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Terrorism and Force Majeure in International Contracts

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Eivind Eriksen

Abstract

The introduction of terrorism to the doctrine of force majeure raises many questions. There is also a distinct lack of case law concerning terrorism as force majeure. This leaves parties to a contract with little or no guidelines as to whether an act of terrorism constitutes a force majeure event. This paper will raise some of the essential questions, and try to give some clarification as to some of the questions concerning the issue. How should we define terrorism? Should terrorism be seen as an 'act of war'? What should the courts do if the parties have left terrorism out of their force majeure clause? And finally, can the normal requirements of the doctrine such as an unforeseen impediment beyond the parties control be sustained when terrorism is the triggering event?

To answer some of these question, it is essential to do some study on the general field of force majeure. This will primarily be done by looking comparatively at the different national legal systems. A brief look at force majeure on the international scene will also be given.

KEYWORDS: terrorism, force majeure, contract law, international contracts

TERRORISM AND FORCE MAJEURE IN INTERNATIONAL CONTRACTS

*By Eivind Eriksen**

Introduction

Objectives of the Paper

One of the main objectives for lawyers in today's society is to predict the changes that may occur over time so that their clients can be protected from these changes. The increase and magnitude of terrorist activity seen in the last years were largely unanticipated. Force majeure will be an increasingly frequent issue in negotiations and disputes. Most international commercial contracts contain at best some loosely drafted clause concerning force majeure. This might have to change, if lawyers wish to provide their clients with adequate certainty about their future rights and obligations.

The introduction of terrorism to the doctrine of force majeure raises many questions. There is also a distinct lack of case law concerning terrorism as force majeure. This leaves parties to a contract with little or no guidelines as to whether an act of terrorism constitutes a force majeure event.¹ This paper will raise some of the essential questions, and try to give some clarification as to some of the questions concerning the issue. How should we define terrorism? Should terrorism be seen as an 'act of war'? What should the courts do if the parties have left terrorism out of their force majeure clause? And finally, can the normal requirements of the doctrine such as an unforeseen impediment beyond the parties control be sustained when terrorism is the triggering event?

To answer some of these question, it is essential to do some study on the general field of force majeure. This will primarily be done by looking comparatively at the different national legal systems. A brief look at force majeure on the international scene will also be given.

Already today, it is possible to see some changes in this area pre- and post the 11th September attacks. Contracts made before the attacks did not usually allow

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1 Davis Jr T., Asaro Jr J., Force Majeure and Addressing Terrorism, New York Law Journal, November 13th, 2001.

for non-performance as a result of an impediment from an act of terrorism. Even though it was quite normal to have clauses with terminology similar to an 'act of war', a change can be seen towards parties wanting to cover themselves against terror as well. Terror is rarely defined, and the question of how these actions might effect the other requirements of the doctrine has yet to be explored. This paper will attempt to address this question.

International Contracts

This paper will primarily look at terrorism as force majeure from a general and international perspective. Acknowledgement of the differences in the legal doctrine of force majeure is essential when it comes to choice of law and forum in international contracts. As this paper will explore throughout the following pages, the proper law will influence rights and obligations of a contract even in an area like this, which is mostly subject to the parties' intention.

The parties must not underestimate the importance of securing their positions when terrorism may affect their contract. Which actions constitute terrorism, and what the consequences of an act of terrorism will have on the contractual relationship, are questions that should be addressed frequently on the international level, when contracts are created.

The Importance of Choice of Law and Forum

Most international contracts are to some extent connected with more than one legal system. This fact can create a conflict of laws within the relationship. As a result of the parties' autonomy, these conflicts can be partly eliminated by the terms agreed on by the parties, by their choice of forum, and by their choice of the applicable law. However, there are restrictions that directly or indirectly limit the parties' autonomy.

The choice made can also effect the interpretation of the clause. This will be further explored in section 3.3 of this paper. An increasing number of contracts are being governed by the Principle of International Commercial Contracts since 1994, which will be further explored in section 3.4.2 of the paper.

Party Autonomy and Limitations

Forum

When it comes to jurisdiction, the most important international treaty in this area is the Lugano Convention from 1988. The background for the convention was a need for international rules, which would clarify what forum had jurisdiction in particular cases. Furthermore, as international trade has grown in magnitude, the need for recognition and enforcement has become increasingly apparent. The convention seeks to regulate all civil matters.

The main rule is that the parties are free to choose any forum as they please. Where the parties have failed to do so, the principle of domicile is decisive. This means that the forum that has jurisdiction is the one where the company being sued has its place of business, in accordance with Article 2. However, there are exemptions from these rules. According to Art. 5 nr. 1 it is possible to sue at the place of performance, Art. 5 nr. 3 when there is a certain forum for liability, Art. 6 when there is a class action and Art. 7-12A when the case is insurance related. Finally, there is a special rule which deals with property rights in Art. 16.

Taking the primary obstacle, the choice of forum, into consideration, the parties should remember that there also might be an obstacle in recognition and enforcement of the judgement or award. Article 26 regulates recognition, while Article 31 deals with enforcement.

Governing law

According to principles of the international sale of goods, the main rule is that the parties are free to choose the governing law of their contract. Should the agreement lack such a clause, the national law of the seller should be considered as the proper law, and therefore govern the contract.

