and to the extent that that 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.

2. In the absence of proof to the contrary, the following events affecting a party shall be presumed to fulfil conditions (a) and (b) under paragraph 1 of this Clause: (i) war (whether declared or not), hostilities, invasion, act of foreign enemies, extensive military mobilisation; (ii) civil war, riot, rebellion and revolution, military or usurped power, insurrection, act of terrorism, sabotage or piracy; (iii) currency and trade restriction, embargo, sanction; (iv) act of authority whether lawful or unlawful, compliance with any law or governmental order, expropriation, seizure of works, requisition, nationalisation; (v) plague, epidemic, natural disaster or extreme natural event; (vi) explosion, fire, destruction of equipment, prolonged break-down of transport, telecommunication, information system or energy; (vii) general labour disturbance such as boycott, strike and lock-out, go-slow, occupation of factories and premises.

3. A party successfully invoking this Clause is relieved from its duty to perform its obligations under the contract and from any liability in damages or from any other contractual remedy for breach of contract, from the time at which the impediment causes inability to perform, provided that the notice thereof is given without delay. If notice thereof is not given without delay, the relief is effective from the time at which notice thereof reaches the other party. Where the effect of the impediment or event invoked is temporary, the above consequences shall apply only as long as the impediment invoked impedes performance by the affected party. Where the duration of the impediment invoked has the effect of substantially depriving the contracting parties of what they were reasonably entitled to expect under the contract, either party has the right to terminate the contract by notification within a reasonable period to the other party. Unless otherwise agreed, the parties expressly agree that the contract may be terminated by either party if the duration of the impediment exceeds 120 days.

ICC HARDSHIP CLAUSE ("Clause")

Several domestic laws deal with hardship situations, through rules intended to protect the disadvantaged party in case events have rendered performance more onerous than could reasonably have been anticipated at the time of the conclusion of the contract. However the solutions adopted by national laws may be substantially different from country to country. When the national laws request the parties to renegotiate the contract, and the renegotiation fails, the consequences of such failure may vary: under some laws the disadvantaged party will only be entitled to terminate the contract, while under others the disadvantaged party will have the right to request adaptation of the contract to the changed circumstances by the judge or arbitrator.

In order to increase certainty, parties may wish to regulate this situation in their agreement, independently from the law governing the contract. The ICC Hardship Clause intends to satisfy this need through a standard clause which can be included in an individual contract.

Since one of the most disputed issues is whether it is appropriate to have the contract adapted by a third party (judge, arbitrator) in case the parties are unable to agree on a negotiated solutions, the clause provides two options between which the parties must choose: adaptation or termination.

1. A party to a contract is bound to perform its contractual duties even if events have rendered performance more onerous than could reasonably have been anticipated at the time of the conclusion of the contract.

2. Notwithstanding paragraph 1 of this Clause, where a party to a contract proves that:

   a) the continued performance of its contractual duties has become excessively onerous due to an event beyond its reasonable control which it could not reasonably have been expected to have taken into account at the time of the conclusion of the contract; and that

   b) it could not reasonably have avoided or overcome the event or its consequences, 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.

3A Party to terminate	3B Judge adapt or terminate	3C Judge to terminate
Where paragraph 2 of this Clause applies, but where the parties have been unable to agree alternative contractual terms as provided in that paragraph, the party invoking this Clause is entitled to terminate the contract, but cannot request adaptation by the judge or arbitrator without the agreement of the other party.	Where paragraph 2 of this Clause applies, but where the parties have been unable to agree alternative contractual terms as provided for in that paragraph, either party is entitled to request the judge or arbitrator to adapt the contract with a view to restoring its equilibrium, or to terminate the contract, as appropriate.	Where paragraph 2 of this Clause applies, but where the parties have been unable to agree alternative contractual terms as provided in that paragraph, either party is entitled to request the judge or arbitrator to declare the termination of the contract.

Paragraph 3 deals with the situation where the parties are unable to agree alternative contract terms. In this case, there are mainly two options: contract termination by one of the parties, or adaptation or termination by the judge or arbitrator having jurisdiction under the contract. Under option A, the party invoking hardship will be entitled to terminate the contract on its initiative.

Under option B, (which is admitted under a number of national laws as well as under the Unidroit Principles), the parties are entitled to request a judge or arbitrator to adapt or terminate the contract. In this case the judge or arbitrator may decide which of the two alternatives is more appropriate, in particular where no adaptation is reasonably possible.

If option B is considered inappropriate by the contractual parties, who fear the adaptation of the contractual balance by a third party (judge or arbitrator), parties can choose option A or C, which do not involve adaptation of the contract by the judge or arbitrator. Under option A, the party invoking hardship will be entitled to terminate the contract on its initiative—and the other party may thereafter claim the unlawfulness of such decision—, whereas under option C, either party may request the judge or arbitrator to declare the termination.

In case the parties opt for adaptation, it may be suggested that the judge or arbitrator invites the parties to submit proposals of the required adjustments, which might be taken as starting point for adapting the contract.