UNIVERSITY OF PUERTO RICO BUSINESS LAW JOURNAL

VOLUME XVI
NUMBER 1
2025

VOLUME XVI **2025** **No.1**

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FACTORING IN THE HAND OF GOD: DEVELOPING STANDARD FORCE MAJEURE CLAUSES FOR TRANSNATIONAL BUSINESS

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I. INTRODUCTION

The global nature of modern business has meant that goods once thought exotic are now within the reach of consumers the world away. Great shipping lanes have been stretched across the seas to connect manufacturers, distributors and sellers. Along with this vast network, hubs have been built in strategic locations to manage the task of mobilizing the trillions of dollars in goods traded. Yet, despite all the logistics and planning involved to ensure the optimization of the global supply chain, transnational business is not out of the reach of the hand of God.

Transnational business is no stranger to difficulties. Certainly, the complexity of global commerce itself makes the system prone to issues. Over time, international mechanisms have been recognized and established to answer the man-made problems it may face. Piracy, for instance, has been addressed through

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its recognition as a universal crime, and incorporated within the body of international *ius cogens*.[1] Unforeseen problems, however, have been treated in a less standardized manner. The effects of the recent COVID-19 pandemic, as well as the outbreak of multiple wars in some of the most significant areas of global commerce, have provided the circumstances by which a uniform system to treat the "hand of God" could be developed through the standardization of *force majeure* clauses for transnational business transactions.

In this essay, I shall describe the nature of *force majeure* clauses and the differences these may have across legal systems. I will then discuss the various models proposed by three key transnational organizations, comparing their reach and focus, to then apply to the material. Such a discussion will demonstrate the ways in which transnational actors –mainly business-related entities– are coping with the unforeseen and unforeseeable and thus factoring in the hand of God.

II. AN OVERVIEW OF *FORCE MAJEURE* CLAUSES

Force Majeure clauses are the contractual terms which would relieve one or both parties in a contract from liability if an extraordinary circumstance prevents either or both from performing.[2] These clauses, thus, serve the purpose of relieving responsibility of parties who, under extenuating circumstances outside of their control, cannot fulfill their obligations and would rather not risk the narrower interpretations certain jurisdictions may impose on when fulfillment is required.

The compilation of circumstances that may be interpreted as constituting a *force majeure* event may vary from jurisdiction to jurisdiction. Yet, generally, these will include those natural phenomena which have come to be understood as "acts of God."[3] In particular, "acts of God" cannot be attributed to human intervention, and thus, are outside the responsibility of any of the parties involved. Natural disasters such as hurricanes, earthquakes, wildfires, and major weather disturbances have long been considered "acts of God"

[1] The impact of piracy on modern shipping and transnational business and the great lengths to which international organizations and states have gone to curtail its effect on the global economy is the subject for a separate paper. Moreover, piracy has long been and universally understood to be illegal, and the systems by which it is regulated would fall outside the scope of this paper and, as we shall see later, the discussion of *force majeure.*

[2] Cornell Law School Legal Information Institute, *Force majeure,* WEX (2021), https://www.law.cornell.edu/wex/force_majeure.

[3] *Id*.

that fall under *force majeure* provisions.[4] Pandemics and war, as well as acts of terrorism, have all been incorporated into certain interpretations of *force majeure* clauses in contracts.[5]

While the general principle of *force majeure* clauses – the relief from contractual responsibility from an act outside of a party's control – is generally accepted, the way in which jurisdictions operating through different legal systems have interpreted and applied the principle varies. In Civil law systems, *force majeure* protections are available for parties bound by contract through provisions in the civil code. Puerto Rico's Civil Code, adopted in 2020, includes a *force majeure* provision covering obligations generally. Styled as "fortuitous cause", article 1166 of the Civil Code reads: "No one shall be liable for events which could not be foreseen, or which, having been foreseen, were inevitable, with the exception of the cases expressly mentioned in the law or those which the obligation so declares."[6] Note that this definition of *force majeure* is open to interpretation as to which events can be included within those two categories – unforeseeable or inevitable – as well as allowing for parties to establish *force majeure* regimes within their contracts. Another case is that of French law, which reserves the classification as *force majeure* to events that are "unforeseeable, unavoidable and external that makes execution impossible."[7]

