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Some Reflections on Force Majeure Clauses in Modern Contracting

Algunas reflexiones sobre las cláusulas de fuerza mayor en la contratación moderna

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Abstract

Force majeure clauses are one of the mechanisms commonly used by the parties in complex and long-term agreements to regulate the effects of supervening circumstances on the obligations of one or both parties. However, there are still issues that have not been sufficiently studied by the doctrine. This paper intends to deal with some of the most relevant ones. In particular, it will analyze the problems related to the faculty of the parties to alter the legal concept of force majeure, the conventional enumeration of events constituting force majeure and, finally, the effects of force majeure on the obligations of the debtor.

Keywords: *Force majeure*; fuerza mayor*; acts of God; long-term agreements; commercial contracting*.

Resumen

Las cláusulas de fuerza mayor son uno de los mecanismos comúnmente utilizados por las partes en contratos complejos y de larga duración, para regular los efectos de circunstancias sobrevinientes sobre las obligaciones de una o ambas partes. A pesar de ello, existen todavía cuestiones que no han sido suficientemente estudiadas por la doctrina. Este trabajo pretende hacerse cargo de algunas de las más relevantes. En particular, se analizarán los problemas relacionados a la facultad de las partes de alterar el concepto legal de fuerza mayor, la enumeración convencional de eventos constitutivos de fuerza mayor y finalmente, los efectos de la misma sobre las obligaciones del deudor.

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I. Introduction

1.1 Changes in circumstances and long-term agreements

The agreement is basically a risk-sharing mechanism that the parties agree upon for the achievement of a practical purpose, usually with economic content. At the time of entering into the agreement, the parties will have evaluated not only the circumstances present at that time, but also those that are likely to exist in the future. Having made this assessment, they will decide whether or not it is in their interest to enter into the contract, i.e. whether the rights (in a broad sense) they acquire are more advantageous than the obligations they assume in exchange.

The problem - obvious - is that the future is uncertain, and the circumstances that the parties projected for the term of the agreement may not arise or may change substantially. The events of the last three years (the pandemic and the war in Ukraine, among others) are dramatic examples in this regard. This problem (the uncertainty of the future) increases proportionally according to the complexity and duration of the contractual relationship. In other words, the further into the future the effects of the agreement extend, the more incomplete and inaccurate the planning that the parties can do. In short, long-term agreements, particularly when they are complex in their binding structure, are particularly prone to changes in circumstances that may alter the forecasts that the parties had in mind when they entered into the contract. [1]

Although this problem could be considered insoluble, there are mechanisms that the parties can resort to in order to anticipate and mitigate the effects of changes in circumstances on the performance of the agreement. One of them is the so-called force majeure clauses, by means of which the parties will distribute the risks of supervening events that make it temporarily or definitively impossible to execute the agreement as stipulated.[2] It is then a question of reconciling two interests in principle opposed: that of the creditor to the performance of the agreement, and that of the debtor, to be exonerated from his obligation in the event of a risk preventing him from performing.

[1] The Unidroit Principles of International Commercial Agreements (IPCA) define a long-term agreement as "an agreement whose performance extends over time and which usually involves, to a greater or lesser extent, a complex transaction and a continuing relationship between the parties". An analysis of this concept in Momberg and Pino (2018). KONARSKI (2003) p. 409.

[2] In this paper the expressions force majeure and acts of God will be used interchangeably. For a comprehensive study of this subject, see Brantt (2010).

1.2. The concept of force majeure clause

Force majeure clauses have usually been defined as those which excuse or relieve a party from liability in the event that events beyond its control prevent it from performing the obligations under the agreement.[3] In general, as explained in detail in the following paragraphs, these clauses are structured on the basis of a definition of what the parties will understand by force majeure, an enumeration (either exemplary or exhaustive) of events constituting force majeure, the effects of force majeure on the obligations of the parties and the procedure necessary for the affected party to invoke force majeure.[4]

However, this definition is incomplete. Indeed, as explained below, force majeure clauses may regulate not only the cases in which the debtor will be relieved of its liability for non-performance upon a supervening event, but also those cases in which the debtor assumes liability for such events. In short, these are clauses that modify the debtor's liability. In the first case, the force majeure clause will serve to mitigate the debtor's liability. In the second case, on the other hand, they are stipulations aggravating the debtor's liability.

