

Protection from liability: *force majeure* events in international contracts

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ABSTRACT

Each of the contracting parties are instinctively under the impression that the other party will perform their obligations in terms of the contract faithfully and satisfactorily.¹ Despite this assumption, the possibility exists that either contracting party might be unable to comply with its contractual obligations due to *force majeure* events. Harms² explains that a *force majeure* event:

Is a circumstance that is unforeseeable and out of the reasonable control of one or both of the parties to a contract and the circumstance makes it objectively impossible for one or both of the parties to perform their obligations under the contract.³

Hutchison⁴ defines a *force majeure* event as:

An extraordinary circumstance that is beyond someone's control such as a war, strike, riot, crime, epidemic; or an event that is described by the legal term an act of God, also known as a *vis major*, such as a hurricane, flood, earthquake, volcanic eruption.⁵

To answer the question of how parties to an international contract can protect themselves against the effects of a *force majeure* event, one must consult international trade law, contract law, and private international law. International trade law are the rules and customs which govern trade between countries. Contract law is applicable since an agreement is concluded between the parties for the rendering of goods or services. Contract law will also apply if the parties choose to include a *force majeure* clause in their agreement. If the parties, choose to not include a *force majeure* clause then private international law will be applied to determine the proper law of the contract which is:

[e]ither the law chosen by the parties or the law with which the contract is most closely connected.⁶

¹ Konarski 2003 *International Business Law Journal* 2.

² Derek Harms is a senior advocate, admitted in South Africa in 1995, and a solicitor of England and Wales.

³ Harms *COVID-19 and Force Majeure* 2.

⁴ Dale Hutchison is a well-known legal author and is currently the head of the Internal Research Unit at ENSAfrica.

⁵ Hutchison *et al The Law of Contract in South Africa* 514.

⁶ Forsyth *Private International Law* 316.

This mini-dissertation endeavours to explain and provide solutions for parties to an international contract, to protect themselves from the effects of *force majeure* events.

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LIST OF ABBREVIATIONS

CISG	<i>United Nations Convention on Contracts for the International Sale of Goods</i> (Vienna, 1980)
CLOUT	Case Law on UNCITRAL Texts
eUCP	<i>Uniform Customs and Practice for Documentary Credits Supplement for Electronic Presentations Version 2.0</i> (2019)
EUR	Euro (European Monetary Unit)
eURC	<i>Uniform Rules for Collections Supplement for Electronic Presentations Version 1.0</i> (2019)
ICC	International Chamber of Commerce
NAHCMD	High Court of Namibia Main Division
SARS	South African Revenue Service
UCCI	Ukrainian Chamber of Commerce and Industry
UCP	<i>Uniform Customs and Practice for Documentary Credits 600</i> (2007)
UNCHR	United Nations High Commissioner for Refugees
UNCITRAL	United Nations Commission on International Trade Law
URC	<i>Uniform Rules for Collections 522</i> (1995)
VAT	Value-Added Tax

Chapter 1: Introduction

1.1 Research problem

International trade opens new trading routes for countries and this, in turn, expands their market. A wider market then makes it possible for countries to gain access to goods and services that are not available domestically. This expansive market is open to business opportunities that would otherwise be unavailable. One benefit of international trade for a business is access to a larger customer base. This can lead to more profits and revenues. This global market, however, is affected by global events and the possibility of a *force majeure* event.

Harms⁷ explains that a *force majeure* event:

Is a circumstance that is unforeseeable and out of the reasonable control of one or both of the parties to a contract and the circumstance makes it objectively impossible for one or both of the parties to perform their obligations under the contract.⁸

Hutchison⁹ defines a *force majeure* event as:

An extraordinary circumstance that is beyond someone's control such as a war, strike, riot, crime, epidemic; or an event that is described by the legal term an act of God, also known as a *vis major*, such as a hurricane, flood, earthquake, volcanic eruption.¹⁰

The term *force majeure* has various definitions, implications, and applications in both international, foreign, and domestic laws. International organisations, such as the International Chamber of Commerce (hereafter the ICC) has released numerous documents to clarify the concept of *force majeure* for the benefit of the international community.

⁷ Derek Harms is a senior advocate, admitted in South Africa in 1995, and a solicitor of England and Wales.

⁸ Harms *COVID-19 and Force Majeure 2*.

⁹ Dale Hutchison is a well-known legal author and is currently the head of the Internal Research Unit at ENSAfrica.

¹⁰ Hutchison *et al The Law of Contract in South Africa* 514.

Thus, the following legal question arises: What measures can parties to an international contract take to protect themselves from liability against a *force majeure* event? This mini-dissertation will try to shed light on this question.

1.2 Motivation

The aim of this research is to explain how parties to an international contract can protect themselves from the effects of a *force majeure* event. Two instances will be explored namely, where a *force majeure* clause is added into a contract and the instance where it is not. To better understand the aim behind this mini-dissertation a hypothetical scenario is given to show how a *force majeure* event can affect international trade.

Country A is renowned for its wine which is the country's main export. Country B does not have the appropriate climate to produce the same quality and quantity of wine, thus it is more beneficial for them to import the wine from A than to try and produce it themselves. During the harvest season A experiences, the worst floods in decades. Most of the vineyards are washed away during the torrents of rain. As per the above-mentioned definition a flood qualifies as a *force majeure* event since it is a natural act of God that is, a *vis major* event. Due to the flood A can only produce enough wine to meet domestic demand. This means that they can't export wine to B. B now has to buy the wine from country C. C is further away, so the cost to import the wine is higher.

Global events can also negatively affect smaller scale business transactions. The same scenario will be analysed but attention will be given to the parties to an international contract. A business in country A (hereafter X) has concluded an agreement with a business in country B (hereafter Y). The agreement is that X must produce one thousand litres of wine. For this scenario X's obligation, in terms of the contract, is to only produce the wine. Y has another contract with Z to transport the wine. X must have the wine ready for transport on or before the first day of July. Due to the flood X is not able to produce the amount of wine agreed upon by the deadline. In this scenario the question then arises whether X's non-performance is now excused entirely or only suspended for the duration of the *force majeure* event.

From the above scenarios it is clear that a *force majeure* event can impact international trade.

1.3 Research question

What legal avenues can parties to an international contract undertake to protect their interests from liability that might arise as a result of *force majeure*?

1.4 Keywords

The keywords for this mini-dissertation are *force majeure*, Volcanic Eruption in Iceland (2010), Covid-19 (2019), Russian Invasion of Ukraine (2022), ICC *Force Majeure* Long Form Clause, *URC 522*, *eURC* Version 1.0, *UCP 600*, *eUCP* Version 2.0, and South African common law.

1.5 Research methodology

The research question of this mini-dissertation will be investigated by way of a literature study. The primary sources will be academic articles and literature by international organisations. The secondary sources will be international case law, domestic case law, international agreements, international conventions, and international statutes.

1.6 Framework of the study

Chapter two will be the steppingstone of this mini-dissertation. This chapter will explain the principles of private international law and South African common law. South African case law will be analysed to get a better understanding of how our courts approach instances of *force majeure*.

Chapter three will describe the international approach to *force majeure* through the explanation of the United Nations' *Convention on Contracts for the International Sale of Goods*¹¹ (hereafter the CISG) and various publications of the ICC. These ICC

¹¹ *United Nations Convention on Contracts for the International Sale of Goods* (Vienna, 1980).

publications are the: *Uniform Customs and Practice for Documentary Credits 600*¹² (hereafter the *UCP*), the *Uniform Customs and Practice for Documentary Credits Supplement for Electronic Presentations Version 2.0*¹³ (hereafter the *eUCP*), *Uniform Rules for Collections 522*¹⁴ (hereafter the *URC*), and the *Uniform Rules for Collections Supplement for Electronic Presentations Version 1.0*¹⁵ (hereafter the *eURC*).

Chapter four will extensively explain what a *force majeure* clause is by using the *ICC Force Majeure and Hardship Clause* as an example, and how parties can include such a clause in their contract. A proposed *force majeure* clause will also be given.

Chapter five will discuss three incidents that affected international trade and how the international community approached these incidents. These incidents are the Volcanic eruption in Iceland of 2010, the Covid-19 pandemic of 2019, and the Russian invasion of Ukraine of 2022.

The last chapter will set out the concluding remarks.

1.7 Relevance for the Research Unit

The overarching focus of the North-West University's Faculty of Law Research Unit is the relationship between law, justice, and sustainability.¹⁶ The Research Unit utilises law to find innovative legal solutions to advance justice and sustainability in South Africa.¹⁷ The study for this mini-dissertation falls under the Research Unit's sub-project Finance, Trade, and Innovation. This sub-project understands that as the world evolves the law must evolve with it. The primary focus of the project is to promote the beneficial evolution of finance, trade, and investment by researching, through a vast array of fields of law, the possible impediments and obstacles that can hinder this evolution.¹⁸ A *force majeure* event can negatively impact

¹² *Uniform Customs and Practice for Documentary Credits 600* (2007).

¹³ *Uniform Customs and Practice for Documentary Credits Supplement for Electronic Presentations Version 2.0* (2019).

¹⁴ *Uniform Rules for Collections 522* (1995).

¹⁵ *Uniform Rules for Collections Supplement for Electronic Presentations Version 1.0* (2019).

¹⁶ North-West University 2022 <https://law.nwu.ac.za/law-justice-and-sustainability/Home1>.

