

# Paris Energy Series No. 9: Expecting the Unexpected: The *Force Majeure* Clause

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## I. Introduction

In August 2014, steel and mining company ArcelorMittal announced that it was suspending an expansion project to triple its iron ore production in Liberia due to the Ebola epidemic in West Africa.<sup>1</sup> A few days earlier, Brazilian sugar exporter Cosan SA declared that it would be unable to deliver sugar to some of its clients after a fire destroyed its warehouse at the Port of Santos in Brazil.<sup>2</sup> And in July 2014, oil and gas company Royal Dutch Shell announced the suspension of a shale gas exploration project in Ukraine due to its proximity to the crash site of Malaysian Airlines Flight 17.<sup>3</sup>

What does a deadly virus in West Africa, a fire in Brazil, and a plane crash in Ukraine have in common? Each resulted in the invocation of *force majeure* (“superior force”), a common clause in long-term international contracts that frees both parties from liability or obligation when an event beyond the control of the parties prevents one or both parties from fulfilling their obligations under the contract. *Force majeure* clauses thus serve as a precaution against the risks posed by certain economic, political, and natural disaster events.<sup>4</sup>

Although *force majeure* often is pleaded at the breakdown of a contract, these clauses frequently are not given the attention they deserve upfront during the negotiation of the contract.<sup>5</sup> Instead parties often insert “boilerplate” *force majeure* clauses into their contracts that are not tailored to reflect the particular agreement,<sup>6</sup> which might lead to problems if a *force majeure* event later materializes.<sup>7</sup> For example, a contract that contains a *force majeure*

clause and a “take or pay” provision – in which the buyer agrees to take the goods or pay for a certain amount of the goods – may be problematic because even if a *force majeure* event makes it impossible to take the goods, presumably the buyer could still pay for them.<sup>8</sup> It therefore is advisable that parties draft *force majeure* clauses to deal with the specificities of their agreements.

Tailored *force majeure* clauses also are important because international arbitral tribunals are as a rule reluctant to interfere with a contract without a specific contractual basis.<sup>9</sup> Tribunals presume that international commercial contracts are drafted with a professional assessment of risk already included in the bargained for contract.<sup>10</sup> Thus it is the parties themselves that must take precautions against the materialization of risk by including carefully drafted *force majeure* clauses in their contracts.

This is particularly true when dealing with contracts that specify that the applicable law is the law of a common law jurisdiction, as there is no general law concept of *force majeure* in the common law. Rather, *force majeure* generally is treated in common law jurisdictions as a creature of consent, and as such will apply only when a *force majeure* clause is included in a contract. This reflects the view that these clauses are used to allocate risk should a given event occur.<sup>11</sup> By contrast, including a *force majeure* clause in a contract governed by a civil law jurisdiction, which generally recognizes the doctrine of *force majeure*, allows the parties to circumvent possible limitations on the doctrine set forth in the applicable law.



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Despite the need for a carefully drafted *force majeure* clause, the full spectrum of such clauses is not known to most contract drafters because most long-term international contracts are confidential and most arbitral awards involving *force majeure* issues are not published.<sup>12</sup> This article therefore discusses the most common formulations of the *force majeure* clause to assist drafters in tailoring the clause to their agreements.

### II. *Force Majeure* and the Applicable Law

As a preliminary matter, it is important to remember that not all domestic legal systems address the notion of *force majeure*. A distinction generally can be drawn between civil law jurisdictions, in which the doctrine generally applies, and common law jurisdictions, which largely do not have a general law application of the concept of *force majeure* (although variations exist, such as in some former English colonies (see below), the English law concept of “frustration,” and the US law concept of “commercial impracticability”). Given its virtual non-existence in common law systems, parties wishing to rely on *force majeure* have little choice but to define the concept in their contracts governed by the law of a common law jurisdiction.

By contrast, one of the main purposes of including a *force majeure* clause in a contract governed by a civil law jurisdiction is that the clause allows the parties to circumvent possible applicable law limitations.<sup>13</sup> Domestic provisions either may be too restrictive or too broad, and do not necessarily reflect the parties’ interests and intentions regarding risk allocation.<sup>14</sup> If it is in the parties’ interests to broaden (or narrow) the scope of the applicable law notion, the clause should be explicit in that respect.

Although the role of applicable law is greatly reduced when the terms of the contract are clear and complete,<sup>15</sup> choice of law still may play an important role in interpreting the *force majeure* clause in the contract or the *force majeure* doctrine more generally.<sup>16</sup> Therefore it is important for contract drafters to understand whether, and if so how, the potential applicable laws provide for and define the doctrine of *force majeure*.