Therefore, in a more comprehensive definition, it can be said that force majeure clauses are those by virtue of which the parties exempt or attribute liability to the debtor in case the latter is unable to fulfill its obligations as a consequence of a supervening event, reasonably unforeseeable, beyond its sphere of control and whose consequences it cannot overcome.

1.3. Force majeure clauses: A commonly used clause

The inclusion of force majeure clauses is a widespread practice, especially in agreements with certain economic relevance and in those entered into by sophisticated parties.[5] The wide use of these stipulations has led important organizations to propose standard force majeure clauses, as well as to the fact that they usually become part of contractual models used in some economic sectors.

For example, in Chile, the General Administrative Bases of Codelco, applicable not only to construction and services agreements, but also to supply

[3] Cfr. ICC Force Majeure Clause 2003/ICC Hardship Clause 2003, p. 3, available at http://www.iccbooks.com/Home/force_majeure.aspx

[4] KONARSKI (2003) p. 409.

[5] PAULUS and MEEUWIG (1999).

agreements entered into by the company, include a clause expressly regulating this matter.[6]

In international matters, one of the best-known examples is the Clause de Force majeure of the ICC (*International Chamber of Commerce*), the latest version of which was published in March 2020.[7] According to the Introductory Note to the Clause, "The purpose of the ICC Force Majeure and Hardship Clauses is precisely to provide traders with balanced and effective standard clauses to be included in international commercial contracts or to be used as a basis for drafting tailor-made clauses." To this end, following a structure common to this type of stipulations, the clause contains a general definition of force majeure and its requirements; a list of cases or events that presumably constitute force majeure; and a regulation on the effects of force majeure, the main ones being the exemption of liability for the defaulting debtor and the possibility of terminating the agreement in certain hypotheses.

There are other notable examples, in specific industries or economic sectors. Thus, the Baltic and International Maritime Council (BIMCO), an independent international shipping association representing about 70% of the world's merchant fleet, has also recently published a model force majeure clause.[8] Likewise, the Guidance on PPP Contractual Provisions, developed under the support of the World Bank and the Public-private Infrastructure Advisory Facility (PPIAF), which is intended as a guide for the drafting of Public-Private Partnership agreements, also contains among its model clauses one of force majeure. [9] Another relevant example is the FIDIC agreements, one of the most widely used contractual models in the construction industry and projects, which have incorporated de force majeure clauses in their various versions.[10]

However, despite the fact that force majeure clauses are a widespread practice in domestic and international contracting, certain conceptual and practical problems or inconsistencies persist in them. The purpose of this paper is to expose and analyze the main ones, proposing alternative solutions for them, in order to conciliate in the best way the interests referred to above. For this purpose, starting from the usual structure adopted by these clauses (Section II), first of all, the problems related to the contractual definition of force majeure are analyzed (2.1),

[6] https://www.codelco.com/prontus_codelco/site/docs/20140507/20140507174458/bag_codelco_r4_nov2020.pdf

[7] https://iccwbo.org/publication/icc-force-majeure-and-hardship-clauses/

[8] https://www.bimco.org/contracts-and-clauses/bimco-clauses/current/force-majeure-clause-2022

[9] https://ppp.worldbank.org/public-private-partnership/library/guidance-ppp-contractual-provisions-2019

[10] https://fidic.org/bookshop

followed by the issues related to introducing a list of events contractually considered as force majeure (2.2), to continue with the clauses that exclude force majeure as an excuse for the debtor (2.3), and then to close this section with the conventional regulation of the effects of force majeure. Section III addresses two additional issues: the procedure to be followed by the parties to determine whether or not an event is force majeure (3.1), and the problem of the distribution of the risks of the other costs arising from force majeure (3.2). The paper ends with some conclusions (Section IV).

II. The Structure of Force Majeure Clauses

While it is clear that freedom of contract provides infinite alternatives to the parties, in general, force majeure clauses are usually structured as follows. First, a definition of what the parties understand by force majeure is provided. Next, it is customary to provide a list of events that are or are not considered force majeure cases. Finally, the effects that force majeure will have on the obligations of the affected party and on the agreement are stipulated. Each of these is discussed below.

2.1 Contractual definition of force majeure

As mentioned above, in principle, freedom of contract gives the parties the autonomy to shape the regulation of force majeure as they consider most convenient. On this, it was also mentioned, there is agreement in doctrine and case law.