When it comes to the question of choice of law, the Roma Convention of 1980 is the leading convention in Europe. According to Article 3 of the Convention, the main rule is that this field is subject to the parties' autonomy. In the absence of such an agreement by the parties, the governing law will, according to Article 4, be decided in accordance with the principle of closest connection, with further rules of presumption in part 2-5.

Nevertheless, the choice of law is not always as easy as it looks. Some legal systems have put limitations on the party's right to choose. In some cases, the chosen forum will not be the same as the chosen law, and this choice can again create further difficulties. In general, one could say that the parties' can regulate most matters of substance, in the chosen law. Furthermore, there is the problem of the division between what parts of the legal system are characterised as

substance, and what other parts as procedure. Here, again, it is necessary to obtain comparative data about the structure of the chosen system of law. One example could be whether a statute of limitations is seen as procedural or substantive.

Force Majeure in International Contracts

To understand the essence of terrorism within the force majeure doctrine, it is important to see the entire picture of this legal issue. This paper will therefore take a closer comparative look at what the doctrine of force majeure, and other similar contract exemptions, consist of. Furthermore, an examination of force majeure in contracts that to some extent touch more than one legal system, so-called transnational contracts, will be given. Finally, this paper will question whether a development has taken place in the doctrine of terrorism as force majeure, and look at some special issues within the doctrine. First of all, it is important to take a closer look at the terminology in this field.

The overriding principle in the world of contracts is that a party must satisfy its obligations. 'Pacta sunt servanda' has always been seen as somewhat sacred. But this doctrine of absolute obligations was to some extent abandoned as the nineteenth century progressed, and thoughts of fairness, and impossibility/impracticality came to the force. It is important to look at these issues as part of the broader picture. There is an overriding connection between how stringent the exemptions are interpreted and which remedies follow from the different excuses. It is always important to remember that on one side there are requirements and on the other there are consequences, like renegotiations, adjustment, or termination of the contract.

Terminology

Force majeure

According to the traditional doctrine of force majeure in most civil law systems, the parties need not uphold their initial rights and obligations under the contract, when a circumstance occurs that is outside the party's control, and makes it impossible to follow through with the initial contract. 'Force majeure serves as a limit to liability not based on fault.'² The situation must furthermore have been unforeseen by the parties. The duties and obligations of the parties are only suspended for the duration of the situation, and notice must be given without delay.

2 B Nicholas, Force Majeure and Frustration, 27 *American Journal of Comparative Law*, (1979), page 231-245, on page 239.

Interpretation and the limits of the doctrine are subject to intense debate, and the above illustration is only meant as an indication of the imprecise nature of the doctrine of force majeure.

Hardship

Hardship is the situation where it is possible to fulfil the rights and obligations of the contract, but the situation might create remedies because of a belief that there should be some equality between the parties' rights and obligations. The balance has shifted due to the hardship.

Some legal systems do not allow remedies to come into force just because extensive hardship occurs. The general idea in these systems of law is that shift in circumstances should be the risk of the parties, and they may use their autonomy to regulate specific situations. As a result of this, many of the long-term contracts that are being made, have some type of clause that opens up negotiations between the parties where a change of circumstances has altered the rights and obligations in the contract.³

On the international level, it is worth noticing that CISG does not mention hardship in its rules. There is therefore a great debate whether hardship provisions can be applied to a contract where CISG is the governing law, from the idea that the UNIDROIT principle can supplement CISG.

Common Law Impossibility and Frustration

According to most common law systems, the subject of performance or non-performance can be decided by the doctrines of frustration or impossibility. The doctrines are different in the sense of whether it is possible to perform in accordance with the contract or not.

The doctrine of frustration

When it comes to the question of termination of contracts in the common law systems, similarities to force majeure can be found in the doctrine of frustration. Lord Radcliffe has described frustration in *Davis Contractors Ltd v Fareham UDC*⁴. This principle has also been adopted in Australia⁵.

Frustration occurs whenever the law recognises that without default of either party a contractual obligation has become incapable of being performed

3 From the official website of CISG,
<http://www.cisg.law.pace.edu/cisg/biblio/perillo3.html>.

4 *Davis Contractors Ltd v Fareham UDC* (1956) AC 696 at 729.

5 See e.g. *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337, 41 ALR 367.

because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. Non haec in foedera veni. It was not this I promised to do.

According to Black's Law Dictionary, frustration is 'the doctrine that, if the entire performance of a contract becomes fundamentally changed without any fault by either party, the contract is considered terminated.'⁶

At this stage it is essential to remember that there are great differences within the 'similar' legal systems as well. To understand how difficult this could be for a normal businessman in contract negotiation, this paper will look briefly at the United States and England.

In the United States the term 'frustration' is limited to situations where it is possible to perform the contract, but performance would be senseless. In these cases the term impracticality is often used.

One example is the booking of a hotel room with a beautiful view to see a parade. If the parade is cancelled, the question comes up whether this changes the rights and obligations of the contract. There is no question whatsoever whether the contract is possible to perform, but because the circumstances have changed so dramatically, the parties may be released from their obligations there under.

