



ICC Force Majeure Clause 2003

ICC Hardship Clause 2003



The world business organization

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FOREWORD

By Maria Livanos Cattai, Secretary General of ICC

Force Majeure literally means “greater force”. Force Majeure clauses excuse a party from liability if some unforeseen event beyond the control of that party prevents it from performing its obligations under the contract.

A hardship clause, on the other hand, requests re-negotiation of the contract if the continued performance of one party’s contractual duties has become excessively onerous due to an unforeseen event beyond the control of that party.

Negotiating force majeure and hardship clauses means operating at the very core of the contract. It is important that the clauses are balanced and apply equally to all parties to the agreement. ICC has designed the ICC Force Majeure Clause 2003 and the ICC Hardship Clause 2003 to facilitate the drafting process both for companies and for their lawyers.

These clauses follow extensive discussion within ICC’s Commission on Commercial Law and Practice, and particularly within the Task Force on Force Majeure and Hardship, chaired by Prof. Jan Ramberg (Sweden). Draftsman-in-chief was Prof. Charles Debattista (UK), and other task force members were Prof. Filip de Ly (Netherlands), Alexis Moure (France), René von Samson-Himmelstjerna (Germany), Fabian von Schlabrendorff (Germany), and Peter Delargy (France).

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ICC FORCE MAJEURE CLAUSE 2003

Introductory Note on the Application and General Structure of the Clause

This clause, known as the “ICC Force Majeure Clause 2003”, is intended to apply to any contract which incorporates it either expressly or by reference. While parties are encouraged to incorporate the Clause into their contracts by its full name, it is anticipated that any reference in a contract to the ‘ICC Force Majeure Clause’ shall, in the absence of evidence to the contrary, be deemed to be a reference to this Clause.

The general structure of the Clause is to provide contracting parties both with a general force majeure formula and with an off-the-peg list of force majeure events. The ICC Task Force on Force Majeure and Hardship discussed at length the respective merits of three options open to it. The first was simply to draft a general force majeure formula, as do the main international instruments to which the Task Force had regard, namely the United Nations Convention on Contracts for the International Sale of Goods (CISG), the Principles of European Contract Law, and the Unidroit Principles for International Commercial Contracts. The second was to draft a general force majeure formula and to provide a merely illustrative list of force majeure events, as does the previous 1985 ICC Force Majeure Clause. The third was to draft both a general force majeure formula and to provide a list of events the occurrence of which altered the evidential balance in favour of the party invoking the clause. The ICC Task Force on Force Majeure and Hardship has decided to draft the clause on the basis of the third option and this because of the three purposes on which the Clause is based. These three purposes are set out below.

First, it is intended that the new clause should assist the largest possible number of users: those who draft neither of such two types of such clauses in their own contracts; those who draft only a general formula but would also like the predictability of an agreed list of events; and finally those who draft only a list of specified events but who wish to invoke an unlisted event as a force majeure event.

Secondly, it is intended to give the list of events a function which goes beyond the merely illustrative, such that a party would find it easier to invoke the clause if it could point towards one of the listed events than if it could only use the general force majeure formula.

Thirdly and on the other hand, it was important not to afford a party invoking a listed event too much protection: it was definitely regarded as wrong for such a party simply to point towards the mere occurrence of a listed event, the effects of which it could reasonably have avoided or overcome, and to claim relief on that basis from its duty to perform.

The Clause seeks to attain these purposes first by providing a general force majeure formula placing the burden of proving the requirements for the application of the clause on the party invoking it. The Clause also provides a list of force majeure events, however, which is subject to the same conditions as established for the general force majeure formula but with evidential advantages for a party invoking the clause through this route. It should be emphasised 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.

1 Unless otherwise agreed in the contract between the parties expressly or impliedly, where a party to a contract fails to perform one or more of its contractual duties, the consequences set out in paragraphs 4 to 9 of this Clause will follow if and to the extent that that party proves:

- [a]** that its failure to perform was caused by an impediment beyond its reasonable control; and
- [b]** that 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
- [c]** that it could not reasonably have avoided or overcome the effects of the impediment.

2 Where a contracting party fails to perform one or more of its contractual duties because of default by a third party whom it has engaged to perform the whole or part of the contract, the consequences set out in paragraphs 4 to 9 of this Clause will only apply to the contracting party:

- [a]** if and to the extent that the contracting party establishes the requirements set out in paragraph 1 of this Clause; and
- [b]** if and to the extent that the contracting party proves that the same requirements apply to the third party.