For example, in *Niko Resources v. Bangladesh Petroleum Exploration & Production Co.*, the respondent argued that a 2005 injunction constituted a *force majeure* event precluding it from paying for gas delivered under a 2006 contract.<sup>17</sup> The respondent’s *force majeure* defense was based on Article 56 of the Bangladesh Contract Act 1872, which provides:

A contract to do an act which, *after the contract is made*, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.<sup>18</sup>

The arbitral tribunal, however, concluded that the 2005 injunction was not a *force majeure* event because “events prior to the conclusion of the contract, known to the parties and thus ‘foreseeable’, do not qualify as *force majeure* and are no excuse for non-performance.”<sup>19</sup> The tribunal reasoned that since the 2005 injunction had been in place before the 2006 contract was concluded, “[t]here can therefore not be a question whether the Parties could foresee a future injunction preventing payment to Niko; the Parties were fully aware of this impediment.”<sup>20</sup>

#### A. Civil Law Jurisdictions

The doctrine of *force majeure* originated in civil law systems. It applies to the non-performance of a contract, irrespective of whether the contract contains a *force majeure* clause. However, as one author has explained, “there are substantial differences among national laws as to the nature of events that qualify, whether or not extreme impracticability is sufficient, and the nature of relief among other things.”<sup>21</sup>

It generally is considered that *force majeure* provisions are not “*d’ordre public*” (mandatory provisions) in civil law jurisdictions.<sup>22</sup> Therefore a *force majeure* clause in a contract may deviate from the legal requirements of the *force majeure* doctrine provided for in the legal system. The more detailed the clause is, the less margin of discretion courts or arbitral tribunals will have.

##### 1. *Force Majeure* Provision and Definition: Quebec

The Quebec Civil Code (Article 1470) contains one of the more detailed *force majeure* provisions in domestic law. Not only does it mention the doctrine, but it also defines it:

A person may free himself from his liability for injury caused to another by proving that the injury results from superior force, unless he has undertaken to make reparation for it.

Superior force is an unforeseeable and irresistible event, including external causes with the same characteristics.<sup>23</sup>

##### 2. *Force Majeure* Provision but no Definition: France, the Netherlands, and Several Arab Countries

In several civil law jurisdictions, the *force majeure* doctrine is expressly mentioned in the legislation, but is not defined. For example, the French Civil Code (Article 1148) provides:

No claim for damages arises when a debtor was prevented from transferring or from doing that to which he was bound, or did what was forbidden to him, by reason of *force majeure* or a fortuitous event.<sup>24</sup>

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The Dutch Civil Code (Article 6.75),<sup>25</sup> the Algerian Civil Code (Article 127),<sup>26</sup> the Egyptian Civil Code (Article 165),<sup>27</sup> the Lebanese Code of Obligations and Contracts (Article 341),<sup>28</sup> and the Emirati Civil Code (Article 273)<sup>29</sup> similarly refer to the *force majeure* doctrine without defining it.

Although these provisions do not define the concept of *force majeure*, the doctrine is well established in the case law. It largely is accepted that three elements need to be present for an event to qualify as *force majeure*: the harm causing event needs to be external, unforeseeable, and irresistible. These elements generally are considered to be cumulative.<sup>30</sup>

### 3. Similar Doctrines: Germany, Italy, and Switzerland

Other civil law jurisdictions have doctrines that are similar to *force majeure*. For example, the German law concept of “contractual impossibility” is composed of two distinct doctrines. The first doctrine is referred to as “the collapse of the bases of the contract” and is similar to the doctrine of “hardship.”<sup>31</sup> The other is the doctrine of “objective impossibility,” which is codified in the German Civil Code (Article 275)<sup>32</sup> and is similar to the French law concept of *force majeure*. The circumstances in which “objective impossibility” is recognized are limited.<sup>33</sup>

Similarly, the doctrine of “supervening impossibility” in the Italian Civil Code (Article 1256)<sup>34</sup> and the doctrine of “impossibility of performance” in the Swiss Code of Obligations (Articles 97 and 119)<sup>35</sup> allow a party to a contract to be excused from non-performance when such performance has become permanently impossible.

### B. Common Law Jurisdictions

The doctrine of *force majeure* is alien to common law systems. In these systems, courts may refer to related, yet distinct doctrines, such as “frustration” (United Kingdom, Australia, India) or “impracticability” (United States).<sup>36</sup>

A contract generally is deemed “frustrated” or “impracticable” when a supervening event renders the performance of the contract so different from what was contemplated at its conclusion that it would not be reasonable to hold the parties bound by it. Unlike the civil law concept of *force majeure* that generally applies to situations where the performance of the contract is *impossible*, the common law doctrines of “frustration” and “impracticability” generally refer to something merely *different* from what was originally contemplated by the parties.<sup>37</sup> That being said, one should not assume that a concept of hardship exists under common law principles. The case law clearly demonstrates that the notion of frustration, for example, “operates within rather narrow confines.”<sup>38</sup>

## III. Drafting a *Force Majeure* Clause

### A. Definition

The traditional criteria of *force majeure* are unforeseeability, unavailability, and the effect of rendering performance impossible.<sup>39</sup>

Long-term international contracts predominately contain one of three types of *force majeure* clauses: some clauses expressly define the concept of *force majeure*, others refer to an external source of law, and still others contain no definition at all.

