



INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW
INSTITUT INTERNATIONAL POUR L'UNIFICATION DU DROIT PRIVE

Principles of International Commercial Contracts
Working Group on Long-Term Contracts

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Supervening events (*)

(Draft prepared by Professor Neil Cohen)

(*) Cf. Study L – Doc. 127, Issue (e).

ARTICLE 7.1.7
(Force majeure)

(1) Non-performance by a party is excused if that party proves that the non-performance was due to an impediment beyond its control and that it 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.

(2) When the impediment is only temporary, the excuse shall have effect for such period as is reasonable having regard to the effect of the impediment on the performance of the contract.

(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 non-receipt.

(4) Nothing in this Article prevents a party from exercising a right to terminate the contract or to withhold performance or request interest on money due.

COMMENT

1. The notion of force majeure

[...]

2. Effects of force majeure on the rights and duties of the parties

[...]

3. Force majeure and hardship

This Article must be read together with Chapter 6, Section 2 of the Principles dealing with hardship (see Comment 6 on Article 6.2.2).

4. Force majeure and contract practice

[...]

5. Long-term contracts

Force majeure, like hardship, is typically relevant in long-term contracts (see Comment 5 on Article 6.2.2), and the same facts may present both hardship and force majeure (see Comment 6 on Article 6.2.2). In the case of hardship, the Principles encourage negotiation between the parties to the end of continuing the relationship rather than dissolving it (see Article 6.2.3).

Similarly, in the case of force majeure, parties to long-term contracts can anticipate that, in light of the duration and nature of the relationship and, possibly, large initial investments whose value would be realised only over time, they would have an interest in continuing rather than terminating their business relationship. Accordingly, the parties may wish to provide in their contract for the continuation, whenever feasible, of the business relationship even in the case of force majeure, and envisage termination only as a last resort. Such provisions can take a number of forms.

Illustration

3. A long-term contract contains a provision to the effect that, except where it is clear from the outset that an impediment to a party's performance is of a permanent nature, the obligations of the party affected by the impediment are temporarily suspended for the length of the impediment, but for no more than 30 days, and any right of either party to terminate the contract is similarly suspended. The provision also states that, at the end of that time period, if the impediment continues the parties will negotiate with a view to agreeing to prolong the suspension on terms that are mutually agreed. It also states that, if such agreement cannot be reached, disputed matters will be referred to a dispute board pursuant to the *ICC Dispute Board Rules*. The parties are bound by that procedure.