SCLA GLOBAL FORUM REPORT- FORCE MAJEURE

Lead Reporter:Dr.Hermann Knott(drafter by Martin Winkler)

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INTRODUCTION OF SCLA

TIANZE ZHANG
COMMITTEE MEMBER AT SWISS CHINESE LAW ASSOCIATION

Its vision is to be a forum and supporter of furthering the mutual understanding and exchange between European and Asian countries. The two countries referred to in its name are a reference to the respective regions, thus not excluding, but inviting for lawyers, law firms, business enter-prises and other organizations to join as members.

At the start of this Global Online Forum Mr. Tianze Zhang welcomed the speakers and partici-pants and gave a presentation of the Swiss Chinese Law Association (SCLA).

In line with its vision the SCLA promotes exchange between its members and with International organizations. SCLA is applying for an observer status with UNCTAD. It is organizing online fora and – when possible again – in-person conferences to allow the direct exchange of views, estab-lishing personal contacts and share knowledge.

The SCLA also promotes the exchange in legal matters between China, Switzerland and Europe-an Countries. It coordinates the publication of the Swiss Chinese Law Review which in its first edition contains articles reflecting the most relevant current legal issues relating to the impact of the COVID 19-pandemic. To put it in a nutshell: SCLA membership provides excellent networking and business opportunities plus the chance to widen substantive knowledge and design new le-gal product as a result of the exchange with.

Mr. Zhang announced the launch of a global survey on Digital Arbitration for July 2020.

FORCE MAJEURE AND FRUSTRATION OF CONTRACTS - A COMMON LAW APPROACH

HUSSEIN HAERI (UNITED KINGDOM)
PARTNER AT WITHERS LLP

Mr. Haeri explained that generally speaking, Force Majeure / frustration of contract are essential-ly concepts that allocate risk of an unforeseeable event which affects contractual performance. Under English law, Force Majeure refers to provisions in the contract providing for the suspen-sion of obli-gations/termination of the contract upon the occurrence of certain events, and frustra-tion of contract is a doctrine applicable under case law where there is no provision in the contract. Notably, the term "Force Majeure" is not a creature of statutes or judge-made law. "Force Majeure" is rather a term used to refer to contractual provisions for unforeseen events. By con-trast, the term "frustra-tion" is used to refer to the doctrine under common law which governs parties' contractual relation-ship upon the occurrence of an unforeseen event, in the absence of any contractual stipulation.

1. High standard to be met under the doctrine of frustration of contract

The doctrine of frustration of contract is a very restrictive doctrine and requires that performance under the contract in light of the unforeseen event is physically or commercially impossible. Ac-cordingly, "… frustration occurs whenever the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract." This test involves a highly fact specific inquiry: In the Li Ching Wing vs Xuan Yi Xiong case the Hong Kong District Court rejected a tenant's claim that a ten-ancy agreement was frustrated because the premises were affected by an isolation order by the Department of Health due to the outbreak of the SARS virus, which meant that it could not be used for 10 days compared to a total lease period of 2 years. The Court held that the 10-day pe-riod was insignificant in view of the two-year fixed term of the lease, and that whilst SARS was arguably an unforeseeable supervening event, it did not "significantly change the nature of the outstanding contractual rights or obligations from what the parties could reasonably have con-templated at the time of the execution of the Tenancy Agreement."

Furthermore, the doctrine of frustration of contract will only apply to unforeseeable events. The risk of a pandemic may arguably not be considered as unforeseeable because there have been previous experiences with pandemics, e.g. the SARS pandemic, and warnings by experts.

COMMENT FROM THE REPORTER

The issue of whether the Coronavirus pandemic was foreseeable is a hotly debated issue. On the one hand, yes, there had been warnings about new pandemics as a possible risk to business disruptions. On the other hand, there was not a sufficiently concrete warning to the business side about the risks of the pandemic until sometime in early 2020.

