

Sanity Check for Your Contracts – New ICC Force Majeure and Hardship Model Clauses

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Unrelated to the current coronavirus pandemic and yet thematically fitting, the ICC (International Chamber of Commerce) released new Force Majeure and Hardship Model Clauses for commercial contracts which update the 2003 version. The clauses may be found on the ICC homepage ([see link here](#)).

This GSK Update explains the new model clauses, highlights benefits and demonstrates potential options of usage in future contracts – not only in times of the coronavirus.

A. ICC Force Majeure Model Clauses

Force Majeure Clauses aim to provide contractual relief in exempting an affected party from its contractual performance duties and from damages as well as from any other remedy as long as the Force Majeure circumstances persist. Force Majeure is defined as the occurrence of an event or circumstances that prevent or impede a party from performing its contractual duties, if and to the extent that the party affected proves that such impediment is beyond its reasonable control, that the event could not reasonably have been foreseen at the time of the conclusion of the contract and that the effects of the impediment could not reasonably have been avoided or overcome by the affected party.

I. Long and short version – parallels

The ICC Model Clauses on Force Majeure now offer a long and a short version that can be used according to the respective needs of the contractual parties. The long version may be of interest for contractual relationships between major companies, whereas smaller companies may prefer a slimmer and less detailed version of the model clause.

In comparison to the 2003 version, both 2020 clauses aim to reduce complexity. A general Force Majeure formula is combined with an updated list of events expressly constituting a case of Force Majeure. Both clauses provide for an obligation to notify of the occurrence of the event. Where an affected party does not give timely notice of such an event, the benefits of invoking Force Majeure are delayed until the receipt of the notice.

As in the previous version, both new versions include the right to terminate the contract where the duration of the impediment invoked has the effect of substantially depriving the contracting parties of what they were reasonably entitled to expect under the contract. To increase legal certainty and foreseeability of potential contract terminations, the clauses now determine a reasonable time frame for the duration of the impediment of 120 days.

II. Long and short version – differences

The long version of the Force Majeure model clauses includes several additional regulations.

Firstly, it accounts for the non-performance by third parties or sub-contractors due to Force Majeure. Thereafter, a contracting party may invoke Force Majeure to the extent that the respective requirements



are established both for the contracting party and for the third party.

Secondly, the long version includes additional temporary impediment and corresponding stipulations on the obligation to notify.

Furthermore, it includes a paragraph on the duty to mitigate. The party invoking Force Majeure is hence obliged to take all reasonable measures to limit the effects of the event.

Last but not least, the long version expressly incorporates the already prevailing common practice of no unjust enrichment.



III. Recommendation of usage in future contracts

In general, it is advisable to include Force Majeure clauses in a contract. They provide an easier contractual relief in comparison to a contractual or statutory impossibility of performance, as Force Majeure only requires reasonableness of non-performance as opposed to impossibility of performance. If there is no Force Majeure clause in the contract, the applicable law must first be clarified for international contracts. If the UN sales law is applicable, the debtor may be able to rely on Art. 79 CISG. In comparison to the ICC model clauses, the debtor is exempt from damages for non-performance, but is, however, not freed from his duty to perform.

The usage of ICC Force Majeure model clauses is particularly advisable in international contracts as these clauses harmonise the principle of Force Majeure known in many legal systems. Additionally, the ICC is a well-known and trusted institution in international trade law.

The clauses may be either expressly referred to or used directly in a respective contract. It goes without saying, that model clauses may be tailored according to the parties' needs, e.g. in times of the coronavirus pandemic, the coronavirus and virus mutations may be added to the list of events constituting Force Majeure events.

Regarding the long version, the parties should evaluate whether a period of impediment of over 120 days justifies a termination of the contract. Regarding the paragraph on unjust enrichment, the returning of a physical item may prove more reasonable than an equivalent compensation in cash.

B. ICC Hardship Model Clause

The new ICC model clauses additionally include an update of the Model Hardship Clause. In principle, hardship clauses enable a debtor to either adjust the contractual obligations or terminate the contract in the event of a particular difficulty in performance.

The ICC Model Hardship Clause requires the parties to negotiate alternative contractual terms, if the continued performance of their contractual duties has become excessively onerous due to an event beyond their reasonable control which could not reasonably have been expected at the time of the conclusion of the contract and if they could not reasonably have avoided or overcome the event or its consequences. Where the parties have been unable to agree on alternative contractual terms, the clause offers three options to choose from regarding the consequence of a hardship event:

The first option is the affected party's right to terminate the contract without the right to request an adaptation by a judge or arbitrator. The second option allows either party to request either the adaptation or the termination of the contract by a judge or arbitrator where appropriate. The third option offers either party the option to request a judge to terminate the contract.

It is highly recommended to include a version of the ICC Model Hardship Clause in any international contract to



account for national differences on the concept of hardship. The parties shall agree on one of the provided options described above.

C. Legal support

At GSK Stockmann, we strive to successfully assert your interests. Whether at the time of signing the contract or in the run-up to or during litigation – we advise in all matters relating to legal and factual questions regarding the drafting contracts, examining existing contracts, extrajudicial contract adjustments, the preparation and implementation of settlement talks, mediation as well as in court and in (international) arbitration proceedings. The GSK Dispute Team develops tailor-made strategies and solutions based on comprehensive conflict resolution experience. Please do not hesitate to contact us at any time!

Justus Jansen

Lawyer
Hamburg
justus.jansen@gsk.de

Birgit Wöhren, LL.M. (New York)

Lawyer
Hamburg
birgit.woehren@gsk.de

Antonius Jonetzki

Lawyer
Hamburg
antonius.jonetzki@gsk.de

Ann-Sophie Mante, LL.M. (Cape Town)

Lawyer
Hamburg
ann-sophie.mante@gsk.de



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www.gsk.de

GSK Stockmann

BERLIN

Mohrenstrasse 42
10117 Berlin
T +49 30 203907-0
F +49 30 203907-44
berlin@gsk.de

HEIDELBERG

Mittermaierstrasse 31
69115 Heidelberg
T +49 6221 4566-0
F +49 6221 4566-44
heidelberg@gsk.de

FRANKFURT / M.

Taunusanlage 21
60325 Frankfurt am Main
T +49 69 710003-0
F +49 69 710003-144
frankfurt@gsk.de

MUNICH

Karl-Scharnagl-Ring 8
80539 Munich
T +49 89 288174-0
F +49 89 288174-44
muenchen@gsk.de

HAMBURG

Neuer Wall 69
20354 Hamburg
T +49 40 369703-0
F +49 40 369703-44
hamburg@gsk.de

LUXEMBOURG

GSK Stockmann SA
44, Avenue John F. Kennedy
L-1855 Luxembourg
T +352 271802-00
F +352 271802-11
luxembourg@gsk-lux.com



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GSK.DE | GSK-LUX.COM