



INVESTIGATING THE SCOPE OF FORCE MAJEURE IN INTERNATIONAL LAWS

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ABSTRACT

Force majeure is a French term speaking of an irresistible and extraordinary force and it is applied to refer to the unfulfillment of a contract due to incidents that are out of the parties' control and cannot be avoided even with exercising of due care. Force majeure has been expanded to the extent that, besides encompassing the domestic laws, it enters the international laws, as well. Based thereon, the actualization of force majeure, in both domestic and international laws, has been pendent over the existence of three conditions: the exogenous nature of the incident, the unpredictability of the incident and the inevitability of the incident. One most important outcomes of the force majeure is liability exemption. Another effect of the force majeure is the cessation of obligation fulfillment and if the force majeure renders the obligation fulfillment permanently impossible it will lead to the obligation abortion otherwise the obligation might be suspended. Force majeure is considered as a factor giving rise to the dismissal of an international liability. Considering the scarcity of the organized compiled materials regarding force majeure, the present study aims at collecting more topics on force majeure so that it can be developed more and the other researchers can make a more ready use thereof. The importance of force majeure lies in the idea that the entry of force majeure into the various legal systems necessitates a comparative research so that the consensus and discrepancies can be more vividly clarified and create at least a provision featuring the most commonalities.

Keywords: Force Majeure, the Scope of Force Majeure, International Laws, Superior Force, Contract.

INTRODUCTION

Force majeure is a French term that has been translated in Persian to “Qovey-e Qahere”. The term “force majeure¹” is comprised of two words “force”, meaning power and coercion, and “majeure”, meaning superior or serious, and the expression speaks of a superior and serious force that is irresistible or an incident that cannot be repelled by an individual hence s/he will not be held responsible (Nikbakht, 1997).

Black's law dictionary defines force majeure as “an incident that is not predictable and controllable”. The term includes natural phenomena like flood and storm as well as man-provoked interventions like rebels, strike and war (Garner, 1999).

Citing a legal expression dictionary named Lexique de Termes Juridiques, an author writes: “force majeure has been defined in civil laws as “generally, any unpredictable and inevitable incident barring an obliged from fulfilling his obligations. Force majeure provides for exoneration. Specifically, force majeure is an unexpected event that is exogenous meaning that it is totally unrelated to the obliged (natural force, government's actions, actions of a third party”².

¹ From now on, force majeure and superior force are used to refer to the same meaning and interchangeably.

² Safa'ei, Hassan, “force majeure or superior power”, p.113

Force majeure has been interpreted in two regards in France's laws: one is general and the other is specific. Force majeure, in its general meaning, includes any event that prevents an obligation from being fulfilled in such a manner that it should have been out of the obligor's control, unpredictable and inevitable. The actions by a third person or an obligee featuring the aforesaid characteristics are considered as stemmed from force majeure. But, force majeure, in its specific meaning, includes events that are unpredictable and inevitable and cannot be attributed to a certain person and solely originate from natural forces (Salimi, 2005).

Of course, it has to be noted that the two abovementioned definitions are identical in their general meanings but they are different in their specific meanings; however, force majeure is generally used in its specific meanings as mentioned above. In general, force majeure is an incident not attributable to an obliged according to the aforementioned characteristics³.

Based thereon, the general meaning of force majeure has been taken into account in the domestic laws of a great many of the countries (Esmā'eili, 2002). For example, paragraph 2 of article 131 of Lebanese penal law "knows fire and explosion as specimens of force majeure" (Salimi, 2005). Article 1793 of Ethiopia's civil procedure knows "the actions of a third party preventing the fulfillment of a given obligation as well as the prevention of obligation fulfillment by law, natural disasters, war and turmoil, death and important accidents like harsh diseases as examples of force majeure" (Ja'afary Langerudi, 2005). The same ideas have also been accepted in Iran's laws (Esmā'eili, 2002).

Some jurists have also made efforts to offer a definition of force majeure. For instance, Russo, a well-known general international law professor, has the following statement in this regard in his book "general international laws": "force majeure is an unavoidable hindrance stemming from external events that prevent the fulfillment of an obligation and/or observation of an axiom of the international laws. All of the domestic legal systems have accepted the dismissal of personal liability of a person who has found the enforcement of contractual obligations impossible in absolute terms due to a force majeure of a type. In international laws, force majeure is followed by the government's exemption of liabilities usually incurred by the unfulfillment of a pact or treaty"⁴.

Topic One: the scope of force majeure

After getting familiar with force majeure, it will be firstly investigated in the domestic laws and then in the international laws considering the idea that the legal excuses are vast in their scope and they can be traced into entire divisions and branches of law.

