

Toward an expanded concept of force majeure: The call to renegotiate the international trade contract

MOUKA Abdelkrim, Faculty of law and political science, University of Jijel, Algeria
moukaabdelkrim@univ-jijel.dz

Send Article Date: 19 /04/2024

Date of acceptance of the article: 10/05/2024

Abstract:

The practice of arbitral jurisprudence in the field of international commercial contracts has created a new concept of force majeure through the modification of the legal consequences of the contract due to changing circumstances on the contract, in order to preserve the stability and continuity of performance of the contractual clauses and to respect the principle of binding force of the contract, Parties resort to the modification of force majeure provisions through contractual requirements by which they seek to adapt the contract and adapt it to changing circumstances, and this power may also be granted to the arbitrator in order to save the contract.

Key words: Force majeure, hardship, international commercial contract, contract adaptation, arbitrator, renegotiation.

Introduction:

It may seem surprising to talk about the revision and appropriateness of the international trade contract in the event that it is affected by the circumstances constituting force majeure, because force majeure, as settled by most national legislations, jurisprudence and national judiciary in particular, leads to the termination of the contractual relationship by termination, and therefore in order to get away from the rigidity and stringency dictated by national laws, dealers in the field of international trade contracts tended to develop and organize their provisions under contractual stipulations as a means of revision and appropriateness of the contract, in order to avoid the rigidity and stringency dictated by national laws.

Similarly, international trade contracts are mainly characterized by their high economic value and that they establish extended contractual relationships between their parties that often reach long periods of time, as they involve operations whose preparation and implementation cost huge funds, so the first concern of the contracting parties is to seek as much as possible to maintain the contractual relationship even if circumstances change leading to the reversal of the economics of the contract, so the contracting parties seek to establish contractual stipulations that expand the provisions of force majeure in order to maintain the contract and enable it to be adapted and adapted in light of the intensity of the changing circumstances, and on this basis to preserve.

This paper will answer a fundamental question related to the role of the arbitrator and the contracting parties in the field of international trade contracts in giving a different concept of force majeure compared to the national legislative concept?.

The question will be answered by mainly addressing the following:

- **Firstly:** Applications of the expanded concept of force majeure
- **Secondly:** Suspending the execution of the contract and calling for the adaptation of the contract according to the circumstances constituting force majeure

Firstly: Applications of the expanded concept of force majeure

Force majeure and hardship are frequently invoked in international trade in the event of unforeseen when unforeseen events make performance of the contract impossible or impracticable (force majeure) or impracticable (force majeure) or substantially disturbing the economic equilibrium of the contract (unforeseeable/hardship). In the first case, the party successfully invoking force majeure will be performance of the contract, while in the second case the party suffering from the unforeseeable (hardship) will have the right to renegotiate the contract and, in certain cases, to obtain its adaptation to the new circumstances¹.

¹ - C. Brunner, Rules on Force Majeure as Illustrated in Recent Case Law, in F. Bortolotti, D. Ufot (eds), Hardship and Force Majeure in International Commercial Contracts, Files XXII of the Institute of International Business Law, ICC 2018, p 82-85.

The application of the abstract concept of force majeure² provisions by its nature leads to the adoption of the strict approach to it by considering it as a reason for the absence of liability, and this is through the tendency of the national judiciary and arbitration courts to assess the general conditions of force majeure in a strict manner³, but it has been practiced in the applications of international trade contracts that the parties have the freedom to organize their contractual relationship and thus introduce some flexibility in the general conditions of force majeure in order to preserve the contract under changing circumstances⁴.

1/ Modification of the effects of force majeure: This is through the organization of the parties and their modification of the effects resulting from the application of force majeure provisions, as it is related in all cases to choosing the appropriate form and the appropriate formula that suits the nature of the contract in order to maintain its stability⁵, and international trade jurisprudence agrees that due to the

² - An unexpected event such as a war, crime, or an earthquake which prevents someone from doing something that is written in a legal agreement: They might now activate the force majeure clauses that will allow them to demand their money back. in:

<https://dictionary.cambridge.org/fr/dictionnaire/anglais/force-majeure>

³ -Naji Abdel Momen, The principle of contractual pact, Journal of Security and Law, Year 8, Issue 1, January, Dubai Police Academy Magazine, Dubai, 2000, pp. 158-159.

⁴ -Al-Kilani Mahmoud, The Penalty for Breach in the Execution of International Technology Transfer Contracts, Doctoral Thesis in Law, Cairo University, 1988, p. 395, as well as Article 19/F4 of the contract (possibility of renegotiation...), from the contract between: CONTRAT: CEVITAL - S.P.A. (Algerie) & ASTRON Buildings- S.A.