Therefore, it is usual that the parties, when regulating the force majeure, start by defining what they will understand as such. But a question arises here that, to the best of the author's knowledge, has not been analyzed: if there is a legal definition of force majeure, is it possible for the parties to alter this definition? In other words, can the definition of force majeure be considered as a rule of public order?

It is not unusual for a Civil Code to define force majeure. Thus, for example, the Chilean Civil Code defines it in Article 45, a provision that is also found in the Preliminary Title of said Code, which gives it a general application beyond the contractual law.[11] The Argentine Civil and Commercial Code defines it in article

[11] Article 45: An unforeseen event that cannot be resisted, such as a shipwreck, an earthquake, the capture of enemies, acts of authority exercised by a public official, etc., is called force majeure or acts of God. A study of the historical background of this rule can be found at De Nardi (2019).

1730,[12] the Brazilian Civil Code in article 393,[13] the French Civil Code in article 1218,[14] and the Spanish Civil Code in article 1105.[15]

The problem referred to will arise in the event that the parties alter the legal definition, in the sense of modifying its conditions of proceeding.[16] For example, by indicating that the event must not only be unforeseeable, but also "extraordinary", a qualification that implies restricting the events that the debtor could argue as being force majeure. On the contrary, the parties could exclude some of such conditions, for example, foreseeability, it being sufficient that the event is supervening, thus lowering the requirements for the affected debtor, broadening the range of events that could be alleged as force majeure.

Since the general rule in contractual law is that the parties can decide whether or not to establish the legal rules, in principle it could be assumed that there is no impediment for the parties to set up their own definition of force majeure. Moreover, the rules governing the subject matter themselves usually allow for their modification upon stipulation by the parties.[17] On the basis of these ideas,

[12] Article 1730: Acts of God. Force majeure. An act of God or force majeure is an event which could not have been foreseen or which, having been foreseen, could not have been avoided. The acts of God or force majeure exempts from liability, except as otherwise provided. This Code uses the terms "acts of God" and "force majeure" as synonyms.

[13] Article 393: *O devedor não responde pelos prejuízos resultantes de acts of God ou força maior, se expressamente não se houver por eles responsabilizado.*

Parágrafo único - O acts of God ou de força maior verifica-se no fato necessário, cujos efeitos não era possível evitar ou impedir.

[14] Article 1218: *Il y a force majeure en matière contractuelle lorsqu'un événement échappant au contrôle du débiteur, qui ne pouvait être raisonnablement prévu lors de la conclusion du contrat et dont les effets ne peuvent être évités par des mesures appropriées, empêche l'exécution de son obligation par le débiteur.*

Si l'empêchement est temporaire, l'exécution de l'obligation est suspendue à moins que le retard qui en résulterait ne justifie la résolution du contrat. Si l'empêchement est définitif, le contrat est résolu de plein droit et les parties sont libérées de leurs obligations dans les conditions prévues aux articles 1351 et 1351-1.

[15] Article 1105: Apart from the cases expressly mentioned in the law, and those in which the obligation so declares, no one shall be liable for those events which could not have been foreseen, or which, if foreseen, were unavoidable.

[16] Obviously, this will have to be evaluated in relation to the law governing the respective agreement.

[17] For example, articles 1547 and 1673 of the Chilean Civil Code, 1733 letter a of the Argentine Civil and Commercial Code, 393 of the Brazilian Civil Code and 1105 of the Spanish Civil Code.

the majority of the doctrine considers that the freedom of the parties in this matter is practically absolute.[18]

However, the question admits certain precautions. It is undisputed that the parties may regulate the *effects* of force majeure or acts of God, in the sense of modifying the default distribution of legal risks, by allocating the risk of events constituting force majeure to a party that by default should not bear them. They may also regulate the effects of force majeure on the agreement (e.g., its suspension or termination), as well as other related matters (mitigation of damages, mutual restitution, etc.).

But it is a different matter whether the contracting parties are entitled to alter the legal notion of force majeure. If one carefully reads the rules that allow the parties to alter the legal rules on the subject, it will be observed that they refer to the effects of force majeure, and especially to who bears the risk of its occurrence. But this is quite different from accepting that the parties modify what the legal system has defined as force majeure or acts of God. The notion of force majeure that the legislator has provided reflects fundamental questions about the tort system. In particular, in the case of contractual law, it makes it possible to determine when and under what conditions a supervening event will produce legal effects on an agreement, and especially regarding the debtor's liability. In this matter, a legislator may be more flexible than others, as is the case with the Argentine Civil and Commercial Code, which admits in its definition events that could have been foreseen by the parties, unlike the definitions provided by other civil codes, such as the Chilean or the French, where unforeseeability is a prerequisite for force majeure.