England claims to stand firmly on the traditional rule: '[a] contract will only be frustrated if the substance of it has become impossible or illegal, or the commercial purpose has been completely destroyed'⁷. Therefore, in England, 'frustration' is used to cover cases of impossibility of performance as well as cases such as those mentioned above. A comparative study shows us that the US has to some extent accepted a change from impossibility to impracticality, while England has rejected this development.⁸

The basis of the doctrine and its elements

According to the Black's Law Dictionary⁹ on the other hand, the impossibility of performance doctrine, is 'the principle that the parties may be released from a contract on the ground that uncontrollable circumstances have rendered performance impossible.' and that 'circumstance excuses contractual performance.' The impossibility can be of a factual matter, e.g. the specific item is destroyed, or a

6 Garner B., BLACK'S LAW DICTIONARY, Second Pocket Edition.

7 From the official website of CISG,
<http://www.cisg.law.pace.edu/cisg/biblio/perillo3.html>.

8 T Southerington, *Impossibility of Performance and Other Excuses in International Trade*, page 111.

9 Garner B., BLACK'S LAW DICTIONARY, Second Pocket Edition.

legal impossibility, e.g. that new law renders the fulfilment of the obligation illegal.

Consequences

To understand the differences in the diverse doctrines, it is very important to look closer at the consequences if the doctrine is to come into effect. As mentioned above, force majeure will in most cases create a duty to renegotiate the contract. This is to some extent not the case when frustration is determined.¹⁰ When it comes to impossibility though, the contract will be seen as non-existing, and the relationship between the parties according to the contract will cease to exist. The doctrine of frustration will 'kill' the contract while the function of unforeseen impediment is to suspend the performance for the duration of the impediment.¹¹

To sum up frustration, the doctrine 'excuses performance in a narrow range of situations, such as the impossibility to perform..., frustration over the purpose of the contract, supervening illegality, delay and outbreak of war.'¹²

A Comparative Study

As an increasing number of contracts have an international element, the different legal systems have all at one time or another been asked to interpret the meaning of the different terms in this field. It is no revolutionary conclusion that judges interpret contracts to some extent in the light of their own systems, and in the belief that their system is the best. This is legal ethnocentrism. On the other side, the development has to some extent moved towards some unity on the issue of non-performance in the different legal systems.

The question of fault

The common-law systems operate on the idea that the question of liability is one of so-called no-fault liability¹³, in this very specific legal area. This means that the question of whether fault from one party has occurred does not even need to be raised. But on the other side, as this paper is exploring, some leeway for an excuse is given through the above-mentioned doctrines. By way of contrast, 'in some civil law countries, fault is perceived to have a greater role in contract

10 T Southerington, *Impossibility of Performance and Other Excuses in International Trade*, page 119.

11 J Thomson, The New Chinese Contracts Law and its Relevance for Sino-Australian Investors, (2000) 16 *Journal of Contract Law*, page 269.

12 K E Lindgren, J W Carter, D J Harland, *Contract Law in Australia*, Butterworths, Sydney, 1986, page 707, paragraph 2135.

13 From the official website of CISG,
<http://www.cisg.law.pace.edu/cisg/biblio/perillo3.html>.

liability than in the common law¹⁴, and the question of fault will in these systems be addressed as a completely separate issue.

The United States Supreme Court described the force majeure doctrine as follows¹⁵

Where parties enter into a contract on the assumption that some particular thing essential to its performance will continue to exist and be available for the purpose and neither agrees to be responsible for its continued existence and availability the contract must be regarded as subject to an implied condition that, if before the time for performance and without the default of either party the particular thing ceases to exist or be available for the purpose, the contract shall be dissolved and the parties excused from performing it.

To be able to be excused, a party must prove that that the impracticability is a result of an unexpected and intervening act. Furthermore, the non-occurrence of that act must have been an assumption by the parties.

On the other side, a party that wishes to be excused from performance on the grounds of impossibility of performance must prove

- (1) the unexpected occurrence of an intervening act,
- (2) such occurrence was of such a character that its non-occurrence was a basic assumption of the agreement of the parties, and
- (3) that occurrence made performance impracticable.

From this we can see that 'the narrow, common law view reflects an instance on both freedom of the parties to look ahead and make provisions in their contracts for foreseeable harm, and the doctrine of precise performance of what has been agreed before the right arises to call for performance from the other side'.¹⁶

Interpretation of Force Majeure Clauses

When it comes to the interpretation of these types of clauses, the historical development of the doctrine has some influence on today's interpretation. The interpretation of the clauses is usually not solely dependent on the actual language and the wording of the contract. The written word is therefore not always the sole source for determining whether performance is excused.¹⁷

14 Ibid.

15 *Texas Co. v. Hogarth Shipping Corp.*, 256 U.S. 619, 629-30 (1921).

16 J Thomson, *The New Chinese Contracts Law and its Relevance for Sino-Australian Investors*, (2000) 16 *Journal of Contract Law*, on page 269.

17 From the official website of Western Systems Power Pool, <http://www.wspp.org/Documents/WSPP%20Web%20Site/Documents%20in%20PDF%20format/MemoForceMajeureABP052600.PDF>.

The clause that the parties select will be interpreted in the light of the legal doctrine, and might be subject to what is known as legal ethnocentrism. Courts will also, to some extent, use the proper law to fill in gaps in incomplete or unclear force majeure clauses.¹⁸ As mentioned above, many systems believe that this is the best way of solving this problem, and therefore it is easy to end up with an interpretation similar to the solution from the proper law. Here again it is important to emphasize the choice of forum and governing law. One example of this can be taken from the above interpretation of force majeure by an American court, which has some influence on the American view on the civil legal systems solution of this matter.