⁵- It appears through many contractual stipulations regulating the force majeure element in practice in the field of international trade contracts, the will of the parties to regulate force majeure in a way that leads to the preservation of contractual obligations and their regulation in accordance with developments without resorting to the termination of the contract, and this appears clearly in some contracts that were the subject of research by Professor FONTAINE Marcel, as the parties seek to preserve the contract even under the influence of changing circumstances:

- " ... In all cases, the party concerned shall take all necessary steps to ensure as soon as possible the normal resumption of performance of the obligations affected by the force majeure event and to reduce as far as possible the delay suffered... ".

- " ... If a case of force majeure lasts more than two months, the two contracting parties will agree on the subsequent performance of the contract in view of the circumstances that have arisen... ".

different regulation of national laws for force majeure, especially those that are strict in their provisions (French law, for example), the parties have the burden of regulating the force majeure clause by defining its conditions and field of application and emphasizing the review and adaptation of the contract according to the circumstances as a result of implementing the force majeure clause⁶.

In this case, the arbitrator is interested in two types of data to resolve the issue of contract implementation under the influence of changing circumstances, the first of which is the external data and events that express the difficulties leading to the difficulty of implementing contractual obligations, and the second is the interest in the contractual requirements that regulate the issue of changing circumstances, especially when the parties agree to review and adapt the contract according to the new circumstances, as the arbitrator in this case depends on the will of the parties translated by contractual requirements in order to address the issue of changing circumstances and their impact on the stability of the basic elements of the contract, all this reflects the important role played by the will in regulating changing circumstances in commercial contracts.

2/ Enumerate the circumstances constituting force majeure: Through contractual stipulations, the parties can regulate the events that fall within the field of force majeure or exclude one of the conditions or mitigate the severity of some of them, and it is customary in international trade contracts for the parties to draw up a list attached to the contract indicating the events constituting force majeure, whether leading to the readjustment of contractual obligations according to the new circumstances or leading to the absence of responsibility⁷, or the opposite where

- ...If the force majeure lasts for more than four months, the buyer and seller will immediately enter into new negotiations with the aim of taking the measures that seem most appropriate to achieve the purpose of the contract... "See: See FONTAINE Marcel & DELY Filip, International contract law, analysis and drafting of clauses, 2nd ed, FEDUCI, Bruylant, Brussels, 2003, p 462-465.

⁶ - AN TOMMATTEI Paul-Henri, Contribution to the study of force majeure, doctoral thesis, Faculty of Law and Economic Sciences of Montpellier, Paris, 1992, p 250.

⁷ - MOISAN Pierre, "Contractual technique and risk management in international contracts", journal Les notebooks de droit, vol 35, n°2, Laval University, Quebec, 1994, spec, p 312-313. FONTAINE Marcel, International contract law: analysis and drafting of clauses ed BRUYLANT, FEC, Brussels, 1989, p 216-217.

the parties indicate the circumstances that explicitly fall outside the scope of the general conditions of force majeure⁸.

However, the issue arises in the opposite case, where the parties do not specify the general conditions of force majeure in the contract, nor do they specify the circumstances that fall within or outside its framework. In this case, the arbitrators are in a critical situation where they have the burden to respect the will of the parties and must search the provisions of the relevant law and the rules of justice in order to consider the issue of changing circumstances and decide to revise or annul the contract due to the severity of the circumstances constituting force majeure.

Secondly: Suspending the execution of the contract and calling for the appropriateness of the contract according to the circumstances constituting force majeure

Among the practical solutions that have emerged from the transactions of international trade contracts that are different from the general provisions of force majeure and the jurisprudence of international commercial arbitration on this issue, the parties tend to stop the implementation of contractual obligations due to the change of circumstances⁹, in order to minimize the losses that may be inflicted on the parties to the contract if they continue to implement the contract under the influence of the change of circumstances¹⁰, and the contractual requirements are the first basis on which the suspension of implementation is based, and the

⁸ - Arbitrators of international trade contracts are usually faced with the question of how to liberalize the force majeure clause through the parties' declaration of their intention to determine the circumstances that constitute force majeure exclusively, thus the question arises about the unspecified circumstances that lead to the reversal of the economics of the contract or directly affect the price component of the contract, as they are considered force majeure according to the general concept but are not mentioned in the list specified by the parties. Therefore, international trade contract jurists call for a general definition of force majeure in the contract by specifying the general conditions that must be met in the circumstance constituting it, while specifying some circumstances by way of example and not by way of limitation.

⁹ - ALMEIDA PRADO Mauricio, *Hardship in international trade law*, Ed Bruylant, Brussels, 2003, p 175.

¹⁰ - On the obligation to minimize losses in the *lex mercatoria*, see: DERAIS Yves, "The obligation to minimize damage in arbitral jurisprudence", RDAI, Paris, 1987, p 375, LE ROY Dominique, *La force majeure in international trade*, doctoral thesis, University of Paris 1, Paris, 1991, p 554.

arbitrator can invite the parties to reconsider the elements of the contract that were under the influence of the changed circumstances based on principles of justice in application of modern trends.