¹⁷ North-West University 2022 <https://law.nwu.ac.za/law-justice-and-sustainability/Home1>.

¹⁸ North-West University 2022 <https://law.nwu.ac.za/finance-trade-and-innovation/finance-trade-innovation>.

international trade. If parties feel as if they have no protection against the impacts of unforeseen or unavoidable events, they will rather try to trade domestically or try to avoid trading with certain countries altogether.

The sustainability of international trade can be boosted through law. If parties to an international trade agreement feel as if their interests are protected when they add additional clauses to their agreement, this will encourage them to trade in the future. This will ultimately lead to the further growth of international trade.

1.8 Ethical requirements

This mini-dissertation was analysed against the North-West University's Faculty of Law: Postgraduate Programmes Ethics Checklist and it was determined that ethical approval is not required.

Chapter 2: Principles of private international law and the South African common law

A contract is an agreement entered into between parties through which the parties intend to give rise to legally binding obligations.¹⁹ A contractual obligation cannot exist *in vacuo*²⁰ it must be connected to a legal system. The question thus arises which legal system is applicable to an international contract. To answer this question the principles of private international law must be analysed.

2.1 Principles of private international law

Forsyth²¹ explains that the proper law of the contract is the law which creates and governs such contract.²² This law is either the one chosen by the parties or the law with which the contract is most closely connected.²³

Most legal systems allow the parties to choose the law that governs their contract. One way by which this decision can be portrayed is by a choice of law clause.²⁴ There are two types of choice of law clause, an explanation and practical example will be given for each. For the following examples A is located in South Africa and B in Norway.

The first type of clause is where parties can either replace all or part of the *ius dispositivum* with the rules of a different legal system.²⁵ The *ius dispositivum* are those rules which the parties may freely alter by agreement, this alteration must be allowed by the governing legal system.²⁶ The following is an example where only a part of the *ius dispositivum* is replaced. The contract between A and B is governed by South African law however, the parties included a choice of law clause in their contract. This clause states that they want Norwegian law to apply to any situations

¹⁹ Hutchison *et al The Law of Contract in South Africa* 6.

²⁰ Forsyth *Private International Law* 316.

²¹ Christopher Forsyth teaches public law at the University of Cambridge, is an honorary professor at the University of Stellenbosch and an honorary member of the advisory board of the faculty of law of the Chinese University of Hong Kong.

²² Forsyth *Private International Law* 316.

²³ Forsyth *Private International Law* 316.

²⁴ Forsyth *Private International Law* 317.

²⁵ Forsyth *Private International Law* 318.

²⁶ Forsyth *Private International Law* 318.

regarding the resolutions of disputes between the parties. This means that all the other aspects of the contract will be regulated by South African law.

The second type is where the parties choose a law system that governs their entire contract, thus excluding the *ius cogens* norms of the legal system that would have been applicable.²⁷ *Ius cogens* are those provisions set out by the governing legal system, which the parties cannot agree to set aside or alter. The following is an example where the parties chose the entire contract to be governed by a specific legal system. A and B inserted a clause in their contract stating: "this contract will be governed in its entirety by the laws of China".

Where parties do not expressly or tacitly state which legal system will govern their contract, a specific legal system must be assigned. This will be the legal system with which the contract has the closest and most real connection.²⁸ The general rule is that the legal system of the *lex loci contractus* will govern the contract, however *lex loci solutionis* will apply if the contract is to be performed elsewhere.²⁹ *Lex loci contractus* means the place where the contract is concluded,³⁰ while *lex loci solutionis* means the place where the contract is to be performed.³¹

This rule, of determining the relevant legal system, can still be difficult to apply in practice. Again, for the following example A is located in South Africa and B in Argentina. A and B met at a grain expo in England. They decided to conclude a contract in terms of which A would supply one ton of grain to B. This means that the *lex loci contractus* is England however, the grain will be produced in South Africa. This means that the *lex loci solutionis* is South Africa, thus the governing law for A and B's contract will be South African law.

²⁷ Forsyth *Private International Law* 330.

²⁸ Forsyth *Private International Law* 8.

²⁹ Forsyth *Private International Law* 331.

³⁰ Forsyth *Private International Law* 331.

³¹ Forsyth *Private International Law* 331.

Forsyth³² is of the opinion that the wording of section 4(2) of the *Rome I Regulation*³³ is easier to use in practice and more eloquent than the general rule. Article 4(2) states that in the instance where the choice of law of the parties cannot be determined, the contract's closest and most real connection is the habitual residence of the party who "is to effect the performance which is the characteristic of the contract."³⁴ In the above-mentioned situation the main characteristic of the contract is the production of grain in South Africa where A is located. The law with which the contract is most closely connected is therefore South Africa.

2.2 South African common law

The previous section explained that the legal system that governs a contract when a choice of law clause is not included, is the proper law³⁵ of the contract or the law with which the contract has the closest and most real connection. For this section let us assume the determined proper law of the contract was South African law since the parties did not use a choice of law clause. The following question then arises: what is the stance of South African law on *force majeure*?

The South African common law does not touch upon *force majeure*, however contracting parties can still rely on the common law principle of supervening impossibility of performance.³⁶ This principle states that:

If the performance of a contract has become impossible, through no fault of the party concerned, then the obligations under the contract are extinguished or suspended.³⁷

For parties relying on the principle to suspend their obligations under a contract, they must prove that it was objectively impossible for them to perform due to an

³² Forsyth *Private International Law* 335.

³³ *Regulation (EC) No 593/2008 of the European Parliament and of the Council* also known as the Rome I Regulation.

³⁴ Article 4(2) of the *Rome I Regulation*.

³⁵ Forsyth *Private International Law* 316.

³⁶ Harms *COVID-19 and Force Majeure* 6.

³⁷ Ebrahim and Kleitman 2022 <https://www.cliffedekkerhofmeyr.com/en/news/publications/2022/Practice/Corporate/corporate-and-commercial-alert-12-january-covid-19-and-the-doctrine-of-supervening-impossibility-of-performance.html>.

event that was unforeseeable and unavoidable.³⁸ The South African doctrine of impossibility has the following strict conditions:

The impossibility must occur after the conclusion of the contract. The event must be unavoidable. The proper performance of the contract must be impossible and not merely economically onerous or burdensome. If the performance becomes objectively or absolutely impossible the contractual obligation is extinguished. This means that the duty to perform and the corresponding right to claim performance falls away.

The following two instances can make a performance objectively impossible: the instances of actual physical impossibility and the instance where the performance cannot reasonably be expected to be performed but it remains physically possible.³⁹ In these two instances both parties' obligations to perform will be extinguished.⁴⁰ The parties cannot rely on this doctrine if the event that causes the impossibility "was foreseen or foreseeable and could have been avoided".⁴¹ The contract will only resume once the event has come to an end.⁴²

2.3 South African case law

To see how the South African courts approached events that were affected by *force majeure* it is necessary to analyse South African case law.

*2.3.1 Eckleben v Mobile Telecommunications Limited Ltd*⁴³

The *Eckleben v Mobile Telecommunications Limited* (I 920/2012) [2016] NAHCMD 46 case (hereafter the *Eckleben* case) is a Namibian case, however the court used South African literature as a basis for their decision.

The facts of the case are as follows. In 2010 Eckleben purchased property at a public auction from a deceased's estate.⁴⁴ There was a condition to the sale that the

³⁸ Harms *COVID-19 and Force Majeure* 5.

³⁹ Harms *COVID-19 and Force Majeure* 5.

⁴⁰ Harms *COVID-19 and Force Majeure* 5.

⁴¹ Harms *COVID-19 and Force Majeure* 5.

⁴² Harms *COVID-19 and Force Majeure* 5.

⁴³ *Eckleben v Mobile Telecommunications Limited* (I 920/2012) [2016] NAHCMD 46.

⁴⁴ *Eckleben* case para 2.

buyer had to take over a rental agreement in respect of the property.⁴⁵ In terms of the rental agreement the owner would lease a small room in a tower to the lessee for the purposes of "erecting and installing equipment and antennas" and the lease would expire in 2016.⁴⁶ In 2011 the lessee, Mobile Telecommunications Limited, gave Eckleben two months' written notice of their intention to terminate the rental agreement.⁴⁷ In 2012 Eckleben issued summons against Mobile Telecommunications Limited and claimed damages for breach of contract.⁴⁸

In terms of the rental agreement Mobile Telecommunications Limited installed aerials on a tower on the property.⁴⁹ These aerials emitted radiation to such a level that it would be dangerous to the health of individuals that are in close proximity to it.⁵⁰ In 2009 the previous owner constructed a sundeck and allowed the public and his staff access to it, the sundeck was, however, in close proximity to the aerials.⁵¹ Eckleben did not want to stop access to the sundeck even though it posed a health risk. He then told Mobile Telecommunications Limited to relocate their installations.⁵² This continued use of the sundeck also made the use of the premises by Mobile Telecommunications impossible.⁵³

The legal counsel for Mobile Telecommunications argued that the written rental agreement warranted that the property leased was fit for a telecommunications base station, but due to the sundeck it was not.⁵⁴ In the pre-trial order the parties agreed that:

...[t]he health risk posed by radiation to personnel of plaintiff and public afforded access to the sundeck made continuous use of the premises by defendant impossible.⁵⁵

⁴⁵ *Eckleben* case para 2.

⁴⁶ *Eckleben* case para 3.