One of the questions that will often arise for the courts in the future, is whether terrorism should be seen as an act of war. The impediment of an act of war is fairly common in international clauses, but the different tribunals have been reluctant to expand the coverage of this type of provision.¹⁹ This issue will to some extent lose its importance as more and more parties include terrorism as an impediment in their contracts. Still, this will take some time, and meanwhile terrorism as an act of war will create great difficulties when it comes to interpretation. More about the issue of terror as an act of war will be explored in part 3.3 of this paper.

On the international level, there are some rules for interpretation when it comes to the Vienna Sales Convention (CISG). Here we find art 7(1), which attempts to create uniformity. The interpretation shall be subject to principles of good faith. Furthermore, part (2) contains sources of interpretation. The interpretation of the contract should be conducted using a subjective approach with true meaning, rather than the written word, see art 8(1). This meaning is then supplied by the objective meaning of the words, as in art 8(2). The approach taken in the convention is somewhat similar to rules of interpretation in most civil law systems, and will therefore be easier to apply for civil lawyers.²⁰

The problem in interpreting these rules are somewhat similar, when it comes to interpretations of clauses in arbitration. According to Bortolotti, 'parties are interested in knowing how arbitrators handle force majeure, and whether they can expect a practical balanced approach.'²¹ Jurisprudence is still somewhat lacking, and hopefully clarifications will emerge in the near future.

18 H. Thomas Davis Jr. and Joseph Asaro Jr: Force Majeure and Addressing Terrorism *New York Law Journal*, November 13, 2001.

19 Op cit 18.

20 From the official website of CISG,
<http://www.cisg.law.pace.edu/cisg/biblio/perillo3.html>.

21 From the official website of ICC,
http://www.iccwbo.org/court/english/news_archives/2003/force_maj.asp.

The exceptions in the doctrine have to some extent developed from a consideration of fairness.²² Still, the ultimate questions tribunals must ask, are where should the line be drawn between fairness in rights and obligations, and limitations on party autonomy?

From an International Aspect

UNIDROIT

UNIDROIT is a voluntary, intergovernmental organisation, situated in Roma. Their primary task is to create international model laws on the field of contract law, and by doing so, reduce the difficulties that occur in international trade.

The work of UNIDROIT has among other things resulted in the Principle of International Commercial Contracts in 1994. The drafting was made with consideration to the different national legal systems, but also to CISG, and other international instruments prepared by UNCITRAL.²³

The main article, dealing with the issues of force majeure, is 7.1.7. According to the commentary, the article covers the area of frustration or impossibility from the common law system, and the doctrine of force majeure from the civil law system.

International Chamber of Commerce

Another international forum of importance to the issue of this paper is the International Chamber of Commerce. The ICC has ready-made contract clauses for international trade, and is also offering arbitration for the conflicts that might arise. As of 2003, the ICC will also have new force majeure and hardship clauses, which include terrorism. These new clauses are meant to 'help parties make adequate provisions for unforeseeable and unavoidable events beyond their control...'.²⁴ These new 'clauses are important international instruments that underline ICC's role as a key business rule-maker by providing up-to-date alternatives to the rules of United Nations, UNIDROIT and other international governmental organizations.'²⁵

22 A Phang, Security of Contract and the Pursuit of Fairness, (2000) 16 *Journal of Contract Law*, page 165.

23 M.J. BONELL, UNIDROIT Principles of International Commercial Contracts: Nature, Purposes and First Experiences in Practice.
<http://www.unidroit.org/english/principles/pr-exper.htm> on 04/03/03.

24 Notes from ICC's website, at
http://www.iccwbo.org/court/english/news_archives/2003/force_maj.asp, 16.04.03.

25 Notes from CISG's website, <http://www.cisg.law.pace.edu/cisg/biblio/perillo3.html>, on 18/03/03.

The importance of these new clauses should not be underestimated. Many parties to new contracts will now choose ICC as their forum and its rules as governing law, merely because of 'increased legal certainty through up-to-date legal instruments that reflect business realities post 11 September 2001 by addressing issues such as terrorism'.²⁶

The Vienna Sales Convention (CISG)

The CISG is also known as the Vienna Sales Convention. The CISG was finalised and adopted in 1980. According to Pryles et al, the Vienna Sales Convention is 'a uniform law on the formation of contracts'²⁷ made by UNCITRAL. 'Not only does the convention deal with the terms and conditions of the substantive contract between the seller and the buyer but it also contains rules on the preliminary question of formation of the contract'.²⁸

On the other hand, the convention does not deal with

- (1) validity, which should be subject to the national laws,
- (2) consumer sales, if the seller neither knew nor ought to have known that the product was meant for that use,
- (3) the issue of property of the goods, or
- (4) product liability.

When it comes to the issue of non-performance and CISG, it is important to notice that the exception from performance only exists as long as the impediment exists. This is to some extent in contrast to frustration in the common law system, where the exemption terminates the contract. CISG also gives time limits for the existence of this exemption from performance.

When it comes to Article 79, the party must fulfil four prerequisites to be excused from the contract without liability. First, the terror must be seen as an impediment that prevents performance. Secondly, the impediment must be beyond the party's control, which the party could not have taken into consideration at the time of the contract. Finally, the party could not reasonably have avoided or overcome the impediment or its consequences.²⁹ These four elements will be analysed and linked up to terrorism in part 4.3 and 4 of the paper.