Common law has developed its own doctrines related to *force majeure*. Absent contractual dispositions and definitions of *force majeure*, the doctrine of impracticability would serve to assess whether or not either party is exempted from responsibility arising from an obligation. The impracticability doctrine maintains that parties would be excused from liability in the event of an unforeseen circumstance which would render performance impractical.[8] While the doctrine could be easily applied to non-performance of contractual obligations that are the direct result of "acts of God", it may be harder for these to apply to governmental action or events caused by human hands.[9]

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[4] Janice M. Ryan, *Understanding Force Majeure Clauses,* VENABLE LLP (February 2011), https://www.venable.com/insights/publications/2011/02/understanding-force-majeure-clauses.
[5] *Id*.
[6] COD. CIV. PR art. 1166, 31 LPRA §9318 (2020). (Translation supplied).
[7] Victoria Rigby Delmon, *Force Majeure Clauses – Checklist and Sample Wording,* WORLD BANK GROUP, at 1, (April, 2008), https://ppp.worldbank.org/public-private-partnership/sites/ppp.worldbank.org/files/documents/Forcemajeurechecklist.pdf.
[8] Patrick Taylor, Brandon Krajewski and Hannah Schwarts, *Supply Chain Survival Series: Impracticability, Impossibility and Frustration of* Purpose, QUARLES (June 21, 2023), https://www.quarles.com/newsroom/publications/supply-chain-survival-series-impracticability-impossibility-and-frustration-of-purpose-article-10#:~:text=The%20doctrine%20of%20impracticability%20may,forth%20the%20doctrine%20of%20impracticality.
[9] Janice M. Ryan, Understanding Force Majeure Clauses, VENABLE LLP (February 2011), https://www.venable.com/insights/publications/2011/02/understanding-force-majeure-clauses.

In these jurisdictions, even when *force majeure* clauses are included in contracts, they are interpreted *strictu sensu*. This narrow interpretation, such as is the case in New York, limits the excuse of liability that the clause provides to the events listed or similar circumstances.[10] For instance, the federal district court for the Southern District of New York interpreted the COVID-19 pandemic, and the interruptions to business which were imposed during the emergency, as being covered by *force majeure* clauses which stated 'natural disasters' as one of the circumstances for excuse.[11] Arising from the same pandemic circumstances, the district court for the Northern District of Illinois ruled that *force majeure* clauses would excuse nonperformance if that nonperformance was directly and proximately attributable to the *force majeure* event.[12] Therefore, contracting parties must be aware of the interpretations that differing jurisdictions have made concerning the extent to which *force majeure* clauses are interpreted once placed in contracts – especially when contracting parties are based in states that offer different, but specific notions of what may be an excusing event.

Thus, given the various ways in which the notion of obligational excuse arising from unforeseen and unforeseeable events can be interpreted, international organizations have begun to create principles and standards to address *force majeure* circumstances in international transactions. There are three principal frameworks which provide general guidance for the creation and interpretation of *force majeure* clauses for international transactions.

III. *FORCE MAJEURE* CLAUSES UNDER INTERNATIONAL LAW

The first of these instruments regard the development of international law in this sphere.[13] The United Nations Commission on International Trade Law (UNCITRAL) promoted the drafting of the United Nations Convention on Contracts for the International Sale of Goods (CISG), which was adopted in 1980.[14]

[10] Cornell Law School Legal Information Institute, *Force majeure*, WEX (2021), https://www.law.cornell.edu/wex/force_majeure.
[11] *JN Contemporary Art LLC v. Phillips Auctioneers LLC*, 472 F. Supp. 3d 88 (S.D.N.Y. 2020).
[12] *Rudolph v. United Airlines Holdings*, 519 F. Supp. 3d 438 (N.D. Ill. 2021).
[13] While the aim of the course for which this essay was written has always been transnational, rather than international law; this provides a first approach to international attempts to harmonize the circumstances under which events could constitute a *force majeure* event.
[14] Ulrich G. Schroeter, *CISG*-Online, FACULTY OF LAW – UNIVERSITY OF BASEL (2024), https://cisg-online.org/home.