⁴⁷ *Eckleben* case para 4.

⁴⁸ *Eckleben* case para 4.

⁴⁹ *Eckleben* case para 6.

⁵⁰ *Eckleben* case para 6.

⁵¹ *Eckleben* case para 6.

⁵² *Eckleben* case para 27.

⁵³ *Eckleben* case para 6.

⁵⁴ *Eckleben* case para 27.

⁵⁵ *Eckleben* case para 27.

The council also argued that because of a supervening impossibility, the agreement became voidable.

The court used the South African publication *The Principles of the Law of Contract* by Kerr⁵⁶ to state the law relating to supervening impossibility as follows:

The basic principle is that if during the currency of a contract the conditions necessary for its operation cease to exist, the change not being due to the fault of either party or to a factor for which either party bears the risk, the contract ceases to exist. ...there is no objection to the traditional phrase 'supervening impossibility of performance' if performance becomes impossible in fact. However, as in the case of initial impossibility of performance, there is difficulty with the word 'impossible'. Performance precisely as contemplated at the time the contract was entered into may no longer be possible, but the result intended may be able to be achieved in some other way. The party bound to perform remains bound if the departure from the norm of the particular contract in question is minor; he is not bound if it is major, i.e., if the kind of performance which is possible in fact is vitally different from what should reasonably have been within the contemplation of both parties when they entered into the contract.⁵⁷

The court had to decide whether the circumstances which were present at the time when the rental agreement was concluded had "changed to such an extent that performance by the parties was no longer possible".⁵⁸ The court stated that there is no marked change in the circumstances from when the agreement was concluded.⁵⁹ There reason behind this was as follows. At the time of the conclusion of the agreement the parties foresaw that a sundeck would be constructed from which a restaurant would be operated.⁶⁰ After construction of the restaurant the antennas would then be relocated.⁶¹ In conclusion Mobile Telecommunications could not rely on the defence of supervening impossibility because, the sundeck was already built and used in 2009 and they should have foreseen the possibility of its continued use.

⁵⁶ Kerr *The Principles of the Law of Contract* 545.

⁵⁷ *Eckleben* case para 28.

⁵⁸ *Eckleben* case para 28.

⁵⁹ *Eckleben* case para 28.

⁶⁰ *Eckleben* case para 28.

⁶¹ *Eckleben* case para 28.

2.3.2 *Skhosana v Eskom*

In the *Skhosana* case⁶² the plaintiff brought an action for damages he suffered in his personal capacity and in his capacity as the “father and natural guardian” of his minor daughter.⁶³ The child sustained bodily injuries from electrical shocks when she came into contact with the electrical conductors of a power line which had broken due to strong winds.⁶⁴ The issue before the court was the determination of the defendant’s liability.⁶⁵ The defendant was an undertaker in terms of section 1 of the *Electricity Act*.⁶⁶ The conductors of the power line, together with its support pylons/poles formed part of defendant's plant or machinery as per section 26 of the *Electricity Act*.⁶⁷ Section 26, the liability of undertaker for damage or injury, states that:

In any civil proceedings against an undertaker, arising out of damage or injury caused by induction or electrolysis, or in any other manner by means of electricity, generated, or transmitted by, or leaking from the plant or machinery of any undertaker, such damage or injury shall be presumed to have been caused by the negligence of the undertaker unless the contrary is proved.⁶⁸

The defendant, however, raised the defence of *force majeure* saying that the injuries suffered by the child was due to storms and strong winds and that he could thus not be held liable.⁶⁹ The defendant called upon an expert witness to testify to the design aspects of the pole and its ability to withstand the pressures that may be exerted on it.⁷⁰ The witness stated that for the pole in question to break:

The weather would have to be very extreme. The wind would have to have been very much substantially higher than that which one would normally have expected, being that which you can get in a tornado, or else you get a twisting force – a torque force, and which is a twisting force – like a twister as they call it in America.⁷¹

⁶² *Skhosana v Eskom* [1999] JOL 4780 (W).

⁶³ *Skhosana* case para 1.

⁶⁴ *Skhosana* case para 1.

⁶⁵ *Skhosana* case para 1.

⁶⁶ *Electricity Act* 41 of 1987.

⁶⁷ Section 26 *Electricity Act* 41 of 1987.

⁶⁸ Section 26 *Electricity Act* 41 of 1987.

⁶⁹ *Skhosana* case para 5.

⁷⁰ *Skhosana* case para 42.

⁷¹ *Skhosana* case para 46.

After many other expert witnesses and evidence, the court held that the defendant had not been negligent in planting the pole at the depth it had been planted and that the defendant had not been obligated to deal with it in such a manner as to enable it to withstand the force of the winds in question.⁷² The court also stated that the defendant could not reasonably have foreseen the occurrence of the strong winds and thus cannot be held responsible.⁷³ The court made reference to the *Kruger* case⁷⁴ where it was stated that

...[t]he question whether, in any given situation, a reasonable man could have foreseen the likelihood of harm and governed his conduct accordingly is one to be decided in each case upon a consideration of all the circumstances. Once it is clear that the danger would have been foreseen and guarded against by a *diligens paterfamilias*, a duty to take care is established, and it only remains to ascertain whether it has been discharged.⁷⁵

The following judgement was handed down in the *Skhosana* case. The defendant:

...[c]ould not reasonably have foreseen the occurrence of a tornado or gust, being a *force majeure* nor could or should defendant in this case have taken steps in all the circumstances to guard against the consequences of such a tornado or gust.⁷⁶

Resultingly, the plaintiff's action was dismissed with costs. The extensive amount of evidence used by this court to determine the objective facts was fascinating, however, there was a missed opportunity by not using the same due diligence to define what *force majeure* or a *force majeure* event was. The court automatically accepted that the strong winds constituted a *force majeure* that is, "a tornado or gust, being a *force majeure*".⁷⁷ Unfortunately, the court did not explain its reasoning in coming to this conclusion. The court made no reference to foreign- or domestic case law, literature, or even international instruments. It is possible that the court based its statement on the public's general acceptance that natural disasters constitute *force majeure* events.

⁷² *Skhosana* case para 53.

⁷³ *Skhosana* case para 53.

⁷⁴ *Kruger v Van Der Merwe* 1966 2 SA 266 (A).

⁷⁵ *Kruger* case paras 272E–G.

⁷⁶ *Skhosana* case para 55.

⁷⁷ *Skhosana* case para 55.

This case illustrates the possible problems that can arise when courts deal with cases relating to *force majeure* events. Due to the absence of *force majeure* in our common law instances of uncertainty as in the case above can occur. This situation can be rectified if a future case creates a precedent that formally sets out the definition of *force majeure*.

2.3.3 *Joint Venture between Aveng (Africa) (Pty) Ltd and Strabag International GmbH v South African National Roads Agency SOC Ltd and another*

The following case is more relevant for the application of *force majeure* in a contractual situation. In *Joint Venture*⁷⁸ the main issue before the court was whether there was a state of *force majeure* entitling the cancellation of the contract. The contract between the parties had a *force majeure* clause where a definition was given in clause 19:

In this Clause "force majeure" means an exceptional event or circumstance: (a) which is beyond a Party's control, (b) which such Party could not reasonably have provided against before entering into the Contract, (c) which, having arisen, such Party could not reasonably have avoided or overcome, and (d) which is not substantially attributable to the other Party. Force majeure may include, but is not limited to, exceptional events or circumstances of the kind listed below, so long as conditions (a) to (d) above are satisfied: (i) war, hostilities (whether war be declared or not), invasion, act of foreign enemies, (ii) rebellion, terrorism, revolution, insurrection, military or usurped power or civil war; (iii) riot, commotion, disorder, strike or lockout by persons other than the Contractor's Personnel and other employees of the Contractor and Sub-contractors, (iv) munitions of war, explosive materials, ionising radiation or contamination by radio-activity, except as may be attributable to the Contractor's use of such munitions, explosive, radiation or radio-activity and (v) natural catastrophes such as earthquake, hurricane, typhoon or volcanic activity...⁷⁹

The wording of clause 19 of the contract is quite extensive. This clause is an excellent example of how parties can include a *force majeure* clause in their contract. A *force majeure* clause is a clause in a contract which the parties can willingly add as per their freedom of contract that regulates the liability of the parties

⁷⁸ *Joint Venture between Aveng (Africa) (Pty) Ltd and Strabag International GmbH v South African National Roads Agency SOC Ltd* [2019] 3 All SA 186 (GP).

⁷⁹ *Joint Venture* case para 92.

when a *force majeure* event takes place.⁸⁰ For the purposes of chapter 2.2 the following paragraph of the *Joint Venture* case must be highlighted:

The context here is whether the ASJV⁸¹ was entitled to rely on *force majeure* for its purported cancellation of the contract. Because there are many issues that were not canvassed in the letters exchanged, a proper and final answer to this question belongs to the dispute resolution forum created in terms of the Contract. I am alive to the fact that I do not have to decide the presence or absence of a state of *force majeure*.⁸²

This case also did not try to pursue a definition of *force majeure* in terms of South African law.