The most robust types of *force majeure* clauses expressly define the concept of *force majeure*. For example:

In this Clause, “Force Majeure” means an exceptional event or circumstance:

- (a) which is beyond a Party’s control,
- (b) which such Party could not reasonably have provided against before entering into the Contract,
- (c) which, having arisen, such Party could not reasonably have avoided or overcome, and
- (d) which is not substantially attributable to the other Party.<sup>40</sup>

Clauses that define the concept of *force majeure* often exclude some of the traditional criteria – most often unforeseeability – and routinely apply a less rigorous standard.<sup>41</sup> For example, many *force majeure* clauses do not require performance to be absolutely impossible.<sup>42</sup> Instead these clauses merely require that performance be “hindered,” “delayed,” or “negatively affected.”<sup>43</sup> Moreover the criteria often are conditioned by “reasonableness,”<sup>44</sup> mostly applied either to unforeseeability or unavailability.

Other *force majeure* clauses do not expressly define the concept of *force majeure* but rather reference an external source such as “generally recognized *force majeure* causes” or “cases of *force majeure* admitted by case law of [insert country].”<sup>45</sup> However, caution must be taken when using vague formulations; for example, the former phrasing does not specify *by whom* the *force majeure* causes are “generally recognized.” In addition, where a clause references the definition of *force majeure* in a specific law, drafters should ensure that it is the same law of the contract; otherwise it later might create difficult conflict of laws issues for an international arbitral tribunal.<sup>46</sup>

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In ICC Case No. 11265, the contract did not expressly define *force majeure* and instead merely referred to a list of events qualifying as *force majeure*.<sup>47</sup> The arbitral tribunal considered that the *force majeure* provision in the contract should be read in light of the UNIDROIT Principles, which contain a general definition of *force majeure*.<sup>48</sup> Based on that definition, the tribunal concluded that the respondent's failure to perform did not constitute *force majeure*.<sup>49</sup>

Finally, the least common type of *force majeure* clause is one that contains no definition. For example:

If, as a result of *Force Majeure*, any Party is rendered unable, wholly or in part, to carry out its obligations under this Agreement...then [inclusion of description of consequences].

Under this clause, the law applicable to the contract ordinarily will determine whether the criteria for *force majeure* have been satisfied. As explained above, it therefore is recommended that contract drafters carefully research the law applicable to the contract before including a *force majeure* clause in a contract, especially if the clause contains no definition.<sup>50</sup> But note that some domestic courts and international arbitral tribunals may try to give effect to the *force majeure* clause in accordance with the parties' reasonable intentions, regardless of the law applicable to the contract.

### B. List of Events

International arbitrators have a tendency to construe *force majeure* clauses narrowly. Drafters thus need to use very clear language when defining the events that will excuse performance and explicitly state whether the conditions apply to all events or only to a specifically enumerated set of events. Providing an illustrative (non-exhaustive) list of events that constitute *force majeure* accordingly reduces uncertainty in the contractual relationship.<sup>51</sup>

*Force majeure* clauses generally list examples of events that are considered *force majeure* for purposes of the contract.<sup>52</sup> For example:

In this Clause [ ], "Event of Force Majeure" means an event beyond the control of the Authority and the Operator, which prevents a Party from complying with any of its obligations under this Contract, including but not limited to:

- (a) act of God (such as, but not limited to, fires, explosions, earthquakes, drought, tidal waves and floods);
- (b) war, hostilities (whether war be declared or not), invasion, act of foreign enemies, mobilisation, requisition, or embargo;
- (c) rebellion, revolution, insurrection, or military or usurped power, or civil war;

- (d) contamination by radio-activity from any nuclear fuel, or from any nuclear
- (e) waste from the combustion of nuclear fuel, radio-active toxic explosive, or other hazardous properties of any explosive nuclear assembly or nuclear component of such assembly;
- (f) riot, commotion, strikes, go slows, lock outs or disorder, unless solely restricted to employees of the Supplier or of his Subcontractors; or
- (g) acts or threats of terrorism.<sup>53</sup>

Natural disasters and armed conflicts are the most frequently included events.<sup>54</sup> *Force majeure* clauses can include governmental or judicial actions, but this often is limited when contracting with a state-owned entity to prevent that entity from creating a *force majeure* claim.<sup>55</sup> Furthermore, depending on the contract, it might be beneficial to clarify whether the non-performance by third-parties (such as subcontractors) constitutes *force majeure*.<sup>56</sup>

It is advisable to list specific events – such as "fires, explosions, earthquakes, drought, tidal waves and floods" in the example above – to minimize an arbitral tribunal's discretion in interpreting the clause.<sup>57</sup> Moreover when a laundry list approach is used, drafters should be sure to include words such as "including but not limited to," or otherwise a strict interpretation may be adopted.<sup>58</sup> To obviate the concern of a limited interpretation should the event not fall in the listed categories in the clause, drafters occasionally use a *force majeure* clause that lists "effects" rather than events.