With the purpose of creating uniform, "gap filling" rules for international partners, the application of the CISG would apply automatically to the contracting parties from the member states which ratified the agreement.[15] It is important to note, however, that the CISG respects the ability of parties to not only specify the terms and law they wish to apply to their contracts, but also to exclude it altogether.

Article 79 of the CISG establishes a uniform *force majeure* clause to be applied for the international sale of goods. It establishes that:

> *(1) A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.*[16]

The CISG's *force majeure* provision establishes two requirements for excuse from liability for failure to perform: (1) that the failure to perform was due to an impediment beyond the control of the party; and (2) that the impediment or its consequences were unforeseen or unavoidable at the time of concluding the contract. This provision certainly seems to align with the general principles of *force majeure* discussed above, yet it could be interpreted quite restrictively for any of the contracting parties.

Moreover, while Article 79 of the CISG outlines these requirements, this does not mean that they have been greatly expanded to harmonize what they may point towards. In fact, the CISG's Advisory Council published an opinion asserting that the available judicial decisions have not focused on the criteria to meet the requirements of externality (that the event was not within the control of the party seeking the excuse) and have likewise failed to discuss the requirements that the impediment could not be taken into account at the time the contract was concluded.[17] This lack of definition of language that was purposely flexible and vague at the time of ratification has meant that CISG's *force majeure* clause has yet to be a harmonizing

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[15] *The U.N. Convention on Contracts for the International Sale of Goods*, UNITED STATES DEPARTMENT OF COMMERCE (2007), https://web.archive.org/web/20070505032243/http://www.osec.doc.gov/ogc/occic/cisg.htm.
[16] United Nations Convention on Contracts for the International Sale of Good, UNCITRAL, art. 79, at 24 (April 11, 1980), https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09951_e_ebook.pdf.
[17] CISG-AC Opinion No. 7, Exemption of Liability for Damages under Article 79 of the CISG, Rapporteur: Professor Alejandro M. Garro, Columbia University School of Law, New York, N.Y., USA. Adopted by the CISG-AC at its 11th meeting in Wuhan, People's Republic of China, on 12 October 2007, at 2, https://cisg-online.org/files/ac_op/CISG_Advisory_Council_Opinion_No_7.pdf.

instrument for the various actors involved in international business transactions that may suffer at the hand of an "act of God."

Nevertheless, this does not mean that intergovernmental bodies have not continued to try and set forth harmonizing principles to apply to *force majeure* clauses in business contracts between parties from different countries. The International Institute for the Unification of Private Law (UNIDROIT) has proposed a set of principles for international commercial contracts, which are available for parties to apply to govern their contract. The UNIDROIT Principles of International Commercial Contracts 2016 (PICC), establishes guiding principles for nonperformance, which include a standardized *force majeure* clause. Article 7.1.7 of the PICC states that:

> *(1) Non-performance by a party is excused if that party proves that the non-performance was due to an impediment beyond its control and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.* [18]

The general principle of *force majeure* in the PICC remains the same as those set forth in the CISG. The PICC *force majeure* provisions, however, provide the parties with greater structure regarding notification and duration of the excusable nonperformance in articles 7.1.7(2) and 7.1.7(3). Thus, this instrument provides greater structure through which contracting parties could better establish a comprehensive yet generalized regime to answer the need to unify the commercial relationship between parties conducting business emerging from varying traditions.

The general nature of these two instruments is offset by the third framework. The International Chamber of Commerce (ICC) is a non-governmental organization which seeks to facilitate international trade and investment.[19] In pursuit of that mission, the ICC has created tools to bridge the gap between varying legal traditions and different jurisdictions, especially with regards to facilitating business transactions and

[18] *UNIDROIT Principles of International Commercial Contracts*, UNIDROIT, art 7.1.7 (1), at 240 (2016), https://www.unidroit.org/wp-content/uploads/2021/06/Unidroit-Principles-2016-English-i.pdf.
[19] *Our mission, history and values,* INTERNATIONAL CHAMBER OF COMMERCE https://iccwbo.org/about-icc-2/our-mission-history-and-values/ (last visited on October 28, 2024).