2.3.4 *Commissioner for the South African Revenue Service v Encarnacao*

In the *Commissioner for the South African Revenue Service v Encarnacao* [2019] JOL 42734 (SCA) case (hereafter the *Encarnacao* case) the DA Encarnacao Trust (hereafter the Trust) imported two consignments of cigarettes into South Africa from Zimbabwe.⁸³ The cigarettes were then stolen by unknown robbers from a customs and excise warehouse.⁸⁴ The commissioner for the South African Revenue Service (hereafter SARS) informed the trustees that they were still liable for outstanding customs duties and VAT.⁸⁵ The Trust disputed liability for payment on the ground that they qualify for a full rebate in terms of Rebate Item 412.09 of the *Customs and Excise Act*.⁸⁶ Rebate Item 412.09 in Schedule 4 of the *Customs and Excise Act*⁸⁷ deals with circumstances under which goods qualify for rebate:

Goods, excluding goods contemplated in Rebate Item 497.02, in respect of which the customs duty, together with the fuel levy (where applicable), amounts to not less than R2 500.00, proved to have been lost, destroyed, or damaged on any single occasion in circumstances of *vis major* or in such other circumstances as the Commissioner deems exceptional whilst such goods are...⁸⁸

⁸⁰ Hutchison *et al The Law of Contract in South Africa* 514.

⁸¹ The Applicant in this case.

⁸² *Joint Venture* case paras 121-122.

⁸³ *Encarnacao* case para 1.

⁸⁴ *Encarnacao* case para 1.

⁸⁵ *Encarnacao* case para 2.

⁸⁶ *Customs and Excise Act* 91 of 1964.

⁸⁷ Rebate Item 412.09 of the *Customs and Excise Act* 91 of 1964.

⁸⁸ Rebate Item 412.09 of the *Customs and Excise Act* 91 of 1964.

One of the issues before the court was to decide whether the armed robbery qualified as a *vis major* or a circumstance "which the Commissioner deems exceptional".⁸⁹ It should be noted that the *Customs and Excise Act* does not define *vis major* but merely refers to it in Schedule 4 and 6 of the *Act*. SARS did not contest that armed robbery cannot qualify as a *vis major*.⁹⁰ Their reasoning was in line with their *SARS Procedure Step of 14 March 2012* at para 2.9(e) which states that:

Robbery by armed or dangerous attackers can be regarded as *force majeure*, but theft in the ordinary cause (*sic*) will seldom be regarded as *force majeure*.⁹¹

The court stated that an armed robbery qualifies as a *vis major* in South African law since it "recognizes that *vis major* includes human acts in addition to acts of nature or acts of God".⁹² The court used this definition as found in *Wille's Principles of South African Law*.⁹³ The court held that the Trust was entitled to a rebate and SARS's appeal was dismissed with costs.

Du Bois' definition of *vis major*, published in 2007, includes both acts by mankind and acts of God that is, acts of nature. Hutchison's definition,⁹⁴ published in 2017, only defines acts of God as *vis major*, but includes both *vis major* and acts of mankind under *force majeure*.⁹⁵

2.3.5 *Frajenron (Pty) Ltd v Metcash Trading Ltd and Others*

The *Frajenron* case⁹⁶ is a very elaborate one, therefore for purposes of this mini-dissertation only the relevant paragraphs will be discussed.

The court stated that if a party wished to use impossibility as an excuse for non-performance in the past, two factors must be present namely *vis major* and *casus fortuitous*.⁹⁷ As the law evolved the courts recognized that not every *vis major* and

⁸⁹ *Encarnacao* case para 15.

⁹⁰ *Encarnacao* case para 15.

⁹¹ *Encarnacao* case para 15.

⁹² *Encarnacao* case para 15.

⁹³ Du Bois *Wille's Principles of South African Law* 850.

⁹⁴ Hutchison *et al The Law of Contract in South Africa* 514.

⁹⁵ Hutchison *et al The Law of Contract in South Africa* 514.

⁹⁶ *Frajenron (Pty) Ltd v Metcash Trading Ltd* 2020 3 SA 210 (GJ).

⁹⁷ *Frajenron* case para 13.

casus fortuitous would excuse non-performance and that the facts of each case would be used to determine whether a *vis major* and *casus fortuitous* excused a non-performance.⁹⁸ These facts included the following:

...[t]he nature, terms and context of the contract, the nature of the parties, their relationship and the nature of the impossibility relied upon.

Parties cannot rely on an impossibility caused by their own acts or omissions.⁹⁹ It is also required that the impossibility must be absolute, not relative, and objective.¹⁰⁰

When a change in circumstances occur that is "neither foreseeable nor foreseen" then the obligation to perform is discharged.¹⁰¹ The court also stated that *vis major*- and *casus fortuitous* events are any events caused by human actions or acts of nature that are "unforeseeable with reasonable foresight and unavoidable with reasonable care".¹⁰²

Although this case does not reference *force majeure* directly it does refer to *vis major* events which per Hutchison's definition¹⁰³ are seen as *force majeure* events.

2.4 Decision of the parties

The determination of the proper law of the contract, where the parties do not expressly or tacitly state which legal system will govern their contract can be a strenuous and time-consuming process. It can also be an expensive one if professional legal advice is sought by the parties. A suggestion would thus be for the parties to include a choice of law clause which specifically chooses a legal system that is well versed in the application of *force majeure*, or a *force majeure* clause itself.

⁹⁸ *Frajenron* case para 13.

⁹⁹ *Frajenron* case para 13.

¹⁰⁰ *Frajenron* case para 13.

¹⁰¹ *Frajenron* case para 17.

¹⁰² *Frajenron* case para 17.

¹⁰³ Hutchison *et al The Law of Contract in South Africa* 514.

This will provide clarity and stability for future transactions between the parties. This modicum of control might also make the parties feel more at ease by knowing they are protected if such an uncontrollable and unforeseeable event occurs.

Chapter 3: International approach

This chapter will show the international community's approach to *force majeure*. This is to show parties, to an extent, what the consequences will be if they decide to make use of a choice of law clause.

3.1 CISG

The United Nations Convention on Contracts for the International Sale of Goods (hereafter the CISG) is a treaty that was created by the United Nations Commission on International Trade Law (hereafter UNCITRAL).¹⁰⁴ The purpose of the CISG is to provide uniform rules in order to promote the development of international trade.¹⁰⁵ The CISG sets out guidelines for contract formation and the obligations of parties.¹⁰⁶ It also provides a comprehensive set of remedies in cases of non-performance.¹⁰⁷

Parties are not allowed to add a choice of law clause stating, "this contract is subject to the *United Nations Convention on Contracts for the International Sale of Goods* (Vienna, 1980)". Article 1 of the CISG states that:

This Convention applies to contracts of sale of goods between parties whose places of business are in different States: (a) when the States are Contracting States; or (b) when the rules of private international law leads to the application of the law of a Contracting State.¹⁰⁸

This means that the CISG will only be applicable when the parties' places of business are in contracting states. Another way in which the CISG can be applicable to a contract is when private international law determines that the proper law of the contract is a contracting state. For arguments sake let's assume that A and B have concluded a trade agreement. A is located in South Africa and B in Germany. South Africa is regrettably not a contracting state, but Germany is.¹⁰⁹ If the proper law of the contract is determined to be South African law, the CISG will not be applicable,

¹⁰⁴ United Nations date unknown <https://uncitral.un.org/en/texts/salegoods>.

¹⁰⁵ United Nations date unknown <https://uncitral.un.org/en/texts/salegoods>.

¹⁰⁶ United Nations date unknown <https://uncitral.un.org/en/texts/salegoods>.

¹⁰⁷ United Nations date unknown <https://uncitral.un.org/en/texts/salegoods>.

¹⁰⁸ Article 1 of the *United Nations Convention on Contracts for the International Sale of Goods* (Vienna, 1980).

¹⁰⁹ United Nations date unknown <https://uncitral.un.org/en/texts/salegoods>.

but if the proper law is determined to be German law, then the CISG will be applicable. If A and B add a choice of law clause stating "this contract will be in line with the laws of Germany" then the CISG will also be applicable.

The CISG does not make specific reference to *force majeure*. Article 79, however under the heading "Exemptions" states that:

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.¹¹⁰

Article 79 of the CISG therefore relieves a contracting party from paying damages if the breach of contract was due to an impediment beyond its control. This described impediment is not unlike the definition of a *force majeure* event provided for by Harms.¹¹¹ Both refer to a circumstance that is unforeseeable and beyond a contracting party's control.

There are various case laws in the international community that analyse article 79.¹¹² It should be noted that a translated abstract from UNILEX¹¹³ was used for the following case since it was published in Dutch. In the *Vital Berry* case¹¹⁴ a Chilean company (the seller) concluded a contract with a Belgium company for the delivery of frozen raspberries.¹¹⁵ Before the goods were shipped, the buyer asked the seller to reduce their price as there was a significant drop in the value for raspberries in

¹¹⁰ Article 79(1) of the *United Nations Convention on Contracts for the International Sale of Goods* (Vienna, 1980).

¹¹¹ Harms *COVID-19 and Force Majeure 2*.

¹¹² Examples being the following UNCITRAL CLOUT Cases: No.331, No. 140, and NO. 166. Please note the CLOUT references are given, because these cases were published in the native language of each court.

¹¹³ UNILEX is a database of international case law and bibliography on the UNIDROIT Principles of International Commercial Contracts and on the *United Nations Convention on Contracts for the International Sale of Goods* (Vienna, 1980).

¹¹⁴ *Vital Berry Marketing NV v Dira-Frost NV* AR 1849/94.

