Article Subject domain:
International Law and Model Contracts

INTERGOVERNMENTAL RESEARCH AND POLICY JOURNAL (IRPJ)

A peer-reviewed, multi-disciplinary journal under the authority of EUCLID / UN Treaty 49006/49007

ISSN: 2663-6832

https://irpj.euclid.int

Termination Of International Construction Contracts: Impacts Of Fidic Contracts Termination Under Force Majeure

Author: Ahmed Ibrahim Masoud

Doctoral Student, Mediation and Conflict Resolution, Euclid University; Master In Business Administration, University of People - the USA, 2020. B.Sc. in Civil Engineering, Suez Canal University - Egypt, 2005.

The author works at a leading infrastructure consulting firm that delivers professional project management across more than one hundred countries.

Name and address of the corresponding author:
Ahmed Ibrahim Masoud
King Fahd Road, Riyadh, Saudi Arabia
Email: ahmedmasoud@gmail.com

Keywords: *Fidic, Governmental Contracts, Force Majeure, Exceptional Events, Negotiation, Mediation*

IGOs: World Health Organization (WHO), International Institute for the Unification of Private Law (UNIDROIT), United Nations Commission on International Trade Law (UNCITRAL)

ABSTRACT

After three years, the entire world continues to suffer from the spread of the Coronavirus. The effects of the Coronavirus crisis extended beyond the health aspect, as it had serious economic consequences and created complex legal dilemmas.

International contracts have been severely affected due to their specificity within the framework of contractual freedom, the different circumstances resulting from the epidemic, and the difficulty of adapting them. International contracts were affected by the measures taken in each country to prevent the spread of the epidemic, which affected contractual obligations. The precautionary measures affected the conduct of the contracts, ranging from the frustration of contracts to the difficulty of their execution. Thus, legal treatment requires practical measures to address emerging circumstances and mitigate their consequences.

This article aims to shed light on the issues facing the implementation of international contractual obligations under force majeure, such as the Corona pandemic. This article studies the options of the contractors in terminating the FIDIC contracts and the possible consequences of unilateral termination of contracts. This article concludes with recommendations on terminating premature FIDIC contracts, facing emerging contractual dilemmas, and avoiding disputes.

1. Introduction

The unforeseen risks represent the greatest challenge facing international contracts in the construction industry. The pandemics that affect large areas of the world are one of the biggest challenges. The Coronavirus (Covid-19) pandemic represents an unexpected global pandemic, which

Copyright remains with the author(s) and IRPJ

Article Subject domain:
International Law and Model Contracts

INTERGOVERNMENTAL RESEARCH AND POLICY JOURNAL (IRPJ)

A peer-reviewed, multi-disciplinary journal under the authority of EUCLID / UN Treaty 49006/49007

ISSN: 2663-6832

https://irpj.euclid.int

undoubtedly created many unexpected obstacles to the obligations of international contracts. Moreover, the multiplicity of forms of international contracts, such as FIDIC (International Federation of Consulting Engineers) and NEC (New Engineering Contract), complicates the treatment of contractual dilemmas.[1]

The Corona pandemic should be studied legally to treat the contractual dilemmas arising from implementing international FIDIC contracts under the Corona pandemic. A sharp vision was not reached about the best legal response to that pandemic, as many specialists and experts did not agree on whether the corona pandemic may be considered a force majeure or an exceptional event.[2]

Therefore, the provisions of the contractual rebalancing of force majeure can be applied when the conditions for applying to each of them are met. Moreover, One of the most important things that must be studied is the fair legal solutions to disputes related to international contracts and obligations resulting from force majeure.[3]

2. International Contracts

2.1. International Contracts Criteria

International contracts are non-local contracts regulating contractual relations between persons internationally. Defining the internationality of the contractual relationship has raised some difficulties, so specialists disagree on the criteria to be followed to determine the internationality of the contracts.[4]

a) Legal Criterion

According to the Legal criteria, a contract is considered an international contract if its legal elements relate to more than one legal system. The foreign character of one of the elements of the contract must be verified, such as the parties, the subject, its scope, and the object of its conclusion.

