From the Napoleonic Code to COVID-19

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From Napoleon to COVID-19 will Force Majeure clauses be recognized by courts? In view of the incoming third lock down and the increasing morbidity, one should hear the story of Henry the French wine merchant who got "stuck" with the wine he had to supply, due to flooded roads, and on the effect of the hurricane at the Mississippi river on cargos loading and delaying vessels, causing demurrages and expenses. The concept of Force Majeure comes from the Napoleonic Code and allows avoiding the imposition of costs and damages on the party to the agreement who did not fulfil its obligations, due to Force Majeure.

It appears that no person was more satisfied than Henri, a French wine merchant. He obtained a lucrative contract for the supply of barrels of wine which had to be delivered "until the end of February".

Unfortunately, at the time that he set out to deliver the wine, during the last three days of the month he was faced with a situation that all the roads were impassable and he could not perform his undertaking.

To his good fortune and notwithstanding that this situation existed in 1934, he received help from Napoleon, or more precisely from the Napoleonic Code which stated in article 1148 that "there would not be a claim for damages where "force majeure" prevents the fulfilment by the obligor of an obligation under the agreement or otherwise performs an act or acts which are not permitted under the agreement 1 in that, in response to a claim filed against Henry for damages, the French Court determined that the trader/supplier is excused from performance when force majeure prevents the performance of the contract 2. As may be otherwise thought, English Law did not adopt the concept of "force majeure".

The only possibility available under English law permitting the non-performance of a contractual obligation is the concept of "frustration" which allows for the non-performance of a contractual obligation in the sense that performance would render the obligation radically different than that originally contracted for. The English concept related more to occurrences which were not foreseeable at the time of the conclusion of the contract, whilst force

majeure circumstances are capable of being foreseen and allow for the parties to suspend performance until the force majeure circumstances have passed, whilst the English frustration is far more limited giving rise to an immediate termination of the contract.

With that, English law recognizes that if the contracting parties agreed in their contract that extraneous circumstances, not under the control of the parties, allow for the suspension of the contract and even for the possibility of cancellation, the underlying ratio is not based on force majeure as a legal concept, but rather the giving of the effect to a contractual undertaking of the parties.

Accordingly, the English decisions are concerned mainly with the interpretation of the party's contractual provisions and not with the examination of force majeure as a legal concept or axiom. A foregoing is illustrated by a recent English case.

A ship presented itself for loading at a port terminal situated in the Mississippi river in order to load 60,000 metric tons of coal intended for carriage to Mexico. As it appeared that a tropical storm was approaching the area, the port authority ordered the ship to leave the terminal having loaded only half of the cargo, in order to protect the pier and because the anchorage outside the port was being taken up by other ships.

The ship in fact managed to take the last anchorage. The hurricane only arrived two days thereafter and after a further period of time after the passing of hurricane, the ship returned to the terminal and completed loading.

The ship owners demanded compensation from the charters for the delay which charterers refused to pay.

The matter proceeded to Arbitration where it was decided that the ship was not compelled to leave the terminal because of the hurricane but rather the anticipation of a storm, as opposed to the actual occurrence of a storm. Accordingly, it was not possible to state that the ship left the terminal as a result of force majeure which would have constituted a lawful delay in performing the contract and excuse the sellers from payment for the delay.

However, to the good fortune of the charterers there was a clause in the agreement which stated that if the ship was delayed for any reason whatsoever not under the control of the charters the "lost time" loading the ship would not be for the charterers account which was the case as the charterers did not, direct the ship to a specific quay at the terminal. The ship left the terminal as a result of an instruction given by the terminal, a matter beyond the charterers control. These factors resulted in the charterers not being responsible for a payment of hundreds of thousands U.S. Dollars.

In another matter. Also relating to the Mississippi river and a hurricane involving a ship which presented itself for loading a cargo of soya intended for Casablanca. In this matter the ship itself was damaged and listed. It took 15 days until the ship was righted.

The cargo of soya which was held in barges awaiting loading was damaged and the ships charterers could not provide an alternative cargo. The charterers contented that the inability to load the cargo was an "Act of God "entitling them to rely on Force Majeure".

This contention was rejected. The Court held that if the parties had agreed that if damage to cargo awaiting loading excuses the parties from fulfilling their contractual obligations it would have been possible to accept the contention. However, this was not the situation. The cargo was described as "soya beans" in the contract and was not further specified.

The charterers were therefore obliged to provide an alternative cargo. Accordingly, the Court held that the contract was unlawfully cancelled by the charterers and obliged them to pay damages to the owners in hundreds of thousand U.S. Dollars. (Arbitration 13/19)

If we revisit to the wine merchant Henri (mentioned in the opening paragraph above) it appears that his "good fortune" was two-fold as he did not agree on specific barrels of wine. Under English law he would have been obliged to supply barrels of wine other than those which has been delayed by the flooding of rivers, more particularly as he commenced delivery at the end February and he could have affected delivery soon after the order was placed, one month earlier.

In a further matter. Also, before the English Courts 3, which was concerned with the carriage of lead pallets, purchased from two mines in Brazil, independent of each other, to be carried from two ports to Malaysia. At a certain stage a dam wall which "protected" one of the mines collapsed causing the mine to cease activities thereby preventing shipment. The charterers contended that the collapse of the dam and the inability to "work" the mine was an "act of god" and an "accident of the mine" excusing them from supplying the cargo.

The ship owners countered that the above reason for not supplying the cargo was not as alleged by the charterers, but was because of a bad relationship between the charterers and the owners of the other mine who refused to sell the required quantity to the charterers. The court accepted the argument of the owners and ordered the charterers to pay the sum of 19.8 million dollars being the sum due by the charterers under the charterparty. We learn therefore, that a hurricane causing an interruption in loading a ship, a hurricane which damaged a cargo awaiting loading and the collapse of a dam causing the closure of a mine supplying a cargo, are all not recognized in themselves by English Courts and Tribunals as force majeure releasing the charterers from their obligations notwithstanding that the events were not under their control.

The above events illustrate how English Law applies "force majeure" in a limited manner, not excusing a party from its contractual obligations and directing that they should be performed in alternative manners, failing which such a non performing party will be liable for damages caused to the counterparty to the contract.

In relation to Israeli law, it appears that Clause 18(a) of the Contracts Law (Remedies for Breach Of Contract) 1971, is more similar to the concept of Frustration of English law then the French Force Majeure.

For example, in a Judgement recently given, in relation to the outbreak of the Corona virus and the government ordered "lockdowns" flowing therefrom, it was held that a wedding reception which was cancelled as a result of the lockdown has to be regarded as frustrating the contract with the reception hall as having been frustrated and each party was obliged to return what each had been received from the other, in effect the advance payment made to the owners of the reception hall had to be returned (Case No. 6110-05-20).

In another "lockdown", situation relating to a contract of lease between the owners of premises used as a bar, where the lesees of the bar ceased to pay rental, a temporary interdict was issued preventing the owners from utilizing a bank guarantee securing the obligations of the lesees of the bar.

The Court further held that the question of whether the lockdown situation allowed for frustration of the contract required a full hearing covering also the public and social implications. However, in another matter it was held that "Corona" is not a magic word (Application No. 12741-04-20).

However, in further matter the Supreme Court held in application No.2435/20 that the Corona emergency situation is not a "regular circumstance".

It is reasonable to assume that Covid-19 will make its contribution, also to the concepts of "Force Majeure" and "Frustration of Contracts" – one has to await developments.

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