Tallon has stated that the solution adopted in Article 79 does not follow any of the national laws as such. The Article does not use the terms force majeure,

26 Op cit 25.

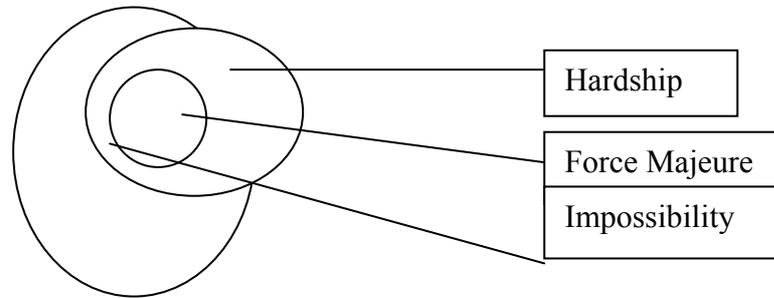
27 M. Pryles, J. Waincymer, M. Davies (eds.), *International Trade Law; Commentary and Materials*, page 104.

28 Ibid.

29 T Southerington, *Impossibility of Performance and Other Excuses in International Trade*, page 68.

frustration or the like, and it forms a system of its own autonomic from the national systems.³⁰ Still, many of the principles discussed above are apparent. The convention is silent when it comes to questions on hardship, but the UNIDROIT principles might be used as a supplement.³¹ Other writers do not agree with this, stating that hardship ‘would not normally exempt the obligations under these rules.’³²

In summary



In summary, one can say that the concept of impossibility covers a great deal of situations of non-performance of contract. The cases of force majeure refer to those situations of impossibility where the impediment is irresistible, unforeseeable and external. On the other hand, hardship does not presuppose impossibility as the cause at all, but solely relates to a shift in the balance or rights and obligations in the contract.³³

Terrorism as Force Majeure

Definition of terrorism

One of the many problems that terrorism as force majeure raises is the vast area of actions that can be seen as the triggering event. When introducing terror into the world of excuses for non-performance, we open a door, but we do not necessarily know what is behind it. Terror is a broad term, and would to some extent create similar remedies when a madman hijacks a plane at random as

30 D Tallon, Article 79 – Exemptions. In Bianca, C. M. and Bonell, M. J. (eds.) *Commentary on the international sales law*. The 1980 Vienna sales convention. Pages 572-595, on page 574.
 31 From the official website of CISG, <http://www.cisg.law.pace.edu/cisg/biblio/perillo3.html>, on 18/03/03.
 32 See among others T Southerington, *Impossibility of Performance and Other Excuses in International Trade*, page 84.
 33 Ibid page 36.

when the carefully planned September 11th attacks took place. Limitations on this fairly new excuse for non-performance can, on the other hand, be narrowed down by the other requirements set up by the doctrine, like 'beyond control', and 'foreseeability'.

Finding an appropriate definition of terrorism is very difficult. One example of a definition is given in the International Convention for the Suppression of the Financing of Terrorism. The definition has been copied in the law passed in Australia to stop the funding of terrorist groups.

Terrorist act means an action or threat of action where³⁴:

- (a) *the action falls within subsection (2) and does not fall within subsection (2A); and (b) the action is done or the threat is made with the intention of advancing a political, religious or ideological cause; and (c) the action is done or the threat is made with the intention of:*
 - (i) *coercing, or influencing by intimidation, the government of the Commonwealth or a State, Territory or foreign country, or of part of a State, Territory or foreign country; or*
 - (ii) *intimidating the public or a section of the public.*

- (2) *Action falls within this subsection if it:*
 - (a) *causes serious harm that is physical harm to a person; or*
 - (b) *causes serious damage to property; or*
 - (ba) *causes a person's death; or*
 - (c) *endangers a person's life, other than the life of the person taking the action; or*
 - (d) *creates a serious risk to the health or safety of the public or a section of the public; or*
 - (e) *seriously interferes with, seriously disrupts, or destroys, an electronic system including, but not limited to:*
 - (i) *an information system; or*
 - (ii) *a telecommunications system; or*
 - (iii) *a financial system; or*
 - (iv) *a system used for the delivery of essential government services; or*
 - (v) *a system used for, or by, an essential public utility; or*
 - (vi) *a system used for, or by, a transport system.*

- (2A) *Action falls within this subsection if it:*
 - (a) *is advocacy, protest, dissent or industrial action; and*
 - (b) *is not intended:*
 - (i) *to cause serious harm that is physical harm to a person; or*
 - (ii) *to cause a person's death; or*
 - (iii) *to endanger the life of a person, other than the person taking the*

34 *Suppression of The Financing of Terrorism Act 2002 Schedule 1.*

- action; or*
(iv) *to create a serious risk to the health or safety of the public or a section of the public.*

When the permanent International Crime Court was recently set up, terrorism was left out of the tribunal's statutes. One of the reasons for this was that the participants failed to agree on a definition of which elements an act of terror should contain. The court has vast penal jurisdiction over great parts of the world's population, and the borders of the tribunals mandate were a very touchy subject for many nations.

One of the industries that had to meet terror 'dead on', was the insurance industry. The Insurance Services Office, Inc. (ISO) is an American company that collects actuarial statistics and prepares standard policy language and forms of insurance for the insurance industry.