### C. Notice

After defining what constitutes *force majeure*, the clause then usually sets forth a notice requirement, which details the necessary procedure to invoke *force majeure*.

Notice of the *force majeure* event often is required to be in writing and to be given "within a reasonable time" (or within a specific period) because of the serious consequences of *force majeure* on the performance of the contract.<sup>59</sup> Furthermore, the party invoking *force majeure* generally must present evidence of the event, either at the time of the notice requirement or, more often, after notice has been given, since it takes time to gather evidence.<sup>60</sup> Some clauses also require notice at the end of the *force majeure* event.<sup>61</sup> The notice requirement is an integral part of the *force majeure* clause: if a party does not comply with the notice requirement, the party may lose the right to invoke the clause.<sup>62</sup>

The party invoking *force majeure* may be required to attempt to overcome the obstacle posed by *force majeure* and re-establish the conditions that enable performance of the

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obligation.<sup>63</sup> *Force majeure* clauses often provide that the other party be kept informed of the measures taken to that effect.

### D. Consequences

Finally, the *force majeure* clause details its consequences, most often suspension, renegotiation, and/or termination.

In long-term international contracts, *force majeure* ordinarily has a suspensive effect, at least initially.<sup>64</sup> For example:

1. A party successfully invoking this Clause is, subject to paragraph [2] below, relieved from its duty to perform its obligations under the contract from the time at which the impediment causes the failure to perform...
2. 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.<sup>65</sup>

These clauses generally provide for an extension of the contractual performance period or termination of the contract as a measure of last resort.<sup>66</sup> Some clauses provide that if the *force majeure* event continues for some time, then renegotiation or termination will follow, either after a fixed time limit or after a "reasonable period."<sup>67</sup>

*Force majeure* clauses frequently provide for renegotiation in contracts where, due to the complexity and financial obligations incurred, it is unsuitable to cancel the contract.<sup>68</sup> When renegotiation of the agreement is provided for, the effect of the failure of negotiations also should be included.<sup>69</sup> Some clauses refer the matter to arbitration, while other clauses provide for termination if agreement cannot be reached.<sup>70</sup>

One matter often ignored in long-term contracts is whether the duration of the event is to be added to the contract's duration. This can be a real issue, in long term gas sale agreements for example,

where buyers and sellers often lock in new quantities as of the agreement's planned termination date, and for whom an extension of that date may accordingly be problematic.

Given that termination is an exceptional remedy, it only will be used in exceptional circumstances or where there is a clear contractual basis. Many *force majeure* clauses do not contain a specific regime for termination due to *force majeure*, but it is becoming frequent practice to include one.<sup>71</sup> For example, *force majeure* clauses in many international petroleum agreements provide for a right to terminate of a given event lasts for a certain period of time; others stipulate that while termination of the contract is not excluded, it only is to be used in exceptional circumstances after the parties become convinced that the venture may not be pursued or following the breakdown of the relationship.<sup>72</sup> Such *force majeure* clauses frequently list ways to mitigate the impact of *force majeure* events to save the relationship and include an obligation on the parties to negotiate to overcome any obstacles set by the event.<sup>73</sup>

## IV. Conclusion

Unforeseeable and unavoidable events – such as the Ebola epidemic in West Africa, the warehouse fire in Brazil, and the crash of Malaysian Airlines Flight 17 in Ukraine – regrettably do occur and thus must be taken into consideration by parties in their economic, political, and natural disaster risk assessment of long-term international projects.<sup>74</sup> In short, contract drafters must expect the unexpected. By carefully reviewing the applicable law and drafting a *force majeure* clause that is tailored to the agreement, the *force majeure* clause can come to the rescue when – not if – such events take place.