¹¹⁵ UNILEX date unknown <http://www.unilex.info/cisg/case/263>.

the global market.¹¹⁶ The seller refused to reduce the price and declared the contract avoided.¹¹⁷ He then instituted an action to recover damages.¹¹⁸

The *Rechtbank van Koophandel* in Hasseltcourt, Belgium held that the contract was governed by CISG.¹¹⁹ The buyer alleged that he was exempted for his non-performance under article 79 of the CISG since the fluctuating prices were unforeseeable.¹²⁰ The court held that the significant drop of the market price of the raspberries did not constitute a case of *force majeure* since fluctuating prices do not make performance impossible as they are foreseeable events in international trade.¹²¹ The seller therefore had a right to cancel the contract or request specific performance and damages. In this case the seller was granted damages, including the expenses incurred in storing the undelivered frozen raspberries and lost profits.¹²²

3.2 ICC

The International Chamber of Commerce (hereafter the ICC), is one of the largest, most diverse business organizations in the world: they represent 45 million companies in over 100 countries.¹²³ They perform several functions for businesses, including the "establishment of rules, dispute resolution, policy advocacy, and training", all to foster international trade and commerce.¹²⁴

3.2.1 UCP and eUCP

One of the problems that parties to an international contract face is when payment should be made. The seller would prefer to receive payment before the goods are transported for delivery. On the other hand, the buyer would prefer to pay only after they received and inspected the goods. One way to circumvent this problem is when

¹¹⁶ UNILEX date unknown <http://www.unilex.info/cisg/case/263>.

¹¹⁷ UNILEX date unknown <http://www.unilex.info/cisg/case/263>.

¹¹⁸ UNILEX date unknown <http://www.unilex.info/cisg/case/263>.

¹¹⁹ UNILEX date unknown <http://www.unilex.info/cisg/case/263>.

¹²⁰ UNILEX date unknown <http://www.unilex.info/cisg/case/263>.

¹²¹ UNILEX date unknown <http://www.unilex.info/cisg/case/263>.

¹²² UNILEX date unknown <http://www.unilex.info/cisg/case/263>.

¹²³ International Chamber of Commerce 2022 <https://iccwbo.org/about-us/who-we-are/>.

¹²⁴ International Chamber of Commerce 2022 <https://iccwbo.org/about-us/who-we-are/>.

the parties agree that the buyer procures a promise from a creditworthy third party, such as a bank, to guarantee payment.¹²⁵ This promise by the bank manifests itself through a document known as a letter of credit.¹²⁶ The bank will only make the promised payment when the seller provides certain predetermined documents that are listed in the letter of credit as well as a demand for payment.¹²⁷

The primary goal of the *Uniform Customs and Practice for Documentary Credits 600*²⁸ (hereafter the UCP) is to ease international trade by "providing global uniform rules regulating the issuance and usage of letters of credit".¹²⁹ Article 36 of the UCP, under the heading "*Force Majeure*", states a bank will not assume liability or responsibility for any consequences that arises out of the interruption of its business.¹³⁰ These interruptions are: "...Acts of God, riots, civil commotions, insurrections, wars, acts of terrorism, or by any strikes or lockouts...".¹³¹ The article also lists "causes beyond its control"¹³² as interruptions. Acts of God are events caused by natural forces including:

...[e]arthquakes, floods, tornadoes, snowstorms, hurricanes, etc. In other words, it refers to events which are caused without any human interference, and which could not be prevented.¹³³

As the world of international trade adapted so did the UCP. In 2017 the ICC Banking Commission announced that they would launch a working group to evaluate the existing ICC rules and their adaptability to the digitalisation of trade finance. The *Scope of the Uniform Customs and Practice for Documentary Credits Supplement for Electronic Presentations Version 2.0* (hereafter the eUCP) was published in 2019. The main aim of the eUCP is to regulate the handling of letters of credit in a digital

¹²⁵ Anonymous 2018 <https://www.bowmanslaw.com/insights/shipping-aviation-and-logistics/the-role-of-letters-of-credit-in-the-international-sale-of-goods/>.

¹²⁶ Anonymous 2018 <https://www.bowmanslaw.com/insights/shipping-aviation-and-logistics/the-role-of-letters-of-credit-in-the-international-sale-of-goods/>.

¹²⁷ Anonymous 2018 <https://www.bowmanslaw.com/insights/shipping-aviation-and-logistics/the-role-of-letters-of-credit-in-the-international-sale-of-goods/>.

¹²⁸ *Uniform Customs and Practice for Documentary Credits 600* (2007).

¹²⁹ Meynell *Commentary on eUCP Version 2.0 and eURC Version 1.0* 4.

¹³⁰ Article 36 of the *Uniform Customs and Practice for Documentary Credits 600* (2007).

¹³¹ Article 36 of the *Uniform Customs and Practice for Documentary Credits 600* (2007).

¹³² Article 36 of the *Uniform Customs and Practice for Documentary Credits 600* (2007).

¹³³ Meynell *Commentary on eUCP Version 2.0 and eURC Version 1.0* 69.

environment.¹³⁴ Article e14 of the eUCP, under the heading "Force Majeure", states that a bank will not assume liability or responsibility for any consequences that arise out of the interruption of its business.¹³⁵ This part is identical to article 36 of the UCP, however, the eUCP includes the following:

...[i]ncluding but not limited to its inability to access a data processing system, or a failure of equipment, software, or communications network...¹³⁶

These interruptions are: "Acts of God, riots, civil commotions, insurrections, wars, acts of terrorism, cyberattacks, or by any strikes or lockouts or any other causes".¹³⁷ Again, this part is almost identical to article 36 of the UCP, but specific reference is given to cyberattacks in article e14. Article e14 also lists "causes beyond its control"¹³⁸ as interruptions, additionally, "failure of equipment, software or communications networks"¹³⁹ are considered as causes beyond its control. Interesting to note is that the previous *Uniform Customs and Practice for Documentary Credits Supplement for Electronic Presentations Version 1.1*¹⁴⁰ did not include a *force majeure* clause.¹⁴¹

3.2.2 URC and eURC

The *Uniform Rules for Collections 522* (hereafter the URC) is a set of rules that assists parties namely sellers, banks, and businesses in the process of collecting debts.

Article 15 of the *URC*, under the heading "Force Majeure", is almost identical to Article 36 of the *UCP*. Article 15 states that a bank will not assume liability or

¹³⁴ Meynell *Commentary on eUCP Version 2.0 and eURC Version 1.0* 4.

¹³⁵ Article e14 of the *Uniform Customs and Practice for Documentary Credits Supplement for Electronic Presentations Version 2.0* (2019).

¹³⁶ Article e14 of the *Uniform Customs and Practice for Documentary Credits Supplement for Electronic Presentations Version 2.0* (2019).

¹³⁷ Article e14 of the *Uniform Customs and Practice for Documentary Credits Supplement for Electronic Presentations Version 2.0* (2019).

¹³⁸ Article e14 of the *Uniform Customs and Practice for Documentary Credits Supplement for Electronic Presentations Version 2.0* (2019).

¹³⁹ Article e14 of the *Uniform Customs and Practice for Documentary Credits Supplement for Electronic Presentations Version 2.0* (2019).

¹⁴⁰ *Uniform Customs and Practice for Documentary Credits Supplement for Electronic Presentations Version 1.1* (2007).

¹⁴¹ Meynell *Commentary on eUCP Version 2.0 and eURC Version 1.0* 69.

responsibility for consequences arising out of interruptions to their business.¹⁴²

These interruptions are listed as:

...Acts of God, riots, civil commotions, insurrections, wars, or any other causes beyond their control or by strikes or lockouts.

The wording of this article can be construed to mean that strikes or lockouts are considered as *force majeure* events even though it is not beyond the bank's control. It is submitted that if the writers wanted to minimise confusion, they should have placed the words "...strikes or lockouts..." before "...other causes beyond their control..." as they did in article 36 of the *UCP* which has the following wording "strikes or lockouts or any other causes beyond its control."

As with the eUCP the banking commission's working group evaluated the *URC* and adapted it to keep up with the digitalisation of trade finance. This adaption is manifested by the *Uniform Rules for Collections Supplement for Electronic Presentations Version 1.0*¹⁴³ (hereafter the eURC). Article e13 of the eURC, under the heading "Force Majeure" provides that:

A bank assumes no liability or responsibility for the consequences arising out of the interruption of its business, including but not limited to its inability to access a data processing system, or a failure of equipment, software or communications network, caused by Acts of God, riots, civil commotions, insurrections, wars, acts of terrorism, cyberattacks, or by any strikes or lockouts or any other causes, including failure of equipment, software or communications networks, beyond its control.¹⁴⁴

Article e13 of the eURC, under the heading "Force Majeure", is identical to article e14 of the eUCP.

¹⁴² Article 15 of the *Uniform Rules for Collections* 522.

¹⁴³ *Uniform Rules for Collections Supplement for Electronic Presentations Version 1.0* (2019).

¹⁴⁴ Meynell *Commentary on eUCP Version 2.0 and eURC Version 1.0* 102.

Chapter 4: *Force majeure* clause

According to Konarski,¹⁴⁵ international contract law is supported by the principle *pacta sunt servanda*,¹⁴⁶ which binds parties to their contractual obligations. Releasing a party from its contractual obligations will constitute as an exception from this basic principle of international contract law. However, parties can contract to mitigate the circumstances surrounding *force majeure* events.