3 In the absence of proof to the contrary and unless otherwise agreed in the contract between the parties expressly or impliedly, a party invoking this Clause shall be presumed to have established the conditions described in paragraph 1[a] and [b] of this Clause in case of the occurrence of one or more of the following impediments:

- [a]** war (whether declared or not), armed conflict or the serious threat of same (including but not limited to hostile attack, blockade, military embargo), hostilities, invasion, act of a foreign enemy, extensive military mobilisation;
- [b]** civil war, riot rebellion and revolution, military or usurped power, insurrection, civil commotion or disorder, mob violence, act of civil disobedience;
- [c]** act of terrorism, sabotage or piracy;
- [d]** act of authority whether lawful or unlawful, compliance with any law or governmental order, rule, regulation or direction, curfew restriction, expropriation, compulsory acquisition, seizure of works, requisition, nationalisation;
- [e]** act of God, plague, epidemic, natural disaster such as but not limited to violent storm, cyclone, typhoon, hurricane, tornado, blizzard, earthquake, volcanic activity, landslide, tidal wave, tsunami, flood, damage or destruction by lightning, drought;
- [f]** explosion, fire, destruction of machines, equipment, factories and of any kind of installation, prolonged break-down of transport, telecommunication or electric current;
- [g]** general labour disturbance such as but not limited to boycott, strike and lock-out, go-slow, occupation of factories and premises.

- 4** A party successfully invoking this Clause is, subject to paragraph 6 below, relieved from its duty to perform its obligations under the contract from the time at which the impediment causes the failure to perform if notice thereof is given without delay or, if notice thereof is not given without delay, from the time at which notice thereof reaches the other party.
- 5** A party successfully invoking this Clause is, subject to paragraph 6 below, relieved from any liability in damages or any other contractual remedy for breach of contract from the time indicated in paragraph 4.
- 6** Where the effect of the impediment or event invoked is temporary, the consequences set out under paragraphs 4 and 5 above shall apply only insofar, to the extent that and as long as the impediment or the listed event invoked impedes performance by the party invoking this Clause of its contractual duties. Where this paragraph applies, the party invoking this Clause is under an obligation to notify the other party as soon as the impediment or listed event ceases to impede performance of its contractual duties.
- 7** A party invoking this Clause is under an obligation to take all reasonable means to limit the effect of the impediment or event invoked upon performance of its contractual duties.
- 8** Where the duration of the impediment invoked under paragraph 1 of this Clause or of the listed event invoked under paragraph 3 of this Clause has the effect of substantially depriving either or both of 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.
- 9** 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 be under a duty to pay to the other party a sum of money equivalent to the value of such benefit.

Notes**a) The general Force Majeure formula in paragraph 1**

The general formula triggering the consequences of force majeure set out in paragraph 1 of the Clause amalgamates elements of the previous ICC Force Majeure Clause 1985, CISG article 79, the Principles of European Contract Law section 8:108 and the Unidroit Principles for International Commercial Contracts article 7.1.7. The threshold adopted for the invocation of the Clause is considerably lower than impossibility of performance: hence the use of the phrase “beyond its reasonable control” in paragraph 1[a] and “could not reasonably have avoided” in paragraph 1[c].

b) Force Majeure and sub-contractors: paragraph 2

Paragraph 2 is designed specifically on the basis of CISG article 79(2) and is intended to make it clear that a contracting party can invoke the Clause where A fails to perform its duties towards its contracting party B because of non-performance by C, a sub-contractor in a contract with A. As is the case with CISG, A here must establish the three conditions set out in the general formula in paragraph 1 both in its own regard and in regard to the sub-contractor C. The reason for maintaining this double threshold is that A would otherwise find it too easy in most cases of outsourcing to invoke force majeure simply by proving that C did not perform its sub-contract. Such a result was felt by the Task Force to be harsh on B, a contracting party with legitimate expectations of performance by A. For the same reason, non-performance by a sub-contractor is not included among the events listed in paragraph 3.

c) Force Majeure and existing impediments

The Clause does not limit the consequences of force majeure to impediments that occur after the time the contract was concluded. The Task Force decided against such a limitation on the ground that a party might wish to invoke the Clause in circumstances where it simply did not know – and could not have known – of the existence of the impediment at that time. If the parties wish to apply the consequences of force majeure solely to events which occur after the contract is concluded, there is nothing in the Clause limiting their ability to do so by special term in their contract. Care should be taken in such circumstances,

however, because such a clause would have the effect of excluding the consequences of force majeure where impediments that existed at the time of the conclusion of the contract were unknown to the parties.