From the perspective of the business people affected by the pandemic I would not hesitate to conclude that the catastrophic effects of the Coronavirus were not foreseeable. For a risk to be foreseeable it is not sufficient that there are general warnings about its possible occurrence at an undefined point in time in the future. These vague pronouncements are not a basis for business enterprises to engage in concrete measures to minimize risks.

Therefore, despite general warnings expressed earlier, I would consider the Coronavirus as un-foreseeable in a legal sense. Nobody was able to prepare for this outbreak and its consequences.

2. No self-induced frustration

Another limitation to the doctrine of frustration of contract is that the frustrating event cannot be due to the act or election of the party seeking to rely on it. The underlying rationale of this limita-tion is that a Party to a contract shall not be allowed to excuse itself from performance.

3. Legal consequences of Frustration

A successful frustration of contract claim brings the contract to an end forthwith, without more and automatically. As regards the remedies section 1(2) Law Reform (Frustrated Contracts) Act 1943 provides that “All sums paid or payable to any party in pursuance of the contract before the time when the parties were so discharged (in this Act referred to as ‘the time of discharge’) shall, in the case of sums so paid, be recoverable from him as money received by him for the use of the party by whom the sums were paid, and, in the case of sums so payable, cease to be paya-ble”.

4. Drafting Force Majeure clauses

Mr. Haeri explained the importance of carefully drafting Force Majeure clauses because other-wise, a party's only recourse in the face of an unforeseen event is the above-explained high standard under the doctrine of frustration of contract. One drafting consideration is that the spe-cific examples listed should be expressed to be non-exhaustive and not limit the scope of the Force Majeure clause. When considering which specific examples should be listed one should also take into account the specific requirements of the particular business concerned, e.g. as a distributor one may want to provide for protection against non-performance by suppliers.

Another drafting consideration relates to the legal consequences of a Force Majeure event: the options are renegotiation, suspension of performance, termination or a mixed approach, i.e. dif-ferent legal consequences depending on the severity of the Force Majeure event. In case of a right of termination a further drafting consideration concerns the restitution of benefits derived by either contracting Party before the termination of the contract.

ICC FORCE MAJEURE CLAUSE 2020

ANGELIKA ZODER (AUSTRIA)
HEAD OF LEGAL AFFAIRS AT ICC AUSTRIA

1.ICC Force Majeure clause 2020

Then, Ms. Zoder presented the ICC Force Majeure clause 2020. This model clause was prepared by the ICC Commission for Commercial Law and Practice involving experienced lawyers from common and civil law countries may be incorporated into a contract by way of reference to its Long Form version or by directly inserting the Short Form alternative into the contract.

The elements of Force Majeure are:
• Impediment beyond the reasonable control of the affected Party; and
• Not foreseeable at the time of the conclusion of the contract, and
• The effects of the impediment cannot be avoided or overcome by the affected Party.

The ICC Force Majeure Clause 2020 sets out presumed Force Majeure events, which may also be amended by the Parties. In the presence of one of the listed events it is presumed that the first two elements of Force Majeure as set out above are fulfilled; the affected Party only has to prove the existence of the third element of Force Majeure as listed above.

As far as formal requirements are concerned, the ICC Force Majeure clause 2020 provides that without undue delay the affected Party shall give notice of the event to the other Party. This no-tice requirement is the condition for relief of the affected Party. This relief consists in the sus-pension of performance and release from liability. However, the affected Party has a duty to miti-gate the effects of the Force Majeure event.

Either contracting Party has a right to terminate the contract if the effects of the Force Majeure event deprive substantially either or both parties of what they were expecting under the contract. This is presumed to be the case when the duration of the impediment exceeds 120 days, another relief for the burden of proof of the affected party.

During the discussion, a participant asked Ms. Zoder whether the notice-requirement must also be met where the Force Majeure event is of universal knowledge and universal impact. Ms. Zoder answered that the notice requirement applied since businesses may be affected in different ways in different countries.

COMMENT FROM THE REPORTER

This is a very good question and impliedly may have been intended to address the situation ex-isting in the context of the Coronavirus pandemic. An answer in the affirmative would mean that when the pandemic erupted and caused contractual parties to invoke Force Majeure, no notice were necessary. In such case, the party entitled to receive the relevant performance would not have to notify the other party of its inability to perform. Although the notice requirement is often considered as a mere formality with regard to what everyone should know, it in fact is an im-portant tool to create security for the other party of the contract.