Chapter One: Domestic Laws

According to what was mentioned, force majeure, as envisioned in France's law, is an accident in case of occurrence and actualization of which the party obliged to perform certain action as caused by a contract or a quasi-contract is exempted from doing so in such a manner that it is stated in article 1148 of France's civil procedure that "there is no room for compensation of losses when an obliged person is inhibited from submitting what s/he has been obliged or when s/he performs things that s/he is prohibited due to force majeure or an unexpected accident" (Nikbakht, 1997)⁵.

³ Safa'ei, Hassan, Ibid, p.113

⁴ Safa'ei, Hassan, Ibid, p.115

⁵ The text offered in the current dissertation of article 1148 of France's civil law is a translation of the English text and it has been retrieved from the following source: Nikbakht, Hamid Reza, Ibid, footnote no.46, p. 114)



“The conditions that the article enumerates for force majeure and abrupt incidents are: firstly, the accident should be outside the obliged person’s will; in other words, its root and source should not be attributable to the obliged person’s volition. The second is that the accident should be unpredictable in which case the rationality of the anticipation should be taken into consideration, i.e. the prediction should have been made based on evidences and proofs. Finally, the obliged should have been inhibited from fulfilling the obligation meaning that s/he should have found the fulfilling of the obligation improbable both in practical and legal terms in such a way that acting in line with accomplishing the assigned task is deemed invalid and devoid of effect” (Tavassoli Jahromi, 2006).

It is also stated in article 1147 of this country’s civil law that “in case it is deemed expedient, the obliged is sentenced to the compensation of loss when s/he fails due to the non-performance or delay in performance prove that the unfulfillment has been for an external force not attributable to him or her even if s/he is found not malicious” (Nikbakht, 1997).

The term superior force or force majeure has not been objectively used in Iran’s laws but its concept can be readily inferred from some articles of the civil law. Articles 227 and 229 of Iran’s civil law are amongst the most important of these articles. Article 227 states that “violator of the obligation is sentenced to loss compensation when s/he fails proving that the non-performance has been due to an external cause unrelated to him or her”.

Force majeure can be inferred in this article from the non-performance being characterized by an exogenous nature. Based thereon, the individual proving that the obligation fulfillment has been rendered impossible due to an external cause not attributable to him will be exempted from liabilities hence not sentenced to compensation of the losses otherwise he will be convicted (Adel, 2001). It is stipulated in article 229 that “any obligor becoming incapable of fulfilling his or her obligations for a cause the repelling of which is found out of his or her scope of power will not be sentenced to the compensation of losses”. In this article, an accident the repelling of which is out of the obliged person’s power and choice manifests the concept of force majeure (Adel, 2001).

As a general principle, corresponding to article 275 of Germany’s civil law, “the obligor will be exonerated from the liabilities if s/he fails fulfilling his or her obligations for reasons other than his default and guilt and/or negligence of his employees”⁶.

It is stated in article 705 of Portugal’s civil law that “a person not fulfilling his or her obligations is liable to the compensation of the incurred losses unless the non-performance stems from the prevention by the opposite contract party or the result of a force majeure of a type in the coming about of which the obligor has had no involvement” (Rezapour, 2008).

In England’s law, force majeure is viewed as a borrowed term. The closes concept in England’s law to force majeure is the expression “frustration (barrenness) of the contract fulfillment and impossibility of fulfillment”. However, these two provisions are theoretically different from



⁶ Joern Rimke, “Force majeure and hardship: Application in international trade practice with specific regard to the CISG and the UNIDROIT Principles of International Commercial Contrasts”, *Pace International Law Review*, Pace University, 1999-2000, p. 207.

(As a general rule, section 275 of the Bürgerliches Gesetzbuch [German Civil Code] discharges the debtor of his obligation if, after the conclusion of the contract, its performance was rendered impossible for reasons other than negligence, his own fault, or the negligence of his employees.) the text was available at: [http://www.cisg.law.pace.edu/cisg/biblio/rimle.html\(1388/11/28\)](http://www.cisg.law.pace.edu/cisg/biblio/rimle.html(1388/11/28))

force majeure and vaster in their domain⁷. In common law countries, conclusions have been reached using these theories that are more or less similar to results obtained from force majeure (Safa'ei, 2005).

Based on contract abortion doctrine, if a contract is rendered unenforceable due to unpredictable and natural factors out of the obligor's volition, it will be spontaneously revoked and the legal relationship between the parties ends in the same point (Safa'ei, 2005; Atiyah, 1975).

In the laws of this country (England), besides being followed by the result of contract enforcement impossibility, force majeure also includes results like prevention of enforcement as well as preservation of a certain obligation via hindering another, to wit the obligor being placed in a situation that s/he will have to breach other obligations s/he has in respect to other parties if s/he wishes to perform a given obligation" (Adel, 2001).