It should be noted that differences in one of the legal elements of the contract, such as the nationality of the contracting parties or their various places of residence, are not necessarily elements of an international contract.

[1] Oren Perez, "Using Private-Public Linkages to Regulate Environmental Conflicts: The Case of International Construction Contracts," Journal of Law and Society 29, no. 1 (March 2002): 269–299, https://doi.org/10.1111/1467-6478.00212.

[2] Harun Tanrıvermiş, "Possible Impacts of COVID-19 Outbreak on Real Estate Sector and Possible Changes to Adopt: A Situation Analysis and General Assessment on Turkish Perspective," Journal of Urban Management 9, no. 3 (September 2020): 263–269, https://doi.org/10.1016/j.jum.2020.08.005.

[3] Frederick R Fucci, "Hardship and Changed Circumstances as Grounds for Adjustment or Non-Performance of Contracts: Practical Considerations in International Infrastructure Investment and Finance," *American Bar Association*, 2006, https://xdocs.net/documents/hardship-and-changed-circumstances-as-practical-considerations-in-international.

[4] Hague Conference on Private International Law, 'Principles on Choice of Law in International Commercial Contracts', accessed 26 January 2023, https://www.hcch.net/en/instruments/conventions/full-text/?cid=135.

Copyright remains with the author(s) and IRPJ

Article Subject domain:
International Law and Model Contracts

INTERGOVERNMENTAL RESEARCH AND POLICY JOURNAL (IRPJ)

A peer-reviewed, multi-disciplinary journal under the authority of EUCLID / UN Treaty 49006/49007

ISSN: 2663-6832

https://irpj.euclid.int

b) ***Economic Criterion***

Many legal systems have adopted the economic standard of international contracts. French judiciary relied on the economic criterion for which the contract is considered international if it relates to international trade interests. Thus, the international contract is based on an economic relationship that goes beyond the internal economy of a country and entails the movement of funds from one country to another.

The international contract results from moving funds from one country to another according to economic criteria. At the same time, it is a contract that relates to more than one legal system. Thus, the concept of the economic criterion for international contracts is consistent with the legal criteria.

c) *Dualism Criterion*

Many specialists tend to adopt the narrow legal criterion through which the contract is considered international when the foreign character effectively touches one of its elements. Therefore, some specialists have adopted a modern view that the dualism criteria should be applied. The dualism criteria combine legal and economic criterion. According to the dualism criteria, an international contract is linked to the legal systems of different countries and aims to make a profit, transfer services across borders, or achieve the interests of international trade.

2.2. Nature of International Construction Contracts

Since ancient times, societies have been accustomed to trading exchanges. With the emergence of international borders in the modern era, and with the modern concepts of development and the transformation of countries to find an alternative to theories of self-sufficiency, new theories emerged that call for the entry of foreign entities to invest within countries. Regardless of the nature of the trading exchange, the movements of funds, whether material or moral, technical, or administrative expertise, the vast majority occur within a contractual framework.

a) *Differentiation Between International Construction Contracts and Other International Trade Contracts*

International construction contracts differ from other international trade contracts, such as supply contracts. It is noted that international construction contracts are considered a type of public works contract. International construction contracts are concluded between a public legal person and a foreign contractor to conduct works of a construction nature, according to special rules for transferring foreign experience and exchanging funds from one country to another.