In Chile, although the issue has not been discussed in doctrine, the Supreme Court has ruled that a clause that gives one of the parties (the creditor) the power to declare unilaterally which events constitute acts of God or force majeure with respect to the debtor, contravenes good faith as understood in art. 1546, the Court considering that such declaration cannot be arbitrary or *contrary to the legal rules defining the acts of God or force majeure* (emphasis is ours).[19] The ruling implies that although the parties may contractually regulate the force majeure, this regulation

[18] Thus, in Chile, ABELIUK (2003), T.2, p. 750; CÁRDENAS and REVECO (2018), p.176, who, referring to the clause of acts of God, point out that "Its validity is indisputable, according to the final paragraph of article 1547 CC Ch (Civil Code of Chile), which expressly authorizes the parties to regulate the acts of God, by means of a convention that modifies the regime of supplementary contractual civil liability applicable to the legal relationship. The same predicament is derived from article 1673 CC Ch.". In France, commenting on the aforementioned article 1218, the doctrine has indicated that "according to a constant case law, both the notion and the effects of force majeure can be the subject of conventional provisions", DESHAYES, GENICON and LAITHIER (2016), p. 479.

[19] Decision of January 29, 2002, Rol 4804-2000.

cannot alter the concept that the legislator gives of such institution, and must therefore adjust to the minimum conditions that it establishes.[20]

2.2 List or enumeration of events

It is also common for the force majeure clause not only to define what is to be understood as such, but also to contain a list or enumeration of events that the parties understand as constituting it (or not) for the particular agreement. This list may be of an exhaustive or exemplary nature. Likewise, the events may be described generically (e.g., "workers' strikes") or with greater specificity (e.g., "national or regional strike in country XXXX, to which at least XX percentage of the construction workers adhere").

A first observation should be made with respect to clauses that include a list of events constituting force majeure. Strictly speaking, these are not unforeseeable events, since they are expressly described in advance by the parties, but whose *occurrence* is uncertain, and which the contracting parties believe will (if they occur) have the effect of preventing, definitively or temporarily, the performance of the obligations of one or both parties.

Secondly, it might be thought in principle that specifying precisely and exhaustively the events likely to make the clause applicable is the best way of safeguarding the stability of the agreement and avoiding disputes as to its applicability or non-applicability. However, this technique may have the disadvantage of leading to a restrictive interpretation of the force majeure events affecting the agreement, in the sense that even if an event occurs that satisfies the legal or contractual definition of force majeure, it cannot be considered as such because it is not included in the exhaustive list.

Due to the above, it seems better to establish an open list for the application of the clause, especially in the case of long-term agreements, where it is impossible for the parties to anticipate each and every event or situation that may hypothetically affect the agreement. This does not prevent the parties from including, in addition, specific events in which they consider that the clause must necessarily apply, so as to avoid discussions on its applicability to those particular cases.

Thirdly, there is a fundamental question that has been little dealt with in doctrine: must the events designated as constituting force majeure also comply with the requirements established in the legal or contractual definition for an event to be considered as such? Or is it sufficient that they are included in the list for them

[20] In Chile, according to the majority doctrine, it must be an external, unforeseeable and irresistible event for the debtor affected. For a detailed analysis of these requirements, see BRANTT (2010).

to be considered, without further ado, "force majeure events"? Thus, it is usual to include "civil war" among force majeure events, but can a civil war that was easily foreseeable due to the political situation of the country be considered as such? The sensible answer seems to be no, and the tests of foreseeability and irresistibility must then be applied to determine whether, in the specific case, a civil war can be considered as an act of God event. In this way, for example, the Guidance on PPP Contractual Provisions on Public-Private Partnership Agreements expressly establishes that, when listing force majeure events, it clarifies that they must also comply with the general requirements that the same agreement has established when defining force majeure.[21]