Another very relevant question is whether Force Majeure may be invoked in a context where the contract was concluded after the pandemic began, let us say in May, and the alleged Force Majeure event occurred in June or July as a result of a second or third wave of rising cases. It could be argued that the parties were aware of the risk and could have taken measures (e.g. selecting alternative suppliers) to avoid the risk.

FORCE MAJEURE & DISPUTE RESOLUTION

CLARISSE VON WUNSCHHEIM (SWITZERLAND)
PARTNER AT ALTENBURGER

Then, Ms. von Wunschheim gave her presentation on 'Dispute Resolution in relation to Force Majeure' disputes by using a case study involving a global supply chain with different contracts which are governed by different laws. This global supply chain has been disrupted due to the Covid- 19-pandemic. She first pointed out that a universal solution for the ensuing disputes proves difficult for the following reasons: First, the contracts underlying this global supply chain are governed by different laws and are subject to different dispute resolution fora. Second, the different dispute resolution fora might have different legal approaches to the Covid-19-pandemic (Civil law vs. Common law and also different approaches within the Civil law system). Third, there are psychological barriers such as hindsight bias. The fourth reason is time sensitivity i.e. the need for a quick and business friendly dispute resolution.

She then discussed the pros and cons of different dispute resolution methods (State Courts, Arbi-tration, Early Neutral Evaluation, Expertise and Mediation) and came to the conclusion that the most adapted option is Mediation for the following reasons: Mediation is speedy, low-cost, neutral, cross-cultural, industry-specific, flexible and - if so agreed - binding.

She then went on to explain how a clause for Med-Arb - which she considers the best-suited dis-pute resolution method - should be structured: in relation to the Mediation-proceedings two Medi-ators shall be appointed, one of each nationality of the parties in order to ensure that both are aware of the impact of their decision in their country. The mediation clause should also make reference to the rules of an International or Regional Mediation Institution in order to ensure neu-trality. In relation to the Arbitration-proceedings three Arbitrators shall be appointed one for each country affected for the same reason as in Mediation, and a Third Arbitrator who shall act as moderator in order to reach consensus among the members of the Tribunal. The Parties shall also provide for the Arbitral Tribunal to be able to decide ex aequo et bono or based on transna-tional law (e.g. Principles of European Contract Law, lex maercatoria etc.). The reason for this is that, as explained above, the contracts underlying this global supply chain are governed by dif-ferent laws and

the overlapping of the legal concepts makes it difficult to have one single legal solution. By contrast, a decision ex aequo et bono or based on transnational law might come closer to a fair decision taking into account the situation under all contracts affected.

COMMENT FROM THE REPORTER

Experience from the 'hot' period of the pandemic (mid-March to mid-June) confirm that the par-ties have sought for rapid and pragmatic resolutions of disputes on a commercial basis. Urgent commercial issues needed to be resolved and therefore a tendency could be observed according to which the parties intended to avoid formal dispute resolution mechanisms. This is principally in line with the suggestion made from a legal perspective to base solutions on principles of com-mercial law (lex mercatoria). So experience tends to prove that parties do not need formal incen-tives to resort to quick dispute resolution proce
dures.

With regard to the advantages of using experts for technical and business-related aspects, a way of solution which allows faster resolution procedures, see the commentator's article on ADR mechanisms in M&A transactions using the following link:
https://www.revistadedireitocomercial.com/dispute-resolution-in-m-a-transactions-it-does-not-always-have-to-be-a-court

THE IMPACT OF COVID-19 EPIDEMIC AS FORCE MAJEURE ON CHINESE COMPANIES UNDER INTERNATIONAL TRADE CONTRACTS

JIA HUI (CHINA)
PARTNER AT DEHENG LAW FIRM

Mr. JIA first gave an overview on the legal situation regarding Force Majeure under Chinese law. Under Chinese law, in order to constitute Force Majeure, the event in question must be unfore-seeable at the time of the signature of the contract, unavoidable and insurmountable. The event in question must also be the proper cause for an obstacle to make the contractual performance. The Party affected must then give notification and provide evidence that it is unable to perform the contractual obligation. The Party affected is under an obligation to mitigate losses. The legal consequences are determined case by case and may take the form of (1) relief from damages, (2) modification of Contract terms and (3) Termination of contract. In order to illustrate the afore-said Mr. JIA presented eight very interesting case studies.