Force majeure events either lead to the suspension of contracts in cases of temporary impossibility, or termination in cases of absolute and permanent impossibility.¹⁴⁷ However, parties should still be careful to not use a *force majeure* event as an excuse to not honour their contractual obligations, because this could possibly lead to specific performance or damages claims.¹⁴⁸ To not fall prey to this temptation it is better for the parties to rather include a *force majeure* clause in their contract. Most *force majeure* clauses in practice only suspend a party's non-performance for the duration of the *force majeure* event and do not entirely excuse it.¹⁴⁹

When reading this chapter, and the dissertation as a whole, the following statement by Konarski should be kept in mind: A "study of *force majeure* clauses in international contractual practice is complicated"¹⁵⁰. The reason for this is because most international contracts are confidential and the only people privy to it are the parties to the contract themselves. This means that most of the *force majeure* clauses that are used in practice are hardly disclosed to the public. Therefore, this chapter focuses on the *ICC Force Majeure and Hardship Clauses* which are publicly available.

¹⁴⁵ Konarski 2003 *International Business Law Journal* 2.

¹⁴⁶ Agreements must be kept.

¹⁴⁷ Konarski 2003 *International Business Law Journal* 5.

¹⁴⁸ Harms *COVID-19 and Force Majeure* 2.

¹⁴⁹ Harms *COVID-19 and Force Majeure* 2.

¹⁵⁰ Konarski 2003 *International Business Law Journal* 2.

4.1 ICC Force Majeure and Hardship Clause

The ICC originally released the *ICC Force Majeure and Hardship Clauses* (hereafter the *Clause*) in 2003, but updated it in 2020 due to the Covid-19 outbreak.¹⁵¹ The main aim of the *Clause* is to help large and small scale businesses draft contracts that are adaptable to unforeseen events.¹⁵² The *Clause* was drafted to be used in international contracts in any jurisdiction in order to increase legal certainty.¹⁵³ This *Clause* contains a list of *force majeure* events and a general *force majeure* definition to further include circumstances that may not fall within the aforementioned list.¹⁵⁴ There are even explanatory guidance notes that give the parties practical context to consider when they wish to make use of this *Clause* in their contract.¹⁵⁵ This *Clause* can either be incorporated expressly or by reference, for example, "The *ICC Force Majeure Clause* is incorporated in the present contract", and contractual parties can also use this *Clause* as a basis to draft their own *force majeure* clause.¹⁵⁶ This *Clause* has a Long Form and a Short Form. The Long Form gives guidance on issues where the Short Form does not. Attention will thus be given to the Long Form.

In terms of this *Clause* when a party successfully invokes *force majeure* the affected party is "relieved from its duty to perform and from responsibility or damages".¹⁵⁷ This relief is from the date of occurrence of the *force majeure* event and in case of a temporary event until the event ceases to prevent the performance.¹⁵⁸

Paragraph one of the Long Form defines *force majeure* as follows:

Force Majeure means the occurrence of an event or circumstance (*Force Majeure* Event) 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

¹⁵¹ International Chamber of Commerce 2022 <https://iccwbo.org/about-us/who-we-are/>.

¹⁵² International Chamber of Commerce 2022 <https://iccwbo.org/about-us/who-we-are/>.

¹⁵³ International Chamber of Commerce 2022 <https://iccwbo.org/about-us/who-we-are/>.

¹⁵⁴ International Chamber of Commerce 2022 <https://iccwbo.org/about-us/who-we-are/>.

¹⁵⁵ International Chamber of Commerce 2022 <https://iccwbo.org/about-us/who-we-are/>.

¹⁵⁶ International Chamber of Commerce 2022 <https://iccwbo.org/about-us/who-we-are/>.

¹⁵⁷ International Chamber of Commerce 2020 <https://iccwbo.org/publication/icc-force-majeure-and-hardship-clauses/> 1.

¹⁵⁸ International Chamber of Commerce 2020 <https://iccwbo.org/publication/icc-force-majeure-and-hardship-clauses/> 1.

affected by the impediment (the Affected Party) 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.¹⁵⁹

The Long Form's definition of *force majeure* is less stringent than the South African common law principle of supervening impossibility of performance due to its express reference to reasonableness in conditions (a) to (c). The common law principle makes no reference to reasonableness whatsoever. The Long Form's definition is quite close to the definition provided for by Harms¹⁶⁰. Both say that the event must be out of the reasonable control of the affected party and that the event must be unforeseeable. However, the Long Form is more lenient in that it states that the "effects of the impediment could not reasonably have been avoided or overcome by the affected party"¹⁶¹. Harms' definition, on the other hand, requires that the event must make it objectively impossible for the affected party to perform its obligations under the contract.

Paragraph three of the Long Form gives a list of "Presumed *Force Majeure* Events".¹⁶² These events automatically fulfil conditions (a) and (b) of the definition and an affected party only needs to prove that condition (c) was fulfilled:

- a) war (whether declared or not), hostilities, invasion, act of foreign enemies, extensive military mobilisation;
- b) civil war, riot, rebellion and revolution, military or usurped power, insurrection, act of terrorism, sabotage or piracy;
- c) currency and trade restriction, embargo, sanction;
- d) act of authority whether lawful or unlawful, compliance with any law or governmental order, expropriation, seizure of works, requisition, nationalisation;
- e) plague, epidemic, natural disaster or extreme natural event;

¹⁵⁹ International Chamber of Commerce 2020 <https://iccwbo.org/publication/icc-force-majeure-and-hardship-clauses/> 1.

¹⁶⁰ Harms COVID-19 and Force Majeure 2.

¹⁶¹ International Chamber of Commerce 2020 <https://iccwbo.org/publication/icc-force-majeure-and-hardship-clauses/> 1.

¹⁶² International Chamber of Commerce 2020 <https://iccwbo.org/publication/icc-force-majeure-and-hardship-clauses/> 2.

f) explosion, fire, destruction of equipment, prolonged break-down of transport, telecommunication, information system or energy;

g) general labour disturbance such as boycott, strike and lock-out, go-slow, occupation of factories and premises.¹⁶³

The Long Form's list of *force majeure* events is also more extensive than that provided for by Hutchison.¹⁶⁴

Paragraph five of the Long Form Clause is "Consequences of *Force Majeure*".¹⁶⁵ This paragraph states that an affected party who successfully invokes this clause is relieved from their duty to perform their contractual obligations and is also relieved from any liability for damages or any other breach of.¹⁶⁶ This relief, however, only stretches from when the *force majeure* event causes the inability to perform.¹⁶⁷ Another condition is that the affected party has to inform the other by notice, without delay, the moment when the *force majeure* event causes the inability to perform.¹⁶⁸

4.2 Proposed force majeure clause

Every definition for *force majeure* and consequently for *force majeure* events encountered in this mini-dissertation differs based on the source. One example being the definitions provided by Harms¹⁶⁹ and Hutchison.¹⁷⁰ Both are well respected South African writers, but each provides a definition where the core elements differ. In Harms' definition a *force majeure* event is unforeseeable and out of the

¹⁶³ International Chamber of Commerce 2020 <https://iccwbo.org/publication/icc-force-majeure-and-hardship-clauses/> 2.

¹⁶⁴ Hutchison *et al The Law of Contract in South Africa* 514.

¹⁶⁵ International Chamber of Commerce 2020 <https://iccwbo.org/publication/icc-force-majeure-and-hardship-clauses/> 2.

¹⁶⁶ International Chamber of Commerce 2020 <https://iccwbo.org/publication/icc-force-majeure-and-hardship-clauses/> 2.

¹⁶⁷ International Chamber of Commerce 2020 <https://iccwbo.org/publication/icc-force-majeure-and-hardship-clauses/> 2.

¹⁶⁸ International Chamber of Commerce 2020 <https://iccwbo.org/publication/icc-force-majeure-and-hardship-clauses/> 2.

¹⁶⁹ Harms *COVID-19 and Force Majeure* 2.

¹⁷⁰ Hutchison *et al The Law of Contract in South Africa* 514.

reasonable control of one or both of the parties to a contract, while in Hutchison's definition a *force majeure* event needs only to be beyond someone's control.

In South Africa a court has not yet created precedent as to a definition for *force majeure*. Until such legal precedent has been established the parties to an international trade contract have the following options: they can either add a *force majeure* clause to their contract or they can include a choice of law clause which will lead to the application of a specific country's laws, where this country's laws are well acquainted with the concept of *force majeure*.

Konarski¹⁷¹ also lists 2 requirements that the "most advanced *force majeure* clause" must contain. The first requirement is that a definition for *force majeure* must be included which contains the following elements:

[a]n event that (1) renders the performance impossible, and is (2) beyond the parties' control, (3) reasonably inevitable and (4) unforeseeable...¹⁷²

The second requirement is that either an exhaustive or open-ended list of circumstances that qualify as *force majeure* events must be included.¹⁷³

The following is a proposed *force majeure* clause that can be included in an international contract:

A *force majeure* event is a circumstance that is unforeseeable and out of the reasonable control of one or both of the parties to a contract and the circumstance makes it objectively impossible for one or both of the parties to perform their obligations under the contract. A *force majeure* event is, but is not limited to, the following occurrences: a war, strike, riot, crime, epidemic, or an event that is described by the legal term an act of God, also known as a *vis major*, such as a hurricane, flood, earthquake, or a volcanic eruption.