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## Endnotes

- 1 See ArcelorMittal statement on operations in Liberia, ArcelorMittal, Aug. 8, 2014, <http://corporate.arcelormittal.com/news-and-media/press-releases/2014/aug/08-08-2014?lang=english>.
- 2 See *Brazil's Cosan declares force majeure to some sugar clients*, Reuters Africa, Aug. 5, 2014, <http://af.reuters.com/article/commoditiesNews/idAFL2N0QB0PA20140805>.
- 3 See *Shell declares force majeure on Ukraine exploration project*, Reuters Africa, July 31, 2014, <http://af.reuters.com/article/energyOilNews/idAFL6N0Q63VX20140731>.
- 4 See Klaus Peter Berger, *Renegotiation and Adaptation of International Investment Contracts: The Role of Contract Drafters and Arbitrators*, 1(4) *Transnat'l Disp. Mgmt.* (2004), at 4; see also Hubert Konarski, *Force Majeure and Hardship Clauses in International Contractual Practice*, 2003 *Int'l Bus. L. J.* 405, 425 (2003) (noting that *force majeure* clauses "constitute ordinary commercial safeguards as a means of protecting the parties against an unexpected turn of events").
- 5 See Karl-Heinz Böckstiegel, *Hardship, Force Majeure and Special Risks Clauses in International Contracts in Adaptation and Renegotiation of Contracts in International Trade and Finance: Studies in Transnational Economic Law* 160-61 (1985).
- 6 For example, the model *force majeure* clause promulgated by the International Chamber of Commerce in 2003. See *ICC Force Majeure Clause 2003*, International Chamber of Commerce, ICC Publication 650 (2003).
- 7 See, e.g., Konarski, *supra* note 4, at 407 ("[T]he automatic use of standard *force majeure* clauses by drafters, without any serious attempt to tailor them to the specific transaction, may lead to serious difficulties if a *force majeure* risk materializes."); Jennifer Bund, *Force Majeure Clauses: Drafting Advice for the CISG Practitioner*, 17 *J. L. & Com.* 381, 410 (1998) (emphasizing that "drafters should read the entire contract to ensure that it is internally consistent").
- 8 See Bund, *supra* note 7, at 410.
- 9 See, e.g., Mark Augenblick & Alison B. Rousseau, *Force Majeure in Tumultuous Times: Impracticability as the New Impossibility*, 13 *J. World Investment & Trade* 59, 59-60 (2012) ("Arbitration tribunals, however, rarely enforce *force majeure* clauses unless the specific impediment is defined in the clause..."); Zeyad A. Al Qurashi, *Renegotiation of International Petroleum Agreements*, 22(4) *J. Int'l Arb.* 261, 284 (2005) ("International arbitrators are extremely reticent when it comes to varying contracts without a specific contractual basis").
- 10 See, e.g., Augenblick & Rousseau, *supra* note 9, at 60 ("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."); Al Qurashi, *supra* note 9, at 285 ("Arbitrators presume that parties engaged in such contracts are knowledgeable about their transactions and aware of the risks that such transactions may pose. They generally interpret party silence about possible future contingencies as a concise decision to assume the risk of such eventualities."); Berger, *supra* note 4, at 7 ("The basis of this approach is the presumption of professional competence of international businessmen and the ensuing high level of responsibility for the contents and conduct of their legal relationships. This principle has been continuously emphasised by international arbitral tribunals over the past decades.")
- 11 See, e.g., Timothy S. Taylor & Allison O. Kahn, *Force Majeure: Risk Allocation for Unforeseeable Events*, 15(2) *Contract! Construction Litigation Committee* 7, 7 (2006) (citing *Westinghouse Elec. Corp. Uranium Contracts Litig.*, 517 F. Supp. 440, 459 (E.D. Va. 1981), where a US court stated that "the risk of contingency that affects performance is presumed to rest on the promisor. However, the parties may agree to shift a particular risk to the promisee, or to allocate the various risks between them as they see fit."); see also Joni R. Paulus & Dirk J. Meeuwig, *Force Majeure, Beyond Boilerplate*, 37(2) *Alb. L. Rev.* 302, 311 (1999) ("When considering the appropriate consequences of the invocation of *force majeure*, the draftsman should ensure that the consequences of *force majeure* are allocated between the parties clearly and in a manner consistent with the parties' intentions. It is a question of appropriate risk allocation. *Force majeure* clauses, like other clauses in contracts, may rightly represent a negotiated agreement between the parties as to an allocation of risk between them.")