1/ Suspend the execution of the contract and call for its harmonization: In order to respect contractual requirements, the parties to the international contract usually face the change of circumstances constituting force majeure by agreeing to continue the implementation of contractual obligations without suspending them, or agreeing to suspend the implementation of obligations under the influence of external circumstances and renegotiate the contractual obligations in order to adapt them to the new circumstances¹¹. The suspension system is indispensable in the case of force majeure unless it is clear that the circumstances led to an absolute impossibility in implementation, as the debtor to implement any obligation in international trade contracts who is under the influence of force majeure circumstances that lead to his inability to continue implementation can suspend the implementation of an obligation¹².

The process of suspending the execution of contractual obligations is considered the most appropriate methods and methods adopted by dealers in the field of international contracts in order to maintain the continuation of the contract to face the circumstances forming force majeure, by calling for the renegotiation of

¹¹ -The jurisprudence of international trade law, especially Mr. KAHN, confirms that recourse to suspending the performance of contractual obligations in the event of force majeure is a practical solution in order to call for the review and adaptation of contractual obligations according to new circumstances, even if not stipulated by the parties to the contract by inviting the arbitrator to do so, in respect of the principles of justice and given the nature of international trade contracts, on this point, cf: KAHN Philippe, "Force majeure and long-term international contracts": JDI, n°3, Paris, 1975, p 481.

¹² - For example, with regard to the contractual stipulations that can be included by the parties to face force majeure and call for renegotiation and adaptation of the contract, especially the price element in the international contract, we cite one of the international contracts that were the subject of study by Prof. KAHN Philippe : "...If as a result of force majeure, the project manager or the builder cannot perform their services as provided for in the contract for a period of six months, the parties will meet as soon as possible to examine the contractual implications of said events in particular on the prices and deadlines for the continuation of the respective services ...", in, KAHN Philippe, "Force majeure and international contracts...", p 483.

contractual obligations, especially when it comes to the financial division element of the contract - the price of goods or the price element in the contract - which is considered the main nerve of all international contracts, this process protects the future possibility of continuing the implementation of contractual obligations once the circumstances forming force majeure are removed, and helps to avoid the automatic termination of the contract that is a consequence of the implementation of a force majeure event.

Perhaps what helped to adopt this solution was the tendency of the rules governing international trade contracts to enshrine the system of suspending the execution of contractual obligations in the event of force majeure, and this appears by analyzing the provisions of Article 79 of the Vienna Convention and Article 74 / P2 of the Hague Convention on the International Sale of Goods, that after the end of the circumstance constituting force majeure, the contract returns to effect, so during the period of suspension, the parties can reconsider the elements of the contract and adapt it according to the new circumstances, and the model clause on force majeure prepared by the International Chamber of Commerce, especially Article 7, implies that during the period of suspension of the contract's execution.

2/ The role of arbitration in applying the principle of justice to suspend the contract in order to harmonize the contract: The reality of international trade contracts has created practical solutions to face the circumstances constituting force majeure and its impact on the stability of contractual obligations, especially in the absence of a clause in the contract to suspend it in order to review and adapt the contractual obligations in accordance with the new circumstances, in this case the arbitrators in the field of international contracts seek to preserve the contract and not to approve its dissolution and emphasize this based on the principle of justice, since continuing to implement the contractual obligations in accordance with the conditions that were agreed upon when the contract was concluded is contrary to the principle of justice due to the impact of contractual obligations on the circumstances constituting force majeure, so can not the

Talking about the possibility of the arbitrator stopping the implementation of the contract and inviting the parties to review the contract is considered one of the practical solutions imposed by practices in the field of international trade contracts,

especially if the parties to the contract stipulate this in order to preserve the continuation of the international contract¹³, but regarding the suitability of the arbitrator himself to the contract and in the absence of a stipulation by the parties raises controversy among jurists, one side of the jurisprudence, especially the jurist BREDIN completely rejects the intervention of the arbitrator based on the principle of justice to review the contract according to new circumstances based on the binding force of the contract¹⁴.

The other side of the international trade jurisprudence, led by the jurist **LOQUIN Eric**, believes that the arbitrator can adapt the contractual obligations, whether when applying the rules of law governing the contract or the terms of the contract, and that his authority extends to revising the contract by restoring the contractual balance as directed by the will of the parties¹⁵, and some doctrinal opinions confirm that the role of the arbitrator when applying the principle of justice when the parties agree to resort to arbitration is an implicit license for them to adapt the contract in the event of a fundamental change in contractual obligations under the effect of force majeure¹⁶.