Therefore, it is observed that force majeure accounts for an article or several articles in the domestic laws of the countries and it seems that it has been considered as a factor contributing to the dismissal of liabilities by many countries.

Chapter Two: International Laws

Force majeure is very wide in its scope and its traces can be found in every divisions and branches of law. Besides having entered domestic laws, force majeure has found its way to the international laws in such a manner that it has influenced both the international private laws and the international general laws.

The existence of force majeure can be vividly observed in the international private laws in such a way that paragraph(s) are currently being devoted to force majeure in important commercial contracts, especially international ones, between the citizens of various countries. Although there are differences in terms of definition and/or examples of force majeure, it has proved its powerful presence and it is not practically ignored even if it is left unsaid. The intention is enabling the arbitral tribunals or the courts to determine its conditions and effects in adherence to the "laws governing the contract (Almasi, 2005)" in case of the condition not being specified in the contract (Esmā'eili, 2002).

Based thereupon, International Chamber of Commerce (Lovilanzhe, 2008)⁸ (ICC) in its issuance no.421 deals with force majeure condition in such a manner that it has implicitly described force majeure in paragraph 1 and, then, speaks of the examples of force majeure in paragraph 2. The aforementioned chamber states in the first paragraph of force majeure condition that "a party to a contract is exonerated from the liabilities stemming from obligation unfulfillment in case of proving one of the followings:

- The non-performance be stemming from an accident or impediment out of his or her volition and control.
- The party to a contract cannot be reasonably (normatively) expected to have anticipated upon contract conclusion the aforementioned impediment or accident and the effect it would have on his or her ability of contract implementation.

⁷ To compare force majeure with contract abortion, please refer to the same dissertation, pp.81-87

⁸ ICC is considered as a consultative authority based on UN's charter. Nowadays, the foresaid chambers, amongst the other arbitration institutions, are envisioned as institutions to which cases of countries' contract with foreign companies are referred.



- The party to a contract is found incapable of having avoided or overcome the impediment and accident or at least its effects⁹.

Moreover, the principles of international commercial contracts (Akhlaghi and Emam, no.29)¹⁰ of the international institute for the unification of the private law (Shafa'ei, 1997)¹¹ (UNIDROIT) introduce force majeure as an excuse for the obligation unfulfillment in such a manner that article 7-1-7 of these principles stipulate that “obligation unfulfillment by a party to a contract is excused in case that s/he proves that obligation unfulfillment has been due to the existence of an impediment beyond his or her control and that s/he could have not been expected to have taken the foresaid impediment into account or avoided its outcomes or overcome the impediment or its outcomes” (Akhlaghi and Emam, no.29).

Force majeure has also been considered in the document of the principles of European contract law (Hojjati, 2005)¹² (PECL)¹³.

It is stipulated in the foresaid document in article 8: 108 on liability exemption as caused by the existence of an impediment that:

- 1) If a party unfulfilling an obligation proves that s/he has not been able to do so due to the existence of an impediment out of his or her control and unpredictable, inevitable or irresistible in reasonable terms at the time of contract conclusion, s/he will be exempted from the liabilities.
- 2) In case that the impediment is found temporary, liability dismissal mentioned in the article will also be authentic as long as the impediment exists. However, in case that delay causes essential unfulfillment, the other party can act the same way.
- 3) The party incapable of fulfilling his or her obligation should prove that s/he has sent a warning of the existence of an impediment and its effect on his or her ability of fulfilling the obligation to the other party within a reasonable period after getting



⁹ Mohebbi, Mohsen (translator), “force majeure condition”, issuance no.421 of the international chamber of commerce, p.15

¹⁰ The principles of international commercial contracts of international institute for the unification of the private law were released in 1994. They are seen as one of the most successful international documents in the field of international trade. The general set of rules for the international commercial contracts were posited in these principles.

¹¹ The international institute for the unification of private law was established in 1926 by Great Britain’s government and its objective is coordination and unification of the regulations pertaining to the private law of the various countries parallel to the gradual development of a coordinated system of international private law

¹² Due to the insufficiency of the European commercial rules, the European courts were obliged to use the American commercial laws and there were a lot of discrepancies between the members of EU regarding the use of the American business regulations and the Europeans were forced in the majority of cases to interpret and coordinate the American business regulations with their commercial problems due to the differences in the application domain of those regulations. Based thereon, the Europeans, seeking for an integrated legal system approved by all the members, published the European contracts’ regulations on 11th of January, 2001, in European commission. Please refer to Ole Lando, “Salient Features of The Principles of European Contract Law: A Comparison with UCC”, Pace International Law Review, Pace University, 2001, pp. 340-342.