- 12 See Konarski, *supra* note 4, at 405.
- 13 The "law applicable to the contract," "applicable law," or "governing law" is the law that generally is chosen by the parties and that a judge or arbitral tribunal will apply to determine the parties' right under the contract. See generally Michael Polkinghorne, *Choice of Law in Oil & Gas Agreements: What difference does it make?*, *The Paris Energy Series* No. 4 (June 2010), at 2; see also Stephen Hancock & Lawrence Collins, *International Resources Law: A Blueprint for Mineral Development*, 29A *Rocky Mountain Mineral L. Special Institute* (Feb. 1991), at 1-2.
- 14 See Jacques Mestre & Jean-Christophe Roda, *Les principales clauses des contrats d'affaires* 397 (2011).
- 15 While one might think that *force majeure* clauses only "complement" the applicable law, such clauses can be considered "self-sufficient" if they are clear and unambiguous. This argument was developed in the ICC case *National Oil Company v. Sun Oil Company of Libya* (Case No. 4462/AS, Award dated May 31, 1985). The tribunal in that case accepted the respondent's contention that the *force majeure* clause in the contract could not be interpreted "independently" from the contract's governing law. However, the tribunal considered that the clause was ambiguous.
- 16 See *The Paris Energy Series* No. 4, *supra* note 13, at 2; Giuditta Cordero-Moss, *Boilerplate Clauses, International Commercial Contracts and the Applicable Law* 368 (2011). Cordero-Moss explains that even when *force majeure* clauses are "detailed and extensive," one may argue that "the principles of the applicable law are likely to influence the understanding of the clause. For example, many *force majeure* clauses describe the excusing impediment as an event beyond the control of the parties that may not be foreseen or reasonably overcome. Different systems may have differing understandings of what is deemed to be beyond the control of one party."
- 17 *Niko Resources (Bangladesh) Ltd. v. Bangladesh Petroleum Exploration & Production Co. Ltd. & Bangladesh Oil Gas & Mineral Corp.*, ICSID Case Nos. ARB/10/11 and ARB/10/18, Decision on the Payment Claim, Sept. 11, 2014.
- 18 *Id.* ¶ 196 (emphasis added).
- 19 *Id.* ¶ 200.
- 20 *Id.* ¶ 202.
- 21 David Rivkin, *Lex Mercatoria and Force Majeure in Transnational Rules in International Commercial Arbitration* 161, 208 (1993).
- 22 Cordero-Moss, *supra* note 16, at 368.
- 23 Quebec Civil Code, art. 1470.
- 24 French Civil Code, art. 1148.
- 25 Dutch Civil Code, art. 6:75 ("A non-performance cannot be attributed to the debtor if he is not to blame for it nor accountable for it by virtue of law, a juridical act or generally accepted principles (common opinion).")
- 26 Algerian Civil Code, art. 127 ("Save for a legal or contractual obligation, a person is relieved from the obligation to repair damages if he proves that said damages were caused by external factors, such as a fortuitous event, a *force majeure*, the victim's fault or a third-party's fault.")
- 27 Egyptian Civil Code, art. 165 ("In the absence of a provision of the law or an agreement to the contrary, a person is not liable to make reparation, if he proves that the injury resulted from a cause beyond his control, such as unforeseen circumstances, *force majeure*, the fault of the victim or of a third party.")
- 28 Lebanese Code of Obligations and Contracts, art. 341 ("The obligation is extinguished when, since it was created, the performance which is its object has become impossible, either naturally or judicially, without the debtor's fact or mistake.")
- 29 Emirati Civil Code, art. 273 ("(1) In contracts binding on both parties, if *force majeure* supervenes which makes the performance of the contract impossible, the corresponding obligation shall cease, and the contract shall be automatically cancelled. (2) In the case of partial impossibility, that part

