

CLIENT ALERT

International Chamber of Commerce Updates its Model Force Majeure and Hardship Clauses Amidst COVID-19 Pandemic

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Business disruptions caused by the global COVID-19 pandemic have demonstrated the importance of including clauses in contracts to appropriately govern the parties' rights and obligations when such disruptions occur. Even as many U.S. jurisdictions begin the process of loosening the restrictions imposed to stop the spread of the pandemic, it is to be expected that business disruptions will continue. Accordingly, before you enter into any new contracts, you should consider carefully the force majeure and/or hardship clauses you include to address such business disruptions.

If you have previously relied on the model force majeure or hardship clauses supplied by the International Chamber of Commerce (ICC), or are looking for such model clauses to include in your contracts, you should be aware of the recent changes to those clauses.

The full revised ICC model force majeure and hardship clauses can be found [here](#).

Background

Force majeure ("superior force" in French) and related doctrines, such as hardship, allow a contracting party to amend, suspend, and/or terminate performance when certain unforeseeable events that are beyond the control of the parties occur, such as a global pandemic or government action or prohibition. While some jurisdictions recognize and apply such doctrines even if not explicitly provided for in a contract, it will generally still be better, and create more certainty, if the parties adopt contract clauses that reflect their agreement as to what constitutes force majeure and what rights and obligations each party will have when a force majeure event occurs, and whether the parties anticipate modifying the agreement in cases of extreme hardship.

For many decades, parties have relied on model clauses drafted by the ICC as a starting point for drafting clauses to include in their contracts. In March 2020, the ICC released updated versions of the force majeure and hardship model clauses. According to the ICC, the revisions reflect "the need for simpler presentation and expanded options to suit various companies' needs." These revisions are notable not only because of the current increased focus on the need for such clauses, but also because the ICC rarely revises these clauses. The most recent previous revision was in 2003, and those revisions modified the versions that had existed since 1985.

Overview of Revisions

Parties who have previously used the ICC model clauses should carefully review the new clauses before utilizing them in their contract negotiations. Some of the more notable ways in which the new clauses differ from previous versions are summarized [here](#).

First, the ICC introduced a new “Short Form” model force majeure clause, limited to “some essential provisions covering the most important Force Majeure issues.” The ICC notes that the Short Form clause is particularly suited for use by small and medium sized enterprises. As a result of the new Short Form clause, the previous model clause, as revised, is now referred to as the “Long Form” clause.

Substantively, the Short Form and Long Form clauses do not differ much in either the definition of force majeure or the list of events that are presumed to constitute force majeure events. The key differences between the Short and Long Form include the following:

- The Short Form clause does not explicitly address the duty to mitigate, whereas the Long Form clause states “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.”
- The Short Form clause does not discuss non-performance by third parties, whereas the Long Form clause states “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.”

Second, the 2020 revisions modify the list of presumed force majeure events that appear in both the Short Form and Long Form clauses. Both the 2003 model clause and 2020 Long Form and Short Form clauses include seven subsections, labeled (a) through (g), listing events that are presumed to be events of force majeure. In the 2020 clauses, the number of specific events listed have generally been reduced – for example, the 2003 model clause included “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, nationalization,” which the 2020 versions streamline to “act of authority whether lawful or unlawful, compliance with any law or governmental order, expropriation, seizure of works, requisition, nationalization.”

Additionally, the 2020 revisions add “currency and trade restriction, embargo, sanction” to the list, and move “act of terrorism, sabotage or piracy” to the section that includes “civil war, riot, rebellion and revolution, military or usurped power, insurrection.”

Third, the 2020 revisions add a provision to both the Short Form and Long Form clauses specifying that either party may terminate the contract if “the duration of the impediment [to performance] exceeds 120 days.”

Fourth, the ICC revised its model hardship clause. Both the 2003 and 2020 versions of the Hardship Clause provide that the parties are bound to “negotiate alternative contractual terms” where performance has become “excessively onerous” for one party due to events beyond that party’s control which could not have reasonably been taken into account when the contract was negotiated, and that party “could not reasonably have avoided or overcome the event or its consequences.”

However, where the 2003 version entitled the party invoking the hardship clause to terminate the contract if the other party did not agree to alternative contract terms, the 2020 version provides the parties with three options to choose to include in their contract: (1) the invoking party may terminate, (2) either party may “request the judge or arbitrator to adapt the contract with a view to restoring its equilibrium, or to terminate the contract, as appropriate,” or (3) either party may “request the judge or arbitrator to declare the termination of the contract.”

Practice Pointers

The ICC's model clauses can serve as a starting point for the parties; however, the parties should consider modifying the language of the clauses as appropriate for their particular situations. The following are just a few of the issues the parties should consider when drafting their clauses.

The model force majeure clauses include "plague" and "epidemic" in the list of presumed force majeure events, but do not include "pandemic." A pandemic such as COVID-19 may be covered by the term epidemic, but parties may consider whether they should expand on the listed events in light of the ongoing crisis. Of course, parties should also consider whether the specific cause of any business interruption they may face as a result of the pandemic, whether government orders, labor shortage, material shortage, or other follow-on affects, should be stated explicitly in their contract clause.

In negotiating the appropriate language for their particular contract, the parties should also be aware of the applicable governing law. As the ICC notes, "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 parties should consider whether and how a hardship clause providing for third-party modification of contract terms will be given effect in the relevant jurisdiction.

Additionally, the definition of force majeure in the ICC's model clauses "provides a lower threshold for invoking the clause than impossibility of performance," the doctrine which may apply in many jurisdictions in the absence of a force majeure clause. Parties adopting the ICC's definition should be aware of how they are modifying the law that would otherwise apply.

Finally, it should be noted that while contracting parties could adopt the ICC's previous force majeure clause simply by including "any reference in a contract to the ICC Force Majeure Clause," the introduction of the Short Form clause means that contracting parties should specify whether they intend to adopt the Short Form or the Long Form clause.

Conclusion

Determining whether and to what extent contracting parties should adopt, or modify and adopt, the ICC's model force majeure and/or hardship clauses is a complex and highly fact-specific inquiry. Businesses that are considering drafting new contracts or revising existing contracts should seek legal advice (as early as possible) that can address both operational and legal concerns and can put the business in the best position to coordinate ongoing communications and, eventually, potential disputes.

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