1. Dongfeng v. Jiuxin

Dongfeng and Jiuxin concluded a Sales Agency Agreement on 15 February 2003. After the con-clusion of their contract the SARAS-pandemic broke out and made Jiuxin unable to perform the contract. Jiuxin notified and gave evidence to DongFeng about the impact of the SARAS-pandemic on its ability to perform the contract. The Court seized considered the outbreak of the SARAS-pandemic to be unforeseeable, unavoidable, and insurmountable and exempted Jiuxin from failure of performance.

2. Diamond v. Metal Group

Diamond (the Buyer) and Metal Group (Seller) concluded a Sales Contract on 6 March 2012. Metal was delayed in shipment. Afterwards on 12 May 2012 the EU imposed an anti-dumping duty which resulted in Diamond being unable to realize profits from re-sale. Diamond canceled the remaining orders and sued form termination of contract. The Court seized dismissed the claim because both Parties knew about the upcoming EU anti-dumping duty which for that reason was not unforeseeable.

3 The importance of the contract signing date

The next case study highlighted the importance of the contract signing date.

This case involved a Chinese Company (the Seller) and a Dutch Company (the Buyer). Both Parties concluded a Sales Contract on 20 June 2003, after the outbreak of the SARAS. The Seller failed to perform the contract and issued a Force Majeure notification. The Court seized dismissed the claim of the Seller because at the relevant contract signing date the SARAS had already broken out why it cannot be argued that this outbreak was unforeseeable.

COMMENT FROM THE REPORTER

The cases reported on No. 7.2 and 7.3 are quite relevant in the current pandemic as well: Since when did the parties know about the risk of the Covid-19 pandemic? And is there a need to differ-entiate between different regions? It first appeared in January 2020, as though the virus could be contained to certain parts of China, but then people traveling from China imported the virus to other parts of the world, and that was the beginning of the pandemic, as pronounced by the WHO on January 30, 2020. Presumably that date is the latest one after which contracts could not be concluded invoking that the pandemic was unforeseeable.

4 CONQUIP, INC v. DuoYuan Global Water Membrane Technology

The next case illustrated that a contracting Party that has already been in delay of performance prior to the occurrence of the Force Majeure event cannot successfully rely on Force Majeure. Conquip, a company based in the USA (the Seller), and DY, a company based in China (the Buy-er), concluded a Sales Contract on 11 February 2011. Early 2012, the Buyer obtained an approval from the Chinese government allowing it to import the machine. Early 2013 the equipment arrived in China. In March 2013, the Buyer's 5th payment instalment was delayed. In 2015 the Chinese government issued a restricted industry directory. The Buyer argued that as a consequence it was unable to perform the contract because of Force Majeure. The Court dismissed the Buyer's claim because before the occurrence of the Force Majeure event the Buyer was in delay of per-formance.

COMMENT FROM THE REPORTER

It is most likely that the disputed consideration of the Buyer in the above-mentioned case was money, the purchase price for the machine purchased. From a legal point of view it could very well be argued that – independently of the court's argument regarding a pre-existing delay – the defense of Force Majeure does not apply to monetary obligations existing under a contract. Un-der many legal systems the principle 'Money must always be available, there is no excuse for not being able to pay' prevails. This principle could also be applied to Force Majeure events, thus being a further ground to dismiss Buyer's claim, a ground which could arguably even enjoy logi-cal priority).