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- of the contract which is impossible shall be extinguished, and the same shall apply to temporary impossibility in continuing contracts, and in those two cases it shall be permissible for the obligor to cancel the contract provided that the obligee is so aware.”).
- 30 The question of whether all three criteria need to be verified has been debated both in the case law and in the scholarship. For instance, French and Quebec courts have qualified as *force majeure* those events that could be deemed internal to the sphere of activity of the party who invokes the doctrine (e.g., a sudden strike of employees). Some authors have used this case law to argue that the *external* element was no longer necessary. See e.g., Marel Katsivela, *Contracts: Force Majeure Concept or Force Majeure Clauses*, Rev. de Droit Uniforme 2007.
- 31 Guy Block, *Arbitration and Changes in Energy Prices: A Review of ICC Awards with respect to force majeure, Indexation, Adaptation, Hardship and Take-or-Pay Clauses*, 20(2) ICC Int’l Ct. Arb. Bull. 51, 52 (2009) (“By definition, *force majeure* renders the performance of a contract impossible. This is what distinguishes it from hardship, which makes the performance of the contract more onerous or difficult.”).
- 32 German Civil Code, art. 275(1)-(3) (“(1) A claim for performance is excluded to the extent that performance is impossible for the obligor or for any other person. (2) The obligor may refuse performance to the extent that performance requires expense and effort which, taking into account the subject matter of the obligation and the requirements of good faith, is grossly disproportionate to the interest in performance of the obligee. When it is determined what efforts may reasonably be required of the obligor, it must also be taken into account whether he is responsible for the obstacle to performance. (3) In addition, the obligor may refuse performance if he is to render the performance in person and, when the obstacle to the performance of the obligor is weighed against the interest of the obligee in performance, performance cannot be reasonably required of the obligor.”).
- 33 Rivkin, *supra* note 21, at 186.
- 34 Italian Civil Code, art. 1256 (“The obligation is extinguished when, for reasons not attributable to the debtor, the performance becomes impossible...If the impossibility is temporary, the debtor, as long as it lasts, is not responsible for the delay. However, the obligation is extinguished if the impossibility persists until, in relation to the title of the obligation or the nature of the object, the debtor can no longer be considered obligated to perform the contract or the creditor no longer has an interest in achieving it.”).
- 35 Swiss Code of Obligations, art. 97(1) (“An obligor who fails to discharge an obligation at all or as required must make amends for the resulting loss or damage unless he can prove that he was not at fault.”); art. 119 (“1. An obligation is deemed extinguished where its performance is made impossible by circumstances not attributable to the obligor. 2. In a bilateral contract, the obligor thus released is liable for the consideration already received pursuant to the provisions on unjust enrichment and loses his counter-claim to the extent it has not yet been satisfied. 3. This does not apply to cases in which, by law or contractual agreement, the risk passes to the obligee prior to performance.”).
- 36 See Ewan McKendrick, *Force Majeure and Frustration—Their Relationship and a Comparative Assessment in Force majeure and Frustration of Contract* 33, 34-35 (1995).
- 37 See Katsivela, *supra* note 30, at 108.
- 38 See Chitty on Contracts (31st ed. 2012) at 23-003.
- 39 See Marcel Fontaine & Filip de Ly, *Drafting International Contracts: An Analysis of Contract Clauses* 403 (2006).
- 40 *Conditions of Contract for Construction*, International Federation of Consulting Engineers, art. 19.1; see also United Nations Convention on Contracts for the International Sale of Goods, art. 79(1) (“A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it, or its consequences.”).
- 41 See Fontaine & de Ly, *supra* note 39, at 403; Konarski, *supra* note 4, at 425 (noting that “more and more clauses stipulate that the event need not be unforeseeable, but simply beyond the reasonable control of the parties”).
- 42 See Fontaine & de Ly, *supra* note 39, at 405; but see *Hess Corp. v. Eni Petroleum US, LLC & Eni USA Gas Marketing LLC*, 435 N.J. Super. 39 (App. Div., Jan. 9, 2014). In *Hess*, the parties had entered into a contract for the sale of natural gas that did not require that the gas be produced from a specified field or be transported to the delivery point via a specified route. In 2008, a leak in a pipeline resulted in the seller being unable to ship gas from its production fields in the Gulf of Mexico to the delivery point via the pipeline. The seller claimed *force majeure* on the basis that the contract included as a *force majeure* event an interruption and/or curtailment of firm transportation by a pipeline transponder. The buyer disputed the *force majeure* claim, and the US court agreed ruling that the seller’s performance should not be excused by *force majeure* because nothing in the contract obliged the seller to ship the gas to the delivery point via a specific route, or for the gas to have been produced from a specific source. The delivery point itself was unaffected and alternative sources of natural gas were available at the delivery point at such time. The court reasoned that there was nothing in the contract that prevented the seller from purchasing natural gas from other sources and supplying it to the buyer at the delivery point.
- 43 Under English law, clauses that refer to performance being “prevented,” “hindered,” or “delayed” by *force majeure* may of course be subject to different interpretations. See, e.g., *Tennants (Lancashire) Ltd. v. C.S. Wilson & Co. Ltd.* [1917] A.C. 495.
- 44 See, e.g., *ICC Force Majeure Clause 2003*, *supra* note 6, at art. 1 (requiring a party to prove “(a) that its failure to perform was caused by an impediment beyond its reasonable control; and (b) that it could not reasonably have 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”).
- 45 See Fontaine & de Ly, *supra* note 39, at 406; see also Al Qurashi, *supra* note 9, at 280 (providing the following example of a clause in an agreement entered into by Brazil: “In accordance with the provisions of Article 1058 of the Brazilian Code, neither Party shall be liable for losses resulting from a fortuitous event or force majeure.”).
- 46 See Fontaine & de Ly, *supra* note 39, at 407.
- 47 ICC Case No. 11265.
- 48 *Id.* ¶ 128.
- 49 *Id.* ¶ 129.
- 50 See *supra* § II.
- 51 See *ICC Force Majeure Clause 2003*, *supra* note 6, at 7-8.
- 52 See Fontaine & de Ly, *supra* note 39, at 408.
- 53 *Sample Force Majeure Clauses*, The World Bank, <http://ppp.worldbank.org/public-private-partnership/ppp-overview/practical-tools/checklists-and-risk-matrices/force-majeure-checklist/sample-clauses>.
- 54 See Fontaine & de Ly, *supra* note 39, at 408.
- 55 But see Berger, *supra* note 4, at 5 (“If the host country asserts... force majeure event which it brought about itself (legislation), it cannot rely on the clause even where the contract was not made with the state directly, but rather with a government corporation, as is common in natural resources exploration. These corporations are denied reliance on the contractual force majeure clause because by way of piercing the corporate veil they are regarded as an integral component of the state which is responsible for the change of conditions in the host country.”). The authors have seen contracts where different types of state action (i.e., central government action in a contract with a provincial government entity) can still be considered as events of *force majeure* but carry less dramatic consequences (i.e., reduced take-or-pay commitments under a power purchase agreement).
- 56 See Konarski, *supra* note 4, at 416; see also United Nations Convention on Contracts for the International Sale of Goods, art. 79(2) (“If the party’s failure is due to the failure by a third person whom he has engaged to perform the whole or a part of the contract, that party is exempt from liability only if: (a) he is exempt under the preceding paragraph; and (b) the person whom he has so engaged would be so exempt if the provisions of that paragraph were applied to him.”).
- 57 See Bund, *supra* note 7, at 408.
- 58 See *id.*