Are these lists useless then? No, they are not, for two reasons. First, because the events included can be considered as presumptively constituting a force majeure. This is provided, for example, by the ICC Clause, which establishes in its Number 3 "Presumptive Cases of Force majeure", stating that "Unless proved otherwise, the following events affecting a party shall be presumed to satisfy conditions (a) and (b) of paragraph 1 of this Clause, and the Affected Party need only to prove that condition (c) of paragraph 1 is satisfied". The official explanatory note to the Clause states that "Presumptive Force majeure Cases generally meet the requirements of Force majeure. Therefore, it is presumed that if one or more of these events occur, the conditions of Force majeure are met and the Affected Party need not prove conditions (a) and (b) of paragraph 1 of this Clause (i.e., that the event was beyond its control and was unforeseeable), shifting to the other party the burden of proof to the contrary. The party invoking Force majeure must in any event prove that condition (c) is met, i.e. that the effects of the impediment could not reasonably have been avoided or overcome."[22]

Second, because if it is an event that has been described or determined in a sufficiently specific manner, it could indeed be considered as a force majeure event with no recourse to the foreseeability and irresistibility test. For example, if it is an event described simply as "*roadblocks*", it must be demonstrated by the debtor that, in the particular case, it was unforeseeable, and that it is not possible to avoid or overcome its effects on the obligation owed. But on the other hand, if the circumstance detailed in the agreement is "the blockage of route XXX for more than YYYY days", it may well be considered that it is a specific risk that the parties negotiated, from which they intend to exempt the debtor, without further consideration as to whether or not it constitutes an act of God.

For these reasons, it is convenient that the parties, especially the debtor, pay attention to the way in which are described and specified the events that they intend

[21] The headline of the Clause (2) provides that "Force Majeure Events include but are not limited to the following circumstances, provided that they meet the criteria set forth in Clause (1) above". MOMBERG (2010), p. 54.

[22] Available at https://iccwbo.org/publication/icc-force-majeure-and-hardship-clauses/

to constitute hypothesis of acts of God or force majeure, so that they can be effectively considered as such in case they occur, avoiding possible disputes in this respect.

2.3 The exclusion of force majeure as an excuse for the debtor

As explained, considering the precautions concerning the conventional modification of the notion of force majeure, there is no controversy in doctrine and case law that the legal rules governing the acts of God are disposable for the parties.

It is therefore perfectly licit for the contracting parties not only to provide for the cases to be considered as force majeure, but also to expressly exclude certain events as such. In this hypothesis, what happens is that the debtor assumes the risks of the occurrence of force majeure, and therefore must perform even if such circumstances materialize, and could be considered legally (in the abstract) as a case of force majeure.

This is a clause that aggravates the debtor's liability, since it not only anticipates future and uncertain events and, therefore, transforms them into foreseeable events, but also imposes on the debtor the duty to "resist" their occurrence, i.e. to perform even if the events occur. In other words, despite the force majeure affecting his obligations, the debtor must perform (which he will certainly not be able to do exactly because the force majeure materially prevents him from doing so), and if he does not do so, he will be liable for the non-performance, and must compensate the damages arising therefrom.

Another question arises here that has been little explored in doctrine: how effective or valid is a clause of general liability for the force majeure's risks? In principle, if the autonomy of the will prevails in this matter, it could be considered that there is no problem with a clause making the debtor liable for "all acts of God or force majeure". In this hypothesis, the debtor could not be exempted from liability under any event that could theoretically or legally be considered a force majeure.

However, this type of clause is problematic. A general acceptance of the risk of the acts of God or force majeure implies an absolute waiver by the debtor of the possibility of exempting itself from liability in case of unforeseeable and unforeseeable events.

As has been stated for cases of unforeseeability, "this is tantamount to saying that [the parties] assume the risks (and therefore the liability) arising from any foreseeable or unforeseeable event affecting the performance. But how could they assume the risk of an unforeseeable event if, by definition, they must have represented it to them? If a risk is assumed, or what is the same, if the effects that a certain event will have on the performance of the obligation are waived, this

necessarily implies the representation of that risk by the party that assumes (or waives) it."[23]

This reasoning leads to the fact that despite the general or absolute assumption of the force majeure, the affected party can always argue that a given event could not be foreseen by the contracting parties, "since the parties, by logical consequence (something whose existence is unknown cannot be waived) could not have included them in their waiver or assumption of risks", ultimately making such a clause ineffective.[24]

There are additional reasons for considering a clause of general assumption of force majeure as ineffective or void. To this effect, it has been held that the general and absolute exclusion of the acts of God as a ground for the debtor's exemption from liability would be void because it is opposed to the principle of good faith which must govern throughout the contractual term.[25]