contractual obligations. Given the uncertainty arising from the COVID-19 pandemic in 2020, the ICC set forth to update the model *force majeure* clauses that it provides.[20]

The 2020 edition of the ICC's *force majeure* clauses combines the strict interpretation of *force majeure* clauses that is prevalent in the interpretation of these contracts in Common Law systems, but also in the broader tradition envisioned in Civil Law systems – which is present in international frameworks as well. On the one hand, the general formula for *force majeure* clauses is present and the ICC defines *force majeure* as follows:

> 1. *Definition. "Force Majeure" means the occurrence of an event or circumstance [...] that prevents or impedes a party from performing one or more of its contractual obligations under the contract, if and to the extent that the party affected by the impediment [...] proves:*
> a. *that such impediment is beyond its reasonable control; and*
> b. *that it could not reasonably have been foreseen at the time of the conclusion of the contract; and*
> c. *that the effects of the impediment could not reasonably have been avoided or overcome by the Affected Party.*[21]

This definition of *force majeure* follows the same pattern as the previous frameworks discussed, as well as the traditional civil law framing of this instrument.

The ICC's model *force majeure* clauses, however, also answer one of the main concerns regarding the determination of which events constitute *force majeure* events, especially within the context of common law jurisdictions. By providing a list of "presumed *force majeure*" events, the ICC's model clauses offer a number of events and circumstances, which would be considered a *force majeure,* and the affected party would only have to prove that the effects of the impediment could not be reasonably avoided or overcome.[22] The list includes a number of events which have been major disruptors in international commerce – such as wars and pandemics – as well as other circumstances which could be excluded under the stricter interpretations of *force majeure* clauses under common law – including sanctions, acts of terrorism, telecommunication and even labor disturbances.[23]

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[20] Jaime Curle and Silvie Farre, *ICC updates its force majeure and hardship standard clauses,* DLA PIPER (April 25, 2020), https://www.dlapiper.com/es-pr/insights/publications/2020/04/icc-updates-its-force-majeure-and-hardship-standard-clauses.
[21] *ICC Force Majeure and Hardship Clauses,* INTERNATIONAL CHAMBER OF COMMERCE, at 1 (March 2020), https://iccwbo.org/wp-content/uploads/sites/3/2020/03/icc-forcemajeure-hardship-clauses-march2020.pdf
[22] *Id*. at 2.
[23] *Id.*

This combination of the traditional flexible *force majeure* formula and the list of presumed *force majeure* events seeks to provide wider relief for businesses which may be affected and thus unable to perform their obligations. Moreover, the relief that the ICC's model clauses provide is farther reaching than the other frameworks since it excuses performance, as well as liability, and provides for the resolution of the contract in the case of a prolonged impediment.[24] In this way, the ICC's model clauses demonstrate the ways in which business organizations have sought to factor in the unforeseeable and the unstoppable, providing a model for the greatest relief against the caprice of the hand of God. Additionally, with the combination of traditions and the incorporation of circumstances which have been common during the last years of global economic integration, the ICC's model clauses provide a uniform set of rules which would apply across jurisdictions.

IV. CONCLUSION

As globalization has become the norm of economic activity, unforeseen events which could have disastrous effects on commercial activity need to be answered uniformly across jurisdictions. With that rise, and the various traditions in which the recognition of *force majeure* has developed, various international organizations have proposed frameworks to consolidate the design and interpretation of *force majeure* clauses. UNCITRAL and UNIDROIT have proposed frameworks like the formulae established in code law tradition. These frameworks for *force majeure* clauses are flexible but have provided little guidance as to the interpretation they should be given in varying jurisdictions – especially as to which events constitute *force majeure* impediments. The model *force majeure* clauses proposed by the ICC combine the flexible formula with a list of presumed events which not only reflect modern concerns on possible interruptions to international business but also make clear which events should be considered outside of the control of the parties thereby excusing their liability for failing to perform. This combination makes it easier to plead cases across jurisdictions and in different legal traditions – especially wherever contracts are given the benefit of

[24] Curle and Farre, *supra* note 20.

privilege. In this way, the ICC's model provides a more comprehensive framework which will provide better protections for businesses by explicitly factoring in which mysterious ways the hand of God might act.