d) Listed Force Majeure events: paragraph 3

Paragraph 3 describes a number of events commonly included in force majeure clauses and sets out the evidential presumptions favouring a party invoking the clause who can point to the occurrence of one or more of the listed events rather than simply to the general formula in paragraph 1. A party invoking the Clause by invoking one or more of the events listed is presumed to have established that its failure to perform was caused by an impediment beyond its reasonable control which it could not reasonably have been expected to have taken into account when the contract was made. It is essential to realise, however, that the mere occurrence of the event does not automatically grant relief to the party invoking the Clause. There is still a balance of evidence to be resolved between the parties: on the one hand, the party invoking the Clause still needs to prove that it could not have avoided the effects of the event invoked; and for its part, the other party can still unsettle the presumptions established by the Clause by proving that the event invoked was actually within the control and/or could have been anticipated at the time of contract by the party invoking the event.

e) Events in the list

The list of events in paragraph 3 follows broadly the same list set out in article 2 of the ICC Clause 1985. The main innovation is the inclusion of acts of terrorism in paragraph 3[c]. The events selected for inclusion are ones broadly accepted as being outside the control and anticipation of most contracting parties: a party invoking one or more of these events still needs to prove, however, that it could not reasonably have avoided the effects of the event upon its ability to perform its contractual duties. It may be, of course, that parties in particular situations may wish to alter the list of events, for example by excluding one or more of the events, say event (d), i.e., "acts of authority etc." There is nothing in the Clause preventing the parties from doing so, whether by deletion or addition to the events listed. It should also be noted that where a party invoking the Clause is affected by an event which cannot quite be brought within one of the listed events, that party can still invoke the Clause

through the general formula established in paragraph 1, unassisted by the presumptions which would otherwise apply through the occurrence of a listed event. Thus, for example, where a party seeks relief because of a labour disturbance affecting only its own enterprise (and therefore comes outside event (g) – general labour disturbance) such a party can still invoke force majeure if it can establish the three requirements set out in paragraph 1.

f) Self-induced Force Majeure

The ICC Task Force on Force Majeure and Hardship has chosen not to include an express article excluding from relief events to whose occurrence the party invoking the clause has contributed, i.e., an article similar to CISG article 80, an article which is not repeated, incidentally, either in the Principles of European Contract Law or in the Unidroit Principles for International Commercial Contracts. The condition laid down at paragraphs 1(a) and (c) of the Clause dispense with the need for such an article: an event to which a party has contributed in whole or in part cannot be one outside the control of that party or one whose effects he might not reasonably have avoided or overcome.

g) Force Majeure and freedom of contract

It should be emphasised that this Clause is subject, both at paragraph 1 and 3, to the contrary agreement of the parties whether express or implied in the terms of the contract. A number of examples of such special clauses have already been given in these Explanatory Notes. Again, for example, the parties may have expressly agreed by special term that the supplier was under a contractual duty to obtain an export licence, in which case it would not be open to it to invoke a governmental order, listed at paragraph 3[d], unless the failure to obtain it was caused by another of the listed events.

h) The consequences of Force Majeure: paragraphs 4 and 5

Paragraphs 4 and 5 of the Clause represent the two consequences suggested by the Task Force as resulting from the invocation of the clause, namely, suspension of performance duties and of remedies in damages for the duration of the impediment or event.

**i) Force Majeure leading to termination of the contract:
paragraphs 8 and 9**

The Task Force was faced with two options regarding the moment at which temporary suspension of the contract through force majeure would last long enough to lead to termination: the first was to establish a fixed period; the second was to provide a formula for calculating that period. The Clause adopts the latter approach because 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. The formula used is that employed by CISG article 25, the Unidroit Principles for International Commercial Contracts article 7.3.1 and the Principles of European Contract Law section 8:103, with the caveat, however, that reference to foreseeability has been omitted, this aspect of matters being rendered superfluous by paragraph 1[b] of the Clause.

j) Force Majeure and notice

The giving of notice is referred to in paragraphs 4 and 5, 6 and 8 of the Clause. It is felt that mention of notice in these paragraphs dispenses with the need of a general article on notification, setting out a duty of notice within a reasonable period and the consequences of a failure to notice. The scheme of the Clause makes the consequences of invoking the Clause contingent upon notification without delay, a sufficient incentive to a party wishing to invoke the Clause to give prompt notice to the other party of its intention so to invoke.