The ISO defines terrorism as³⁵:

Activities against persons, organizations, or property of any nature that involves the following:

1. Use or threat of force or violence; or commission or threat of a dangerous act; or commission or threat of an act that interferes with or disrupt an electronic, communication, information, or mechanical system; and
2. when one or both of the following applies:
 - a. The effect is to intimidate or coerce a government or the civilian population or any segment thereof; or to disrupt any segment of the economy; or
 - b. It appears that the intent is to intimidate or coerce a government or the future political, ideological, religious, social or economic objectives or to express (or to express opposition to) a philosophy or ideology.

A narrower definition is given by the Black's Law Dictionary³⁶, which defines terrorism as

[t]he use or threat of violence to intimidate or cause panic, especially as a mean of affecting political conduct.

The definition chosen will be very important for an exemption from contract obligations. It is not difficult to imagine problems that will arise from each of the

35 From an article by Steve Mixter Mike Owendoff, Selected insurance and lease issues to consider after the terrorist attacks of 11th September, 2001, *Journal of Corporate Real Estate* Volume 4 Number 4, at http://www.corenetglobal.org/pdf/san_diego8.pdf on the 28.03.03.

36 Garner B., *Black's Law Dictionary*, Second Pocket Edition.

mentioned attempts to define terrorism. Furthermore, which actions should be part of the exemptions, and which should not be, will in many cases be a question of risk between the contract parties. The boundaries of these exemptions should therefore be left up to the parties' intention. Nevertheless, the lack of ability to foresee what difficulties might arise in a contractual relationship seems to some extent to be lacking. Can we expect that the professional parties in international trade will be able to divide the risk of loss due to terrorism between them?

In summary, it is clear that the act directed against anyone and anything to create fear, and promote some ideological goal will be seen as terror. The difficulties of defining what actions should be covered seem to result in vast and vague terms, to make sure that all of these terrible actions are caught up in the definitions. On the other hand, deciding the boundaries of terror will keep lawyers happy for years to come, with a great amount of work.

Terrorism as an 'act of war'?

The exemption called 'act of war', which is commonly used in these doctrines, was made part of the doctrine when war was something different from what it is today. Everyone knew what actions constituted war, and when a war had started and ended. Today, there is a great need to clarify these issues when it comes to international contract law. In modern society the meaning of the term 'act of war' is not as clear. One example is who is at war when the largest war machine the world has ever known starts a war on terrorism?

It is important to clarify where the meaning of 'act of war' creates difficulties. First of all, the line between what type of action constitutes an 'act of war' and 'act of terrorism,' must be drawn to create predictability in contract relationships. Should terror be interpreted into a clause containing an 'act of war' provision? Secondly, since few clauses contained terrorism as an impediment until recently, should these clauses be subject to progressive interpretation so that terrorism will be covered by these clauses?

Traditionally, acts of war have always, to some extent, been linked to a state and its government. The 'act of war' clause generally excluded non-performance when an obstacle was caused by 'hostile or warlike action . . . by any sovereign power (*de jure* or *de facto*) or by agents of such government or their armed forces'.³⁷

The attacks on the World Trade Center and on the Pentagon were, to our knowledge, not the acts of a sovereign power, and can by this definition not be regarded as an act of war. Still, the president of USA, George W Bush, stated that

37 From an article by Steve Mixer Mike Owendoff, Selected insurance and lease issues to consider after the terrorist attacks of 11th September, 2001, *Journal of Corporate Real Estate* Volume 4 Number 4, at http://www.corenetglobal.org/pdf/san_diego8.pdf, on the 28.03.03.

America was at war, soon after the attacks took place. Did he realise that that statement could affect millions of contracts?

In analysing the war exclusion in the context of a previous terrorist hijacking situation, a US federal appellate court held that ‘. . . a violent and senseless intercontinental hijacking carried out by an isolated band of political terrorists’ does not fall within the war exclusion.³⁸ Still, the actions would be seen as acts of terror.

To try to explain the difficulties, let us look at what questions the boundary between war and terrorism raises today. Are suicide bombers in Israel acts of war or terrorism? Is it necessary to link the actions back to a state for the actions to be seen as war? And what and how should we characterise the actions taken by the forces in Iraq when they started blowing themselves up? Is that terrorism, or act of war? And what if the bomber is from Syria, a nation not at war? Are the actions of these people acts of war or just terrorists?

Case law and literature offers little help in deciding when a terrorist act should be seen as an act of war. This will probably change in the future. More and more tribunals will be forced to interpret clauses, and decide whether acts of terror can be seen as an act of war. In a similar sense, tribunals will be faced with the question of when actions constitute war and when they constitute acts of terrorism.

Impediment beyond control that could not reasonably have been expected and avoided.

Impediment

According to Southerington, the act must be an impediment to due performance, and the word impediment ‘implies a barrier to performance’. Furthermore, the ‘performance has to be prevented by the impediment’.³⁹

There are important questions relating to the requirement of prevention. Must the impediment create absolute or objective impossibility of performance, or should the requirement be less strict. As mentioned above, how strict this requirement is interpreted, will usually have some relation to what the remedies are, and what other remedies are available to the parties. Does the agreement for example contain a hardship clause, as well as a force majeure clause? If so, that will signal that the impediment must be absolute, if the contract can be renegotiated without liability. On the other hand, if the contract contained a clause incorporating the doctrine of impossibility from the common law system,

³⁸ Op cit 37.