This proposed clause is an amalgamation of the definitions provided by Harms¹⁷⁴ and Hutchison.¹⁷⁵ The reason for this being that Harms' definition provides conditions against which an event can be measured to determine whether it

¹⁷¹ Konarski 2003 *International Business Law Journal* 5.

¹⁷² Konarski 2003 *International Business Law Journal* 5.

¹⁷³ Konarski 2003 *International Business Law Journal* 5.

¹⁷⁴ Harms *COVID-19 and Force Majeure* 2.

¹⁷⁵ Hutchison *et al The Law of Contract in South Africa* 514.

classifies as a *force majeure* event. Hutchison's definition mostly consists of examples of circumstances that classify as *force majeure* events, which is beneficial because it provides clarity to the parties of the contract of what can constitute a *force majeure* event. The words "but is not limited to" are added because of Hutchison's advice for parties to refrain from including an exhaustive list of events in their contract due to the possibility that the wording can exclude a specific event by failing to incorporate it in the list.¹⁷⁶ The listed examples are merely yardsticks from which the parties can measure the events to which they themselves are exposed.

¹⁷⁶ Hutchison *et al* *The Law of Contract in South Africa* 6.

Chapter 5: International incidents

It is clear from the above-mentioned case law that *force majeure* is determined on a case-to-case basis. To put this statement into perspective three incidents that affected international trade will be discussed and practical examples of how the international community approached these incidents will be given.

5.1 Volcanic eruption in Iceland (2010)

Iceland is an island located on the ridge between the Eurasian and American Tectonic plates in the North-Atlantic Ocean and its surrounding area has more than 30 active volcanic systems.¹⁷⁷ The volcano Eyjafjallajökull erupted on 14 April 2010 and emitted a 5-10km high plume of fine-grained ash.¹⁷⁸ This ash was transported to mainland Europe, Ireland and the United Kingdom by westerly and northerly winds and thus disturbed the international travel of passengers and transport of goods.¹⁷⁹ The general practice is to avoid airspace contaminated by volcanic ash due to its hazardous effects on jet engines: an example is the British Airways B747 flight that lost power on all four jet engines when it flew through a cloud of volcanic ash in 1982.¹⁸⁰ The reasoning behind this practice is that the potential personal and economic loss outweighs the costs of rerouting or cancelling flights. The "eruption of disruption", the name given to the Eyjafjallajökull eruption, led to more than 100 000 flights being cancelled, an estimated EUR 1.3 billion loss in revenue for airlines, 11.7% decrease in air travel and 40% decrease of cargo transport in Europe.¹⁸¹ The eruption caused an estimated worldwide loss of EUR 3.75 billion in air traffic as it is believed to be the greatest disruption since World War II.¹⁸²

The domestic effects were quite extensive as well. On 14 April 2010 Eyjafjallajökull also began spewing lava¹⁸³ and the government started evacuation procedures for

¹⁷⁷ Petursdottir *et al Super Case Study 3* 308.

¹⁷⁸ Petursdottir *et al Super Case Study 3* 308.

¹⁷⁹ Petursdottir *et al Super Case Study 3* 309.

¹⁸⁰ Petursdottir *et al Super Case Study 3* 309.

¹⁸¹ Petursdottir *et al Super Case Study 3* 314.

¹⁸² Petursdottir *et al Super Case Study 3* 314.

¹⁸³ Petursdottir *et al Super Case Study 3* 308.

individuals who resided in the zones that were deemed dangerous.¹⁸⁴ This eruption was so sudden that the Icelandic Department of Civil Protection and Emergency Management had to issue, to the immediate surroundings of Eyjafjallajökull, the highest priority evacuation orders.¹⁸⁵

5.1.1 Denise McDonagh v Ryanair Ltd

The *McDonagh*¹⁸⁶ case was a direct result of the closure of European airspace on the 15 April 2010 due to Eyjafjallajökull's eruption.¹⁸⁷ In this case the claimant's flight from Portugal to Ireland was cancelled and the claimant had to stay an extra week in Portugal where she incurred additional expenses to the amount of €1129.¹⁸⁸ She brought a claim against the respondent for this unexpected expenditure.¹⁸⁹

One of the issues before the Court of Justice of the European Union in this case was whether the closure of the European airspace, because of the eruption constituted an "extraordinary circumstance" within the scope of Regulation 261/2004.¹⁹⁰

Recital 14 in the preamble to Regulation 261/2004 define an extraordinary circumstance as follows:

Obligations on operating air carriers should be limited or excluded in cases where an event has been caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken. Such circumstances may, in particular, occur in cases of political instability, meteorological conditions incompatible with the operation of the flight concerned, security risks, unexpected flight safety shortcomings and strikes that affect the operation of an operating air carrier.¹⁹¹

The court found that the term "extraordinary circumstance" refers to an event that is beyond the control of the airline carrier regardless of the gravity or nature of the circumstances.¹⁹² The court deemed the closure of the European airspace, due to

¹⁸⁴ Petursdottir *et al Super Case Study 3* 308.

¹⁸⁵ Petursdottir *et al Super Case Study 3* 308.

¹⁸⁶ Case C-12/11 *Denise McDonagh v Ryanair Ltd* [2012].

¹⁸⁷ *McDonagh* case para 2.

¹⁸⁸ *McDonagh* case paras 13-15.

¹⁸⁹ *McDonagh* case para 15.

¹⁹⁰ *Regulation (EC) No 261/2004 of the European Parliament and of the Council* para 17.

¹⁹¹ Recital 14 of *Regulation (EC) No 261/2004 of the European Parliament and of the Council*.

¹⁹² *McDonagh* case para 29.

Eyjafjallajökull's eruption, to be an "extraordinary circumstance" in the given case.¹⁹³ The court also stated that this closure of airspace did not release the respondent from their obligations laid down in articles 5(1)(b) and 9 of the regulation to provide care.¹⁹⁴ The court stated that the respondent had been obliged to provide the claimant with necessary accommodation for the period that her flight was delayed, and by not doing so the respondent had a duty to compensate the claimant for the breach of the duty of care.¹⁹⁵

5.2 Covid-19 pandemic (2019)

A National State of Disaster was declared in South Africa on 15 March 2020 due to the Covid-19 pandemic.¹⁹⁶ On 26 March 2020 South Africa declared a national lockdown where all the citizens were told to stay home except for essential workers. The Government Notice 398¹⁹⁷ released on the 25 March 2020 listed services that would be regarded as essential during the lockdown. Only these essential services could carry on with their business. Item B(4) states that the production and sale of goods listed in category A will be regarded as essential services.¹⁹⁸ Item A states that goods relating to food, cleaning and hygiene, medical products, fuel and basic goods such as airtime and electricity are essential goods.¹⁹⁹ All other non-essential activities were suspended.²⁰⁰ The first lockdown period lasted for 21 days from 26 March 2020.²⁰¹ This meant that businesses not declared as essential had to cease operations.

¹⁹³ *McDonagh* case para 67.

¹⁹⁴ *McDonagh* case para 67.

¹⁹⁵ *McDonagh* case para 41

¹⁹⁶ Ramaphosa 2022 <https://www.thepresidency.gov.za/speeches/statement-president-cyril-ramaphosa-termination-national-state-disaster-response-covid-19-pandemic>.

¹⁹⁷ Gen Not 398 in GG 43148 of 25 March 2020.

¹⁹⁸ Item B(4) in Gen Not 398 in GG 43148 of 25 March 2020.

¹⁹⁹ Item A(1-5) in Gen Not 398 in GG 43148 of 25 March 2020.

²⁰⁰ Consulate General of the Republic of Indonesia in Cape Town 2020 <https://kemlu.go.id/capetown/en/news/5833/president-cyrill-ramaphosa-announced-lockdown-in-south-africa-for-21-days>.

²⁰¹ Consulate General of the Republic of Indonesia in Cape Town 2020 <https://kemlu.go.id/capetown/en/news/5833/president-cyrill-ramaphosa-announced-lockdown-in-south-africa-for-21-days>.

5.2.1 *Freestone Property Investments (Pty) Ltd v Remake Consultants*

In this *Freestone*²⁰² case the plaintiff leased to the defendant two commercial premises in a shopping centre.²⁰³ The plaintiff terminated the two rental agreements because of non-payment of rent in November 2020.²⁰⁴ Due to the lockdown on 26 March 2020 the defendant ceased trading and only recommenced with trading in June, even though the lockdown ended on 30 April 2020.²⁰⁵ The plaintiff instituted a claim against the defendant for arrear rent because the defendant did not make any payments for March until October.²⁰⁶ The defendant argued that he was excused from paying rent for the period of March to June 2020, because the plaintiff was excused from tendering the occupation of the premises.²⁰⁷ The defendant supported the latter argument by submitting that the declaration of the state of disaster made the parties, obligations in terms of the rental agreement objectively impossible to perform,²⁰⁸ meaning that the defendant was unable to lawfully occupy and the plaintiff was unable to tender lawful occupation of the leased premises.²⁰⁹

One issue before the court was determining whether the doctrine of supervening impossibility of performance applied to this case.²¹⁰ The court stated that the doctrine could serve as a defence during the period of the lockdown, but not for any period thereafter.²¹¹ The defendant chose to not reopen for business after lockdown when he was legally permitted to do so.²¹² The court stated that even if there was a decline in foot traffic after the lockdown, which made the operations of the defendant's business economically onerous, this did not mean that the

²⁰² *Freestone Property Investments (Pty) Ltd v Remake Consultants* 2021 6 SA 470

²⁰³ *Freestone* case para 1.