The text was available at: [http://www.cisg.law.pace.edu/cisg/biblio/lando.html\(1388/11/28\)](http://www.cisg.law.pace.edu/cisg/biblio/lando.html(1388/11/28))

It is worth mentioning that the translation of this part has been presented herein according to the following source and through the revision and correction of the author: Hojjati, Ali, “the effect of force majeure in international commercial contracts”, pp.104-111

¹³ Ole Lando, op. cit. p. 366

aware of the situation. The opposite party deserves receiving compensation for any losses originating from the lack of receiving the warning note ...¹⁴

Besides in the international private law, force majeure has also been put forth in the general international laws in regard of the governments' relations, especially concerning the governments' international liabilities.

"The international law authors have generally recounted force majeure and its examples as terminators of the governments' contractual obligations and, thus, it might be possible to say that the effect of the force majeure has been turned into a norm and a practical procedure in the international general law area.

Article 61 of Vienna's 1969 treaty on the obligations' laws should be called crystallization and emergence of the norm in the international documents" (Esma'eili, 2002).

Substantiation on force majeure in the international general law, besides being utilized by the government for these contracts, is practical in all respects, including compensation liabilities. For instance, the numerous verdicts and decisions by Iran-US arbitral tribunal can be pointed out in this regard all of which emphasize on the idea that "... the internal clashes during the course of the Islamic Revolution had caused force majeure conditions at least in the larger cities ... therefore, the losses created as a result of the operationalization of these forces cannot be attributed to the government to hold it accountable. This way, as it holds between real persons, one party cannot file a lawsuit against another for the compensation of losses resulting from delay in or cessation of work progress when force majeure conditions rule" (Esma'eili, 2002)¹⁵.

Also, the international law commission has realized force majeure in such a manner that it is stated in a definition of force majeure in the annuals of the commission that "force majeure is an unpredicted or anticipated external accident that is inevitable or irresistible rendering impossible the obligation fulfillment by an obligor. Furthermore, force majeure has been recognized as an accident that cannot be attributed to the fault of any obligor or as being out of the obligor's volition and it has to have happened in an uncontrollable state for which reason nobody could be required to have fulfilled an impossible thing"¹⁶.

It is stated in another definition that "force majeure is an unpredictable accident out of the parties' control and independent of their wills and inevitably destroying the parties' common intention"¹⁷.

¹⁴ Article 8:108: Excuse Due to an Impediment

2. A party's non-performance is excused if it proves that it is due to an impediment beyond its control ...; 2. Where the impediment is only temporary the excuse provided ...; 3. The non-performing party must ensure that notice of the impediment ... the text was available at: [http://www.cisg.law.pace.edu/cisg/text/textef.html\(1388/11/28\)](http://www.cisg.law.pace.edu/cisg/text/textef.html(1388/11/28)

¹⁵ cited in "the collection of the verdicts and decisions of Iran-US arbitral tribunal, p.244 (verdict no. 24-49-2)

¹⁶ UN, YILC, 1978, Vol. II (part one), pp. 188-222, document A/CN.4/315. (... an occurrence which is not attributable to any "fault" ... takes place independently of the obligor's will... in a manner uncontrollable ... No one is expected to perform the impossible.)

¹⁷ ILC Reports, 2006, p. 270, para. 5. (Force majeure is an unforeseeable occurrence beyond the control and independent of the will of the parties, which unavoidably frustrates their common intent) the text is available at: <http://untreaty.un.org/ilc/reports/2006/english/chp7.pdf> (1388/12/05)



CONCLUSION:

- 1) International liability is an obligation requiring the party violating the international law regulations to compensate the losses imposed.
- 2) Doing a harmful actions or leaving a duty undone that can be attributed to the government as well as the breach of the international obligations causes the creation of liabilities for the violating party; but, factors like force majeure and so on provide for the dismissal of international liabilities of the violating party.
- 3) Force majeure is an external, unpredictable and unavoidable accident that renders obligation fulfilment impossible for the obligor and causes his or her exemption from liabilities. Based thereon, the government incapable of fulfilling its obligation due to the emergence of force majeure will not be liable for the intended action or behavior.
- 4) Actions against the international obligations by an international organization will be stripped of the transgressive aspect if done as a result of a force majeure of a type beyond the organization's control and rendering impossible its behavior in compliance with the obligation; whenever, the impossibility is per se found caused by the violation of the treaty obligations or any other international obligation in respect to the other treaty parties by an opposite party, the impossibility of adherence to the treaty cannot become the basis of treaty revocation or exclusion.
- 5) According to the evolutionary trend of law, the scope of force majeure has been extended and it, besides the domestic laws, has entered the international laws in such a manner that both international private laws and international general laws have been influenced thereby.



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