³⁹ T Southerington, *Impossibility of Performance and Other Excuses in International Trade*, page 68.

and a force majeure clause, could it be interpreted that the impossibility clause was meant for the cases of absolute impossibility, while practical or economic impracticability can be caught by the force majeure clause.

These questions have great relevance in the current context. Many of the actions that might fulfil these types of requirements can be different from the normal impediments. What should happen, for example, if an act of terror does not make the performance absolutely impossible, but the performance creates danger for the parties employees? The act of terror in it self might not create impossibility, but create great fear. Great fear could result in possibility to perform, but at great risk. Is the breach of contract then excusable?

Beyond control

What is viewed as beyond the party's control will in most cases be judged 'on the basis of objective criteria'.⁴⁰ In general, all direct action from the party himself, and his employees will be seen as within the party's control. The party will also be responsible for his subcontractors, in accordance with the doctrine of double force majeure.

The contracting party will, furthermore, be responsible for actions that he has influence on by planning, supervising and organisation. In general, all actions on how the business is run, without questioning whether this is done properly or not, will lead to liability for damages. Even lack of raw materials or financial difficulties will usually be found to be 'within control'. A strike, on the other hand, can be seen as something 'beyond control', as long as the strike is not a direct effect of actions taken by the management, (so-called internal strikes). If that is the case, then the difficulties would not fulfil the requirements and would therefore lead to liability in damages.⁴¹

When it comes to terrorism, it is difficult to see when terror could be an action within the party's control. Still, it is possible to imagine actions where the question might be difficult to answer. One example could be where a builder has the task of setting up a McDonald in different parts of the Middle East. Could the builder see himself free from his obligations if terror should take place on the site? The answer would probably be negative, primarily because this would be an issue of risk between the parties. Still, a well-drafted clause could end up releasing the party from his obligations, even in such a case.

40 T Southerington, *Impossibility of Performance and Other Excuses in International Trade*, page 55.

41 Op cit 40, page 56.

Unforeseen

The impediment must also be unforeseen for the parties. This requirement is often expressed similarly to the requirement that the impediment could not reasonably have been expected to be taken into consideration, at the time of completion of the contract.⁴² These impediments will usually be unusual and remote.

Still, the parties must have seen this risk when entering into the contract. This raises the common question, what actions are unforeseen, if the lawyers when making the contract were making clauses to regulate these actions?

The requirement that the action must be unforeseeable has great importance in the case of terrorism. Some places in the world have for some time been subject to terror on a large scale. Examples are the conflict in Northern Ireland, terror by ETA in the northern province of Spain, and the Middle East Conflict. The question will then be whether terrorism must be seen as a normal risk when contracting in these types of areas? Furthermore, if acts of terror must then be seen as foreseeable, they cannot lead to freedom from liability for damages when terror occurs.

Unavoidable

Closely linked with the requirement that the impediment must be unforeseeable, is the requirement that the impediment was unavoidable or could have been overcome. According to the European Court of Justice, the consequences of an impediment could not have been avoided even if all due care had been exercised.⁴³ However, the parties must take reasonable actions to avoid the event and its consequences.

Here as well, is it plausible to state that the element of unavoidability when it comes to terrorism, creates great difficulties? As the world opens its eyes to terror, the question becomes; what can be done to avoid terrorism, and to what extent? Is it possible to require that companies take steps to avoid terror? Some avoidance could be exercised by increased security, and by taking steps to fight terror in the place where the contract is to be fulfilled.

Choices made by the parties on how to fulfil their obligations can be many. The important thing is that the party must react to events that were not foreseeable at the time of the contract, but became foreseeable some time prior to delivery.⁴⁴ One question that this requirement raises when it come to terrorism, is how far the

42 Ibid.

43 Case 266/84 (1987) 3 CMLR 202, page 223.

44 T Southerington, *Impossibility of Performance and Other Excuses in International Trade*, page 57.

parties must go to avoid the event and its consequences. Does the freight ship have to take the trip around Africa, if there are actions in the Suez-channel? Or can the party still go free from liability for damages if terrorism occurred 'en route'? One can imagine that just a simple reaction, such as, for example, to changing carrier of the goods from a vessel sailing under an American flag, over to one under Egyptian flag, could greatly help the party. But where should the line be drawn?

Can the normal requirements from the doctrines, e.g. unforeseen impediment beyond the parties control be sustained when terrorism is the triggering event?

Terrorism is to some extent different from the normal impediments that have traditionally been included in exemptions from non-performance without liability for damages, like force majeure. The parties in international trade, as well as the different tribunals, will in the future face great difficulties in this field. One of the most troubling issues will be to solve the question on how the different elements in the doctrines are affected by the fact that the impediment is an act of terrorism.

As mentioned above, one of the key requirements in the doctrine is the question of what actions are beyond the party's control. What will then happen if the parties to some extent have influence on the events that occur, but still cannot control the events in the traditional sense? To illustrate, one can return to the example where the United States enters into a building contract with an Arabic country. Let us say that the people of the country are strongly opposed to the Americans' actions. There is no doubt from the side of the US that the construction might be subject to terrorism. Should these parties be free from liability for damages if terror occurs? Or what if the same government goes to war on a neighbouring country, knowing that those actions will increase the possibility of terror towards the construction site dramatically?

These ideas are far fetched from the normal issues that arise from the requirements of force majeure, but still they will be relevant when terror starts playing a substantial role as an exemption from performance. Furthermore, what if the party on one side of the contract is the American State, e.g. building of an embassy, and the same state declares war on the state they are building in? Can the party then declare that the contract no longer carries rights and obligations, because war has broken out?