²⁰⁴ *Freestone* case para 2.

²⁰⁵ *Freestone* case para 2.

²⁰⁶ *Freestone* case para 3.

²⁰⁷ *Freestone* case para 4.

²⁰⁸ *Freestone* case para 4.

²⁰⁹ *Freestone* case para 4.

²¹⁰ *Freestone* case para 8.

²¹¹ *Freestone* case para 37.

²¹² *Freestone* case para 31.

defendant could rely on the doctrine as a defence.²¹³ The court quoted the *Matshazi* case²¹⁴ as support:

The respondent companies are not excused from its obligations to its employees because it has decided not to trade in circumstances where it is able to do so, but has elected not to, in anticipation that such trading will not be profitable. Trading may be burdensome or economically onerous, but economic hardship is not characterised as being a *force majeure event*; it does not render performance objectively and totally impossible.²¹⁵

It should be noted that the court stated that the defendant's decision to cease trading during this time; was not a direct consequence of a *force majeure*.²¹⁶ Regrettably the court did not provide a definition for *force majeure*.

In conclusion the court found that the defendant could use the doctrine of impossibility of performance as a defence for the lockdown period, but not for the period thereafter.²¹⁷ The court in this case could not decide the rent amount in arrears for the lockdown period as it was not sufficiently stated in the plaintiff's papers, accordingly the court granted the defendant leave to defend the plaintiff's claim for payment of the arrears and related interest.²¹⁸

5.3 Russian Invasion of Ukraine (2022)

On 24 February 2022 Russia invaded Ukraine: the war is currently still ongoing.²¹⁹ On that morning missiles, rockets, and airstrikes hit across Ukraine which was then followed by a large ground invasion.²²⁰ This invasion caused Europe's largest refugee crisis since World War II²²¹

²¹³ *Freestone* case para 29.

²¹⁴ *Matshazi v Mezepoli Melrose Arch (Pty) Limited and related matters* [2020] 3 All SA 499 (GJ).

²¹⁵ *Matshazi* case para 40.

²¹⁶ *Matshazi* case para 31.

²¹⁷ *Matshazi* case para 32.

²¹⁸ *Matshazi* case para 49.

²¹⁹ Aloisi and Daniel 2022 <https://www.reuters.com/world/europe/events-leading-up-russias-invasion-ukraine-2022-02-28/>.

²²⁰ Aloisi and Daniel 2022 <https://www.reuters.com/world/europe/events-leading-up-russias-invasion-ukraine-2022-02-28/>.

²²¹ Pita and Costa 2022 <https://english.elpais.com/international/2022-03-03/ukrainian-exodus-could-be-europes-biggest-refugee-crisis-since-world-war-ii.html>.

[w]ith an estimated 8 million people being displaced within the country by late May as well as 7.7 million Ukrainians fleeing the country as of 18 October 2022.²²²

This invasion had a devastating impact on the world food market. Ukraine and Russia are two of the biggest contributors of wheat, corn, barley, fertilizer, and sunflower oil.²²³ Together they account for more than 30% of the world's wheat export.²²⁴ Ukrainian exports have dropped significantly due to the invasion. Sanctions have also crippled Russia's export, of which the following are examples: (1) the European Union will ban imports of Russian seaborne crude oil from 5 December 2022; (2) the European Union, the United States, Canada, and the United Kingdom have agreed to stop buying Russian oil; and (3) Germany has frozen their plans for the completion of the Nordstream 2 gas pipeline from Russia.²²⁵

5.3.1 Ukrainian Law

In chapters 5.1.1 and 5.2.1 case law was used to show a practical approach to the Volcanic Eruption in Iceland (2010) and the Covid-19 pandemic (2019). However, for this section an article from the firm Kinstellar will be used. This article was written by members of Kinstellar's Kyiv office and was released in March 2022. The main aim of the article is to explain the following concept: under Ukrainian law a party that is in breach if its contractual obligation can avoid liability if the party can prove that this breach is a result of a *force majeure* event.²²⁶ The process of using a *force majeure* event as a defence under Ukrainian law is quite fascinating.

Ukrainian law does not provide an exhaustive list of *force majeure* events.²²⁷ Events are subject to open-ended interpretation depending on the factual circumstances of each case. However, it does state what does not qualify:

²²² UNCHR 2022 <https://data.unhcr.org/en/situations/ukraine>.

²²³ Barbaro and Nicas 2022 <https://www.nytimes.com/2022/04/05/podcasts/the-daily/ukraine-russia-food-supply.html>.

²²⁴ Barbaro and Nicas 2022 <https://www.nytimes.com/2022/04/05/podcasts/the-daily/ukraine-russia-food-supply.html>.

²²⁵ BBC News 2022 <https://www.bbc.com/news/world-europe-60125659>.

²²⁶ Martinenko, Volkovetskyi and Placynta *Russia's War Against Ukraine* 1.

²²⁷ Martinenko, Volkovetskyi and Placynta *Russia's War Against Ukraine* 2.

A breach by a contracting party of its own contractual obligations due to a default of a third-party supplier, the unavailability of necessary products and a debtor's inability to pay.²²⁸

The Ukrainian Chamber of Commerce and Industry (hereafter the UCCI) is an organisation that, under the current legislation of Ukraine, has the exclusive right to:

[c]onfirm *Force Majeure* events for further writing off bad tax debt for businesses and individuals, residents and non-residents taxpayers; and to certify the occurrence of *Force Majeure*, in accordance with the Ukrainian effective legislation, the terms of foreign trade and international agreements of Ukraine.²²⁹

A contracting party who wishes to use *force majeure* as a defence must apply to the UCCI for a certificate that confirms that the specific event that prohibited them from performing their contractual obligations is indeed confirmed as a *force majeure* event.²³⁰

The UCCI is obliged to confirm an event as a *force majeure* event if the event:

[i]s exceptional in nature and outside of the parties' control, was not foreseeable when the parties signed the contract, and it makes it impossible to perform the contract.²³¹

The party who is trying to avoid liability for a contractual breach must tender this certificate to court as proof that there was "a causal link between the force majeure event and its contractual breach"²³². On 28 March the UCCI issued "blanket certificates" which confirmed that the Russian Invasion of Ukrainian is a *force majeure* event.²³³

²²⁸ Martinenko, Volkovetskyi and Placynta *Russia's War Against Ukraine* 2.

²²⁹ UCCI 2022 <https://cci.vn.ua/en/about-us/>.

²³⁰ Martinenko, Volkovetskyi and Placynta *Russia's War Against Ukraine* 2.

²³¹ Martinenko, Volkovetskyi and Placynta *Russia's War Against Ukraine* 2.

²³² Martinenko, Volkovetskyi and Placynta *Russia's War Against Ukraine* 2.

²³³ Martinenko, Volkovetskyi and Placynta *Russia's War Against Ukraine* 2.

Chapter 6: Conclusion

Contracting parties naturally assume that the other party will faithfully and satisfactorily perform their obligations in terms of the contract, however circumstances can arise that lead to a party or parties being unable to perform their contractual obligations. Parties to an international contract are especially vulnerable. Where parties within one country contract with one another they are mostly affected by circumstances that occur within that country, whereas parties who contract internationally are susceptible to circumstances that affect the global community. One of these circumstances are *force majeure* events.

It became clear that the differences in definition of *force majeure*, and consequently *force majeure* events, are based on the sources that are used for defining the concept. One example is the definitions provided by Harms²³⁴ and Hutchison.²³⁵ Both are well respected South African writers, but each provides a definition where the core elements differ. In Harms' definition a *force majeure* event is "unforeseeable and out of the reasonable control of one or both of the parties to a contract", while in Hutchison's definition a *force majeure* event needs only to be beyond someone's control. In South Africa a court judgement has not yet created precedent as to a definition for *force majeure*.

The term *force majeure* has various definitions, implications, and applications in international-, foreign- and domestic laws. International organisations have released numerous documents to clarify the concept of *force majeure* for the benefit of the international community. Examples of these are the CISG, UCP, eUCP, URC, and the eURC.

The necessity of protection against *force majeure* events for contracting parties is illustrated by the following events: the Volcanic eruption in Iceland of 2010, the Covid-19 pandemic of 2019, and the Russian invasion of Ukraine of 2022. All of

²³⁴ Harms *COVID-19 and Force Majeure* 2.

²³⁵ Hutchison *et al The Law of Contract in South Africa* 514.

these are exquisite examples of how *force majeure* events can have a drastic effect on the international community.

Parties, whether domestic or international, can protect themselves from the effects of *force majeure* events by including certain clauses in their contract. They can either include a choice of law or a *force majeure* clause. The choice of law clause provides certainty to the parties as to which country's law will govern the contract or a part of the contract. With regard to *force majeure*, parties can choose to have a country that has more experience with the interpretation and application of *force majeure* clauses as the governing law of the contract. The parties can either include a *force majeure* clause that is recognised by the international community, such as the *ICC Force Majeure and Hardship Clause*, or a clause that they drafted themselves.

By including these clauses contracting parties can feel more certain and at ease knowing that they took measures to protect their interests. This ease can be beneficial for the international trade community as well. If the parties feel that they took adequate measures to protect their interests in a contract, then they will be more likely to contract with one another again in the future, maybe even on a larger scale. These are small steps; however, they are steps that create legal certainty for parties enabling them to enjoy the benefits of international trade.

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