ICC HARDSHIP CLAUSE 2003

Introductory Note on the Application of the Clause

This clause, known as the “ICC Hardship Clause 2003”, is intended to apply to any contract which incorporates it either expressly or by reference. While parties are encouraged to incorporate the clause into their contracts by its full name, it is anticipated that any reference in a contract to the “ICC Hardship Clause” shall, in the absence of evidence to the contrary, be deemed to be a reference to this clause.

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 for the consequences of the event.

3 Where paragraph 2 of this Clause applies, but where alternative contractual terms which reasonably allow for the consequences of the event are not agreed by the other party to the contract as provided in that paragraph, the party invoking this Clause is entitled to termination of the contract.

Notes

a) Hardship and Force Majeure

The ICC Hardship Clause 2003 stands separately from the ICC Force Majeure Clause 2003. This has been done for two reasons. First, clauses providing for the consequences of force majeure events are more commonly used than hardship clauses: it was felt that making both clauses operate automatically by incorporation might discourage the use of the force majeure clause. Secondly, the two clauses operate in different circumstances and have different effects; they ought therefore to be kept separate. Having said that, ICC puts forward both clauses as fair allocations of risk in circumstances of force majeure and hardship and both clauses can, of course, be incorporated into the same contract.

b) The origins of the Clause

The Clause differs markedly from the ICC 1985 Hardship provisions, which gave four alternative options for adoption by contracting parties. The Clause now provides one formulation with clear alternative consequences, negotiation or termination, the latter of which would in most cases provide an incentive towards the former. The Clause amalgamates elements of article 1467 of the Italian Civil Code and of article 6.2.2 of the Unidroit Principles of International Commercial Contracts.

c) The parties should perform their duties: paragraph 1

The Clause, taken largely from article 6.2.1 of the Unidroit Principles, starts with the principle that contractual duties should normally be performed, otherwise known as the principle “pacta sunt servanda”. On one view, this paragraph is unnecessary, in that hardship could only be invoked if the rigorous tests of paragraph 2 are satisfied, and this would be the case whether or not there is a paragraph 1. On the other hand, it was felt that the explicit expression of the “pacta sunt servanda” principle gives tribunals a clear indication that paragraph 2 is only to be invoked where its conditions are very strictly satisfied, it being an exception to the usual requirement of performance. It is with this in mind that the phrase “more onerous than anticipated at the time of the conclusion of the contract” is used in paragraph 1 (in which case duties must be performed) and the more demanding phrase “excessively onerous” in paragraph 2(a) (in which case there might be relief from performance.)

d) Hardship and existing impediments

As with the ICC Force Majeure Clause 2003, this Clause is not limited to situations where the events rendering performance excessively onerous occurred after the time the contract was concluded. Here too, the Task Force decided against such a limitation on the ground that a party might wish to invoke the Clause in circumstances where it simply did not know – and could not have known – of the existence of the event at the time of the conclusion of the contract. Again here, however, if the parties wish to apply the consequences of the Hardship Clause solely to events which occur after the contract is concluded, there is nothing in the Clause limiting their ability to do so by special term in their contract. Care should be taken in such circumstances, however, because such a clause would have the effect of excluding the consequences of the Clause where events rendering performance excessively onerous existed at the time of the conclusion of the contract but were unknown to the parties.

e) Hardship and the duty to negotiate: paragraph 2

The Clause places upon the parties the duty to negotiate alternative reasonable terms without expressly referring the matter to a court, as is done in article 6.2.3 of the Unidroit Principles. It was felt that the ICC Hardship Clause should encourage the parties to work out their own solutions through a general dispute resolution clause in their contract, rather than expressly stipulating for a limited reference to a tribunal for re-negotiation in a hardship situation. A “special” dispute resolution provision for hardship cases co-existing with a general dispute resolution clause might cause unnecessary and undesirable confusion. Thus, where paragraph 3 does not work, either because the performing party fails to offer alternative terms or because the non-performing party fails unreasonably to accept them, then the likelihood is that a claim will be made, either for termination brought by the party invoking the Clause or for breach of contract brought by the other party. That claim would go to arbitration or litigation under the general dispute resolution terms in the contract, for example by reference to any of the dispute resolution services provided by ICC.

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