As we know from recent events in the world, some states are fighting a war against terror. But who is this war directed against, and what consequences does this create for clauses incorporating similar doctrines? Maybe the war increases the probability of terror so much that a force majeure clause comes into effect. Then the question whether the increase was foreseeable for the party will arise? And could these acts of terror, or the probability of them have been avoided?

Following this chain of thought, it is necessary not to forget the traditional problems that arise in the types of doctrines that can lead to non-performance without liability for damages. One of the questions that must be raised is whether the act of terrorism or as mentioned war (declared or undeclared) would make the parties' performance impossible, illegal, or commercially impracticable?

To answer this one must first consider what an impediment is, as mentioned above, and what requirement the impediment must fulfil according to that specific doctrine or clause. Does it need to be objectively impossible to fulfil the obligations? When it comes to terrorism in general, the act would have to have immediate and direct effect on the fulfilment of the obligations, for the act of terror could be used as a reason for the obligations to be delayed or even termination of the contract without liability. Here again the limitations of the impediment must be decided. Is it when the contractor cannot find anyone to do the work because of the fear of terrorism, that the party should be excused, or will the exemption come into effect at an earlier stage?

If a bomb were to blow up parts of your hotel two days prior to your arrival, and the terrorist act was unforeseeable, there is not much doubt that the contract will most likely be terminated. But what if the bomb only damaged a small part of the hotel, or even the hotel across the street? Performance could then be possible, but do you still want to go, and could you get away with arguing force majeure? Many of the definitions of terror contain the element of creating fear. High probability of further terrorist acts and fear of lives or injury can constitute a sufficient impediment to terminate a contract. An increase in the likelihood of more action occurring can lead to a dramatic change of circumstances concerning the contract. But how can one in international trade say that the fear created is significant enough?

Elements of importance would in this case be that the bomb has gone off in a hotel, and can therefore be seen as directed towards tourists. Let us also say that the government which the terrorist groups are attacking owns part of the hotel chain. These are all elements in the probability of an act of terror taking place again.

If a state grounds all airline operations due to safety concerns, e.g. the likelihood of terrorism, and a party therefore cannot fulfil his obligations the party would in most cases be able to terminate the contract without liability. Nevertheless, one could think of the example where the threat of terror can excuse someone from flying to a certain area, but where they could nevertheless get there in greater safety by other means of transport, e.g. by train. Would the party then be excused, even though the train would lengthen the journey and cause one party to incur greater expenses? Or could even the desire not to go to a particular region be justifiable cause in itself?

What should the courts do if the parties have left terrorism out of their force majeure clause?

As mentioned in part 3.3, interpretation of old, as well as new clauses is creating difficulties today, and will create more difficulties in the future. One of the main concerns for parties in international trade will be to divide the risk of terror in appropriate ways. This should be done by well-drafted clauses, where the parties have taken acts of terror into consideration.

According to Mestad⁴⁵, a force majeure clause must consist of four elements:

- 1) a definition of causes or relevant events;
- 2) a requirement that performance be prevented;
- 3) a requirement of a causal link between the cause and the prevention;
- 4) consequences that the three prerequisites being fulfilled.

When it comes to acts of terror, the first element must answer what terror means in this contract. The second concern is regarding the extent of the prevention. Then, the clause should state what requirements there should be between the act and the impediment. Finally, the clause must mention what the exemption will lead to.

Furthermore, a good clause should stipulate what the meaning of 'foreseeability' is, how the cause and its consequences should be avoided, and the procedural matters the party claiming force majeure should follow. This will be very important due to the fact mentioned in 4.4, that what impact terror will have on the normal requirements is somewhat undecided.

Conclusions

As this paper has explored, acts of terrorism lead to yet another exception to the general contractual principle of 'pacta sunt servanda'. The number of international contracts containing acts of terrorism as grounds for exemption from this principle is increasing.

Many tribunals have already been faced with difficulties determining whether terrorist acts should constitute exemptions from contracts. For many of them the question has been whether the doctrine should be expanded in order to reflect the new risks of the post September 11th world, and therefore include terrorism even when parties have left these types of acts as a triggering event.

Where the line should be drawn in the future, is primarily a question of risk between the parties. International contracts are to a great extent subject to party

45 O Mestad, *Om force majeure og risikofordeling I kontrakt*, Oslo 1991, page 4-5.

autonomy. It is therefore important that tribunals that deal with these issues take great care to ascertain the parties' intentions, and act accordingly. On the other hand, this area has many holes that need filling, and difficulties will arise in the future.

*For contracts that have not been signed, the parties should carefully consider what type of force majeure clause should be put into the contract, and how the risk of terror should be divided between them.*⁴⁶

There is no doubt that the introduction of terrorism into the world of force majeure in international contracts creates many questions. As this paper has endeavoured to explain, the issue raises many more questions than answers at this stage. In most cases, the question of whether an act of terror will result in changes to the rights and obligations of the contract, must be decided in each individual case. In summary, the most important issue to emphasise is that lawyers the world over must try to predict the unpredictable when clauses made to solve these problems in the future are drafted and agreed upon.

46 Davis Jr T., Asaro Jr J., Force Majeure and Addressing Terrorism, *New York Law Journal*, November 13th, 2001

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