5. Huaken International Trade Co., Ltd. v. Shanxi Lunda Meat Industry Co., Ltd.

The next case highlighted the importance of the notification requirement and the requirement to provide evidence that the Party who is invoking Force Majeure is affected in its ability to perform the contract. Huaken (the Seller) and Lunda (the Buyer) concluded a Sales contract before the outbreak of SARAS. This outbreak caused performance obstacles on the Buyer's side. The Court dismissed the Buyer's Force Majeure claim because the Buyer did not notify the Seller and did not provide evidence that it was affected by Force Majeure.

6. China National Investment International Trade (CNIIT) Co., Ltd. v. SRV

The next case study illustrated the requirement for the affected Party to provide evidence in rela-tion to the causal relationship between the Force Majeure event and the obstacles to perform the contract. SRV, a company based in India (the Seller), and CNIIT, a company based in China (the Buyer) concluded a Sales Contract in February 2011. Afterwards and before the agreed shipment date of 18 March 2011 the Indian government upgraded the Customs System Software for the India Chennai Port. This affected the ability of the Indian Seller to do the shipment in accordance with the agreed shipment date. However, the Indian Seller did not provide evidence that the Cus-toms System Software was the actual cause of the delay. For that reason, the Court dismissed the Seller's Force Majeure claim.

7. Duty to mitigate

The next case study underlined the importance for the affected Party to take remedial measures. In that case the Mexican Buyer and the Chinese Seller signed a Sales Contract. The Buyer re-turned the contractual goods to the Seller due to quality issues. Then, the Sellers's import agent company in Hong Kong suddenly went bankrupt. Due to this bankruptcy the customs clearance failed. The Seller claimed from the Buyer storage costs for three years. The Court dismissed this claim because the Seller did not take remedial measures.

8. Termination

The last case study dealt with the legal consequences of Force Majeure. Mr. JIA explained that under Chinese law a termination of contract is very difficult. Only if one is unable to fulfill the purpose of the contract the affected Party will be able to terminate the contract. In that case study a Chinese Lessor and an US-American Lessee signed a cruise lease contract on 8 Janu-ary 2001. On 13 April 2003, a local

government issued an order prohibiting travel due to SARS. As a consequence, the cruise service was suspended from 13 April 2003 until 1 August 2003. The Lessee claimed termination of contract because of Force Majeure. The Court dismissed this claim because in the light of the limited duration of the suspension of the cruise service the purpose of the cruise lease contract could still be fulfilled.

COMMENT FROM THE REPORTER

This very interesting practical case raises the very interesting issue of whether terminations of longer-term contracts declared in the context of the Coronavirus pandemic will be upheld by the Courts given that in most instances the force majeure situation will eventually be remedied and whether the contractual performances should rather be considered as suspended than giving a right of extraordinary termination.

THE NEWEST SPC'S JUDICIAL GUIDING OPINION OF APPLICATION OF FORCE MAJEURE RULED IN EXTRATERRITORIAL LAW BY PEOPLE'S COURT IN CHINA

YI BO
ASSOCIATE PROFESSOR AT SOUTHEAST UNIVERSITY

The next presentation by Mr. Yi gave an insight into the judicial guidance on the application of foreign law on Force Majeure cases by Chinese Courts.

The people's courts shall determine applicable laws in accordance with the Law of the People's Republic of China on the Application of Law in Foreign-related Civil Relations and other laws as well as relevant judicial interpretations on issues concerning the application of law in foreign-related commercial and maritime dispute cases concerning the epidemic. Accordingly, for the foreign laws applicable to civil relations involving foreigners, the People's Courts, arbitration agencies or administrative authorities shall carry out an investigation. If the parties concerned choose to use the applicable foreign laws, they shall use the laws of those countries. If it is not clear whether there are such foreign laws or the foreign laws have these rules, the laws of the People's Republic of China shall apply.

Where a foreign law shall be applied, the people's court shall accurately understand the provi-sions of the statute law or case law similar to the rules for force majeure in such foreign law and correctly apply it, and shall not act on assumptions for understanding such similar provisions of the foreign law in accordance with the provisions on Force Majeure in the law of China.