This seems especially true when only one of the parties assumes the entire risk of force majeure. In this sense, it is appropriate to hold that these clauses cannot be manifestly unreasonable, according to the parameters of good faith, which must prevail in the interpretation of the clause and of the agreement in general, within the context in which it was executed.[26] This would be a distribution of risks that essentially alters the bilateral nature of the agreement, making one of the parties absolutely and irremediably responsible for the breach, leaving it in an unreasonably inferior position in relation to the other.[27]

Addressing this problem, the revised version of the Principles of European Contract Law, proposed by the *Association Henri Capitant des Amis de la Culture Juridique* and the Société de Législation Comparée, expressly includes a rule limiting the freedom of the parties regarding the risk-sharing clauses, so as to avoid an unreasonable imbalance in the distribution of the risks of the agreement. Article 7:102 of that proposal provides that "a clause which places the greater party of the risks of a change of circumstances on one of the parties is valid only when it does not entail unreasonable consequences for that party."[28]

Notwithstanding the arguments just raised to reject the effectiveness of a general and absolute clause of assumption of risks, in Chilean law there is a rule that must be considered, since it seems to support the opposite solution. This is

[23] MOMBERG (2010), p. 54.

[24] MOMBERG, ibid., citing Mosset ITURRASPE Jorge.

[25] KESSEDJIAN (2005), p. 426, referring to the French case.

[26] DECLERCQ (1995-1996), p. 231.

[27] Similar reasoning has been put forward to establish the limits to resolutory clauses. To this effect, see MEJÍAS (2018), pp. 47-49.

[28] See FAUVARQUE-COSSON, and MAZEAUD (2008).

Article 1673 of the Civil Code, which provides that "If the debtor has constituted himself liable for all acts of God, or for any one in particular, what has been agreed shall be observed." Based on this rule, and on the provisions of article 1547 of the same Code, it has traditionally been said that the assumption of the acts of God is a perfectly lawful clause that aggravates the debtor's liability.[29]

In this respect, it is certain that, as has been held, "a careful analysis of the main text (art. 1673 of the Civil Code) used to support the lawfulness of the debtor's assumption of the acts of God leads to the conclusion that the legislator wished to restrict such an assumption to a particular case of extinction of the obligations to give, which is the loss of the thing owed. There is no general rule in the Code that allows the debtor to become liable for all acts of God, [...] Thus, even if the waiver of the acts of God (or its assumption) is considered appropriate, it would only have absolute value in cases of loss of a *corpus certum* that is owed; but it cannot be extended to other types of performance."[30]

To these arguments can be added that article 1673 is simply the counterpart of the rule established in article 1550, also applicable to obligations to give a *corpus certum* which places the risk of the acts of God in charge of the creditor. The rule established by this last rule has been widely criticized by the doctrine, since neither is it fair, nor does it fit in with the system of transfer of ownership of the Chilean Civil Code.[31] For this reason, it seems reasonable that the legislator has allowed the parties to expressly derogate it, putting the debtor in charge of the risk of the acts of God if so stipulated. But the scope of application of both rules must remain limited - as their text indicates - to the obligations to give a *corpus certum,* without transforming them into rules of general application.

2.4 The effects of force majeure

In the usual structure of force majeure clauses, an important section is usually devoted to regulating the effects that a force majeure event will have on the obligations of the parties and on the agreement.

It should be recalled that the understanding of the effects of force majeure has evolved. Traditionally the essential effect of the acts of God was the extinction of the obligation due to impossibility of performance, which in turn implied that

[29] ABELIUK (2003), p. 750.

[30] MOMBERG (2010), p. 55-56.

[31] For all, see LÓPEZ SANTA MARÍA and ELORRIAGA (2017), pp. 646 et seq.

the debtor was released or exonerated from liability for the non-performance of the obligation.[32]

However, this position is currently considered incorrect. Indeed, it is nowadays agreed that the main effect of force majeure is the exoneration of the party concerned from liability, which means that such party will not be liable for the damages caused by its non-performance. The extinction of the obligation will only take place exceptionally, when the force majeure results in the supervening impossibility of performance, which will depend on the nature of the latter.[33]

Force majeure clauses in contemporary contracting follow the modern notion of the effects of force majeure. Indeed, it is usually agreed that in the event of force majeure, the debtor's obligation is not extinguished, but its enforceability ceases, and therefore the debtor incurs no liability for non-performance, as long as the effects of force majeure are maintained. This implies that, in other words, such non-performance is justified by the acts of God and, therefore, the debtor shall not be liable for the damages that the creditor may suffer as a consequence of such non-performance.