- 59 See Fontaine & de Ly, *supra* note 39, at 418-19; see also UNIDROIT Principles of International Commercial Contracts 2010, art. 7.1.7(3) (“The party who fails to perform must give notice to the other party of the impediment and its effect on its ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, it is liable for damages resulting from such nonreceipt.”); United Nations Convention on Contracts for the International Sale of Goods, art. 79(4) (“The party who fails to perform must give notice to the other party of the impediment and its effect on his ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, he is liable for damages resulting from such non-receipt.”).
- 60 See Fontaine & de Ly, *supra* note 39, at 421.
- 61 See *id.* at 429.
- 62 See Augenblick & Rousseau, *supra* note 9, at 71. While some argue that failure to respect a notice deadline should result in loss of the right to invoke the same, others are less demanding and argue that delay will simply give rise to the other party’s right to recover any losses arising from the delay. As always, different clauses may give rise to different results.
- 63 See Fontaine & de Ly, *supra* note 39, at 428-29; see also ICC Force majeure Clause 2003, *supra* note 6, at art. 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.”).
- 64 See Konarski, *supra* note 4, at 417 (“As a rule in long-term contracts, if by reason of force majeure one of the parties can show that it is rendered unable, wholly or in part, to carry out its obligations under the contract, then the obligations of the party concerned, as long as and to the extent that the obligations are affected by such force majeure, shall be suspended.”).
- 65 See Force Majeure Clause 2003, *supra* note 6, at arts. 4, 6.
- 66 See Berger, *supra* note 4, at 4; Fontaine & de Ly, *supra* note 39, at 425-26.
- 67 See Fontaine & de Ly, *supra* note 39, at 418, 430; see also ICC Force Majeure Clause 2003, *supra* note 6, at art. 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.”).
- 68 See Berger, *supra* note 4, at 5; but see John Y. Gotanda, *Renegotiation and Adaptation Clauses in Investment Contracts, Revisited*, 1(4) Transnat’l Disp. Mgmt. (2004), at 2 (explaining why parties may refuse to include renegotiation clauses in their contracts, including that: such clauses may reduce contract stability and raise the overall costs of the transaction; if the parties are unable to agree as a result of renegotiations and third-party adaptation of the contract is sought, the arbitral tribunal may decline to exercise jurisdiction or the adaptation may be unenforceable because of a lack of a “dispute” between the parties; and if the parties’ original agreement fails to provide the tribunal with sufficient parameters to adapt the contract the tribunal may rewrite the agreement in a way that neither party intended).
- 69 See Stephan Kröll, *The Renegotiation and Adaptation of Investment Contracts*, 1(3) Transnat’l Disp. Mgmt. (2004), at 22 (noting that “[t]he internationally prevailing view...appears to be more and more that these clauses bring about contractual duties of the parties which can be enforced and the violation of which might give rise to damage claims”).
- 70 See Fontaine & de Ly, *supra* note 39, at 432.
- 71 See *id.* at 435.
- 72 See Al Qurashi, *supra* note 9, at 280.
- 73 See *id.*
- 74 See, e.g., Berger, *supra* note 4, at 1 (noting that “[t]he long duration of...contracts makes them particularly susceptible to political or economic influences which are unforeseeable at the time of contract conclusion”); Abba Kolo, *Renegotiation and Contract adaption in the International investment projects: Applicable Legal Principles & Industry practices*, 1(1) Transnat’l Disp. Mgmt. (2004), at 1 (“The long-term nature of the contracts at issue makes them vulnerable to distribute from unforeseen events or events which the parties – for whatever reason – did not and perhaps could not deal with in the contract with sufficient team and in sufficient detail. The longer-term an agreement and the more exposed to geological, commercial and political risk, the more it becomes vulnerable to external events.”).

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