Conclusion:

The conclusion that can be reached and that is applied in international commercial arbitration in this case is to adhere to the terms of the contract, and therefore, whether the arbitrator is an arbitrator by law or by justice, he cannot modify the terms of the contract in the event of changing circumstances or suitability unless there is a contractual clause granting him this authority.

Thus, what must be concluded, noted and emphasized is that the termination of an international contract by rescission is not, contrary to what is followed in

¹³ - LOQUIN Eric, "The amiable composition, Jur. -Class. Proc. civ, Fasc. 1038.

¹⁴ - BREDIN J-D, "the amicable composition and the contract", Rev-arb, 1984, p 266-267. FOUCHARD PH & GUILLARD E & GOLDMAN B Treatise on international commercial arbitration, Litec, Paris, 1996. p 29

¹⁵ - LOQUIN Eric, "The amiable composition, Jur. -Class. Proc. civ, Fasc. 1038.

¹⁶ - Nermine Mohamed Mahmoud Sobh, The principle of pacta sunt servanda and its limitations in international trade law, Ph.D. thesis in law, Faculty of Law, Ain Shams University, 2003, p. 559.

national laws, an automatic effect of force majeure. The most important consequence of this situation related to the impact of changing circumstances on the stability of contractual obligations, including the basic element in international contracts, namely the financial clause of the contract, is the obligation of the parties to deal well with the new conditions through the parties' obligation to consult and renegotiate in order to save the contract, which is not much different from the obligation to renegotiate and regionalize the contract that is provided by the emergency clause, which is one of practical solutions that are considered to be one of the practical solutions to be taken by the arbitrator¹⁷.

The role of the arbitrator in preserving the contract under the impact of changing circumstances to the degree of force majeure appears in his intervention to save the international transaction by inviting the parties to renegotiate the contract in accordance with the new circumstances, especially if he is granted the status of an arbitrator authorized to reconcile, which was reached by the latest arbitration jurisprudence of the ICC Arbitral Tribunal.

Bibliography List setting:

-First: legal texts

- * United Nations Convention on Contracts for the International Sale of Goods, 1980.
- * The Hague Conventions of July 1, 1964 establishing a uniform law on the international sale of personal property.

-Second: books

- * ALMEIDA PRADO Mauricio, Hardship in international trade law, Ed Bruylant, Brussels, 2003.
- * FONTAINE Marcel & DELY Filip, International contract law, analysis and drafting of clauses, 2nd ed, FEDUCI, Bruylant, Brussels, 2003.
- * FONTAINE Marcel, International contract law: analysis and drafting of clauses ed BRUYLANT, FEC, Brussels, 1989.

¹⁷ -Cheedly Lotfi, "The hardship clause: a difficult balance between the fair and the useful", RDAI, n°1, Paris, 2010, p 89.

* FOUCHARD PH & GUILLARD E & GOLDMAN B Treatise on international commercial arbitration, Litec, Paris, 1996

* Naji Abdel Momen, The principle of contractual pact, Journal of Security and Law, Year 8, Issue 1, January, Dubai Police Academy Magazine, Dubai, 2000.

-Third: memory

* Al-Kilani Mahmoud, The Penalty for Breach in the Execution of International Technology Transfer Contracts, Doctoral Thesis in Law, Cairo University, 1988.

* ANATOMMATTEI Paul-Henri, Contribution to the study of force majeure, doctoral thesis, Faculty of Law and Economic Sciences of Montpellier, Paris, 1992.

* LE ROY Dominique, La force majeure in international trade, doctoral thesis, University of Paris 1, Paris, 1991.

* Nermine Mohamed Mahmoud Sobh, The principle of pacta sunt servanda and its limitations in international trade law, Ph.D. thesis in law, Faculty of Law, Ain Shams University, 2003.

-Fourth: Articles

* BREDIN J-D, "the amicable composition and the contract", arbitration review, 1984, p 266-267.

* Cheedly Lotfi, "The hardship clause: a difficult balance between the fair and the useful", international business law review, n°1, Paris, 2010, p 89- 92.

* DERAIS Yves, "The obligation to minimize damage in arbitral jurisprudence", international business law review, Paris, 1987, p 375-378.

* F. Bortolotti, D. Ufot (eds), Hardship and Force Majeure in International Commercial Contracts, Files XXII of the Institute of International Business Law, ICC 2018, p 82-85.

* KAHN Philippe, "Force majeure and long-term international contracts": international law journal, n°3, Paris, 1975, p 481-486.

* LOQUIN Eric, "The amiable composition, Jur. -Class. Proc. civ, Fasc. 1038.

* MOISAN Pierre, "Contractual technique and risk management in international contracts", journal Law notebooks, vol 35, n°2, Laval University, Quebec, 1994, spec, p 312-313

-Fifth: Websites:

* <https://dictionary.cambridge.org/fr/dictionnaire/anglais/force-majeure>