Apart from this general effect, it is convenient for the parties to address some other issues.

1) The status of the obligations of the party not affected by the force majeure. Silence in this matter may have undesirable or unfair effects, if the legal rule of risk distribution is deficient, as in the Chilean case with Article 1550 of the Civil Code.[34] It is therefore advisable to establish what happens with the consideration, for example, by agreeing that it will also be suspended while the force majeure lasts, or that it will be adjusted to respond to the new circumstances.

2) Other effects on the debtor's obligations. For example, considering that the main effect of the force majeure is to suspend the performance of the affected obligation, in a construction agreement, it could result in a justified delay for the Contractor, which in turn may lead to extend the deadline to perform the works. If applicable, the clause should therefore be consistent with those regulating time extensions and their conditions.

[32] This is related to the conception that requires that the irresistibility of the force majeure must entail the absolute and definitive impossibility of performance. By way of example, this idea is put forward by ALESSANDRI, SOMARRIVA and VODANOVIC (2001), p. 282; and ABELIUK (2003), pp. 534- 535.

[33] BRANTT (2010); DE LA MAZA and VIDAL (2020); and TAPIA (2020).

[34] By virtue of this rule, in the case of an obligation to give a *corpus certum*, the obligation of the debtor is extinguished by an act of God, but the creditor remains obligated. That is to say, the creditor must fulfill his own obligation even though he will receive nothing in return.

3) Since the effect of the force majeure is to exonerate the debtor from liability, by continuing to be bound, the debtor must take all measures to overcome or at least mitigate the effects of the force majeure on the obligation affected. The force majeure clause should not only establish this duty expressly, but also specify its extent and limits, which will give certainty to both parties as to its scope. For example, duties of cooperation for the creditor and duties of information for the debtor may be established, tending to overcome and mitigate the acts of God.

4) Recognizing the exonerating effect of the force majeure as its main consequence also entails admitting that it may have only a partial effect on the performance of the obligation. In this case, the clause should establish that the exoneration will also be partial, and the creditor will therefore be able to demand that party that can still be executed by the debtor.

5) In the case of complex agreements, the force majeure could affect one or more obligations of the agreement, while keeping others in force and enforceable. This should also be regulated by the clause.[35]

6) If the force majeure has had only temporary effects, once it has ceased, i.e. once its consequences are no longer irresistible, the non-performance is no longer excusable. It is usual that for this situation, duties of notification of such circumstance are set forth by the debtor, in order to grant certainty to the creditor of the state of performance of the agreement. Furthermore, once the force majeure ceases, if the debtor does not resume performance within a reasonable period of time, the creditor has the right to request specific performance and indemnification for damages arising therefrom.[36]

7) In relation to the termination of the agreement, it should be recalled that, as has been said, despite the force majeure, the debtor's obligation subsists, but the creditor may not request the specific performance, which is suspended as long as the obligation is affected by the acts of God, nor claim damages for the period during which the impediment lasted (since the debtor is exempted from liability). However, its right to resort to the other remedies for non-performance, such as, for example, the termination of the agreement, is maintained. It is therefore necessary for the clause to address the conditions under which the agreement may be terminated (for example, if the force majeure substantially deprives one or both parties of the practical purpose they intended to achieve with the agreement, or if it extends over a long period of time), as well as the

[35] In the same vein, CÁRDENAS and REVECO (2018), p. 181.

[36] DE LA MAZA and VIDAL (2020), p. 116.

effects thereof (its date, mutual restitutions, status of outstanding or partially performed obligations, etc.), which should be consistent with other cases of termination provided for in the agreement.

III. Two Final Questions. The Procedure and other Additional Costs

Finally, there are two issues to consider. One is the consequences of not following the procedure established by the parties for force majeure. The other concerns the costs, other than mitigation measures, that may arise for the affected party as a consequence of the force majeure.

3.1. The procedure

It is usual for these clauses to provide for a more or less detailed procedure to establish whether or not an event constitutes force majeure. Generally, this procedure contemplates, at least, the burden on the party concerned to report within a certain (short) period of time the occurrence of the event and its consequences on the performance, and to provide all the information necessary to enable the creditor to assess whether or not it is indeed an event that may be regarded as force majeure under the agreement.[37]

At this point, the problem arises of determining what are the consequences of the lack of timely notice of the event supposedly constituting force majeure. Sometimes, the clause itself provides for this. Thus, it is usual to provide for the loss of the affected party's right to plead force majeure, or at least its liability for non-performance until such notice is given.