HOW DOES THE FORCE MAJEURE INFLUENCE THE INDUSTRY?

PETER RUGGLE (SWITZERLAND)
PARTNER AT RUGGLE PARTNERS

Mr. Haeri explained that generally speaking, Force Majeure / frustration of contract are essential-ly concepts that allocate risk of an unforeseeable event which affects contractual performance. Under English law, Force Majeure refers to provisions in the contract providing for the suspen-sion of obli-gations/termination of the contract upon the occurrence of certain events, and frustra-tion of contract is a doctrine applicable under case law where there is no provision in the contract. Notably, the term "Force Majeure" is not a creature of statutes or judge-made law. "Force Majeure" is rather a term used to refer to contractual provisions for unforeseen events. By con-trast, the term "frustra-tion" is used to refer to the doctrine under common law which governs parties' contractual relation-ship upon the occurrence of an unforeseen event, in the absence of any contractual stipulation.

1. High standard to be met under the doctrine of frustration of contract
The doctrine of frustration of contract is a very restrictive doctrine and requires that performance under the contract in light of the unforeseen event is physically or commercially impossible. Ac-cordingly, "… frustration occurs whenever the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract." This test involves a highly fact specific inquiry: In the Li Ching Wing vs Xuan Yi Xiong case the Hong Kong District Court rejected a tenant's claim that a ten-ancy agreement was frustrated because the premises were affected by an isolation order by the Department of Health due to the outbreak of the SARS virus, which meant that it could not be used for 10 days compared to a total lease period of 2 years. The Court held that the 10-day pe-riod was insignificant in view of the two-year fixed term of the lease, and that whilst SARS was arguably an unforeseeable supervening event, it did not "significantly change the nature of the outstanding contractual rights or obligations from what the parties could reasonably have con-templated at the time of the execution of the Tenancy Agreement."

FORCE MAJEURE AND AVIATION INDUSTRY

YUE HUANG (CHINA)

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3 The importance of the contract signing date

The next case study highlighted the importance of the contract signing date.

FORCE MAJEURE IN THE INDUSTRY IN LATIN AMERICA

EDUARDO BENAVIDES (PERU)
MANAGING PARTNER AT BERNINZON & BENAVIDES

Finally, Mr. Benavides gave his presentation on Force Majeure in the Industry in the Latin-American region (LATAM). He explained that Arbitration is very important in LATAM because local courts are not very predictable and are working slowly. Across LATAM there is a strong influence from French, German and Italian law. From Italian law stems the concept of adequa-cy/proportionality in bilateral contracts. In relation to Force Majeure LATAM jurisdiction go a step further insofar as according to this concept the counterparty is also released from its obligation when impossibility due to Force Majeure occurs and the contract is automatically terminated.

LATAM countries are very strong exporters of minerals and strong importers of know-how and equipment from the USA and the EU. Mining contracts are strongly affected by the Covid-19-pandemic since this industry is heavily dependent on services for equipment which are now inter-rupted. In the energy sector as well, it is very important that the equipment arrives just-in-time. The legal consequences of delay insofar are drastic: termination of contract and losing a license to operate. In recent Arbitration cases power producers had their license to operate cancelled due to delayed supply of equipment.

The requirement that the event must be extraordinary and unforeseeable in order to constitute Force Majeure is heavily discussed in LATAM because there is not such stability as in Europe (changes of law are a regular phenomenon in LATAM) and challenges of geography (such as storms) should have been considered by the Parties.

In LATAM jurisdictions there is no concept of hardship or clausula rebus sic stantibus. However, a different concept exists in the form of extreme difficulty to perform a contract.

CLOSING DISCUSSION

After the discussion had concluded on behalf of the SLCA Mr. Tianze Zhang expressed his grate-fulness to the speakers who had so well prepared their contributions. He also was grateful to all attendants who participated in the various sessions with excellent discussion points. The video of the Forum as well as the slides will be available shortly after the Forum.

HERMANN KNOTT
MARTIN WINKLER
ANDERSEN TAX LEGAL
MEMBER OF SCLA