What happens if the agreement does not provide for failure to give timely notice? It does not seem reasonable that this would be innocuous, nor - failing such a stipulation - that the sanction would be the loss of the right to plead force majeure. A reasonable alternative, which could be understood as the one to be applied in the absence of a contractual stipulation, is provided by Article 79, paragraph 4 of the CISG: "The party which has not performed its obligations shall notify the other party of the impediment and its effects on its ability to perform them. If the other party does not receive such notice within a reasonable time after the non-performing party knew or ought to have known of the impediment, the latter party shall be liable for damages caused by such non-receipt".

[37] It has been suggested that this duty of information would also arise even without contractual stipulation, as an application of the principle of good faith and its derivative, the duty of cooperation. To this effect, see Comment E to art. III.- 3:104 of the *Draft Common Frame of Reference*.

In other words, the debtor affected by the force majeure, shall be liable for the damages that the creditor has suffered up to the date on which the notice is actually given, provided that they can be causally linked to the lack of timely notice. It will then be a question of those costs that the creditor could have avoided, had it had timely notice of the non-performance (justified by the force majeure).[38]

3.2 The risk of other costs arising from force majeure

As explained, the modern understanding is that force majeure exempts the debtor from liability, who nevertheless remains bound. Therefore, by continuing to be bound, the debtor must perform all measures tending to overcome or mitigate the effects of the force majeure on the obligation affected, according to the diligence required of it and the terms of the agreement. As also said, most clauses expressly contain this duty.

But what about other costs that force majeure may generate for the parties? To resolve this question, it must be remembered that none of the parties is liable for force majeure. It is an event outside the contracting parties' control, since otherwise it simply could not be qualified as an act of God and would certainly constitute a hypothesis of imputable non-performance.

Thus, unless the clause regulates it differently, each party must assume the costs and risks caused by the force majeure. The creditor may not demand performance or damages and must therefore bear the negative pecuniary consequences of the debtor's non-imputable non-performance.

On the other hand, the affected debtor, although it may be excused from performance while the force majeure lasts, without incurring liability, must assume the costs and expenses associated with the affected obligation which are at its own expense, without being able to demand anything from the counterparty for such concepts.[39] This may be particularly burdensome in certain situations, for example, in construction agreements, where despite the force majeure, significant costs may still be incurred by the contractor, such as overhead and financial costs. If the agreement is silent on the matter, such costs will be borne by the contractor, so that a different allocation of risks should be the subject of a special stipulation.

[38] PICHONNAZ (2015), paragraph 42, who calls them "trust expenses".

[39] In Chilean law, with the exception of the provisions of Article 1550 of the Civil Code, which, as explained above, places on the creditor the risk of the acts of God in the obligations to give a *corpus certum*. It is in any case - as already stated - a dispositive rule for the parties.

IV. Conclusions

Although it is common and lawful for the parties to include clauses de force majeure in the agreement, the analysis carried out in this paper shows that such clauses may present certain problems or inconsistencies, which must be properly addressed in order to avoid conflicts when applying or interpreting them.

Thus, in the first place, it should be borne in mind that freedom of contract in this area is not exempt from the limits that are usually imposed on it, particularly in relation to the rules of public order and the principle of good faith. Thus, it is debatable whether the parties can alter the legal definition of force majeure or acts of God, and also whether they can assign all the risks of the acts of God to only one of them (usually the debtor). In this respect, a complete and absolute transfer of the risk of the acts of God to only one of the parties could finally imply the ineffectiveness of the stipulation.

Secondly, as has been explained in this paper, an adequate distribution of risks, which is useful for the fulfillment of the practical purpose that the parties intend to achieve with the agreement,[40] requires that they pay special attention to the drafting of these clauses, specifying, for example, the fate of the obligations not affected by the force majeure, the measures for mitigating and overcoming the supervening event, the distribution of the other costs caused by the force majeure, and the effects of breaches of the contractual procedure established to determine whether or not an event constitutes force majeure, in particular, the debtor's failure to give timely notice.

[40] Practical purpose being understood as "the result pursued by the parties" or "the interest of each contracting party according to the agreement", as defined in the following definition of Morales (2014), p. 82.

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