It should be noted that international construction contracts are limited in their period. Also, international construction contracts are technically and legally complex. Moreover, international construction contracts extend for several years, unlike other international trade contracts. It is noted that the implementation of the contract for a prolonged period will make it vulnerable to fluctuating circumstances and unexpected events that may affect the ability of the parties to fulfill their obligations.

b) *Differentiation Between International Construction Contracts And Local Construction Contracts*

International construction contracts differ from local construction contracts; despite sharing the same concept of the subject. International construction contracts have numerous stakeholders in the conclusion and implementation of international construction contracts, like the employer, contractor, consulting engineer, vendors, suppliers, and many government agencies. Multi-stakeholders in international

Copyright remains with the author(s) and IRPJ

Article Subject domain:
International Law and Model Contracts

INTERGOVERNMENTAL RESEARCH AND POLICY JOURNAL (IRPJ)

A peer-reviewed, multi-disciplinary journal under the authority of EUCLID / UN Treaty 49006/49007

ISSN: 2663-6832

https://irpj.euclid.int

construction contracts lead to intertwined relations between them and the presence of multiple responsibilities in this regard. The diversity of stakeholders creates many technical and financial complications.

c) *Differentiation Between Government Construction Contracts and Other Construction Contracts*

In government projects, the contracting parties with the government cannot negotiate to amend the contract terms, which makes them adhesion contracts. Adhesion contracts exist in government projects, where the contracting parties have an unequal bargaining power to amend the contract terms. It is worth noting that government contracts are completely different from the private and non-profit sectors. On the contrary, non-government contracts contain flexibility in implementation and contract termination. If implementation difficulties arise in non-government contracts, the scope can be changed, and an alternative implementation plan can be discussed.

Moreover, international political factors affect the implementation of international business and projects. Participatory international projects are most affected by the level of the relationship between the countries. The greater bonds of cooperation and partnership between countries, the greater the project's success rate and vice versa. Political fluctuations affect the progress of projects, such as suspending or canceling projects in Ukraine due to the Russian-Ukrainian war, or indirectly, such as the Corona pandemic crisis.

d) *Differentiation Between Construction Contracts and Other Commercial Contracts*

Construction contracts include contractual terms to deal with exceptional events, and there is no equivalent to these terms in the other types of contracts, and this is due to the inevitable prolongation of the duration of construction contracts. During the long implementation of contracts, the employer may express his desire to use the completed parts before completing the project. Moreover, it is worth noting that construction contracts are executed under unstable conditions using materials and labor of variable quantities. Therefore, there are still great possibilities for new emerging conditions during execution. These new conditions relate to the nature of the land, materials, or labor relating to the contract. In contrast, the other contracts are characterized by clarity in the specifications and conditions of the goods or services.

2.3. Characteristics Of International Contracts

International contracts are written transboundary agreements between two parties, one of which is a foreign person, whether a natural or legal person. International contracts have many characteristics that distinguish them from local contracts. The international contract is one of the international relations economics' most important legal acts. International trade contracts are the main nerve in global economics and take various forms to facilitate commercial transactions.[5]

[5] UpCounsel Technologies, "International Contracts: Everything You Need to Know," UpCounsel, October 28, 2020, accessed June 11, 2022, https://www.upcounsel.com/international-contracts.

Copyright remains with the author(s) and IRPJ

Article Subject domain:
International Law and Model Contracts

INTERGOVERNMENTAL RESEARCH AND POLICY JOURNAL (IRPJ)

A peer-reviewed, multi-disciplinary journal under the authority of EUCLID / UN Treaty 49006/49007

ISSN: 2663-6832

https://irpj.euclid.int

a) *Rules of International Trade*

The rules of international trade resulted from developing a set of professional practices of the international trade community, codified by international organizations, and drafted in international agreements. These rules, which spontaneously emerged in the international trade community, came to govern, and apply directly to international trade relations.[6]

b) *Complex Contracts*

International commercial contracts are a clear form of complex contracts due to their nature and characteristics. International commercial contracts have appeared since the Middle Ages. In contrast, administrative contracts appeared after World War II, as some countries rushed to attract foreign investments. International administrative contracts, upon their start, focused on specific investment sectors represented by the petroleum concessions granted by some developing countries in Africa, Asia, and South America.[7]

2.4. Special Conditions of The International Contract

Many special conditions are included in international commercial contracts. The special conditions consider the special nature of the state, which enjoys unlimited legislative and executive power. The special conditions attempt to bridge the gap in the legal balance between the contracting parties.

a) *Re-negotiation Clause*

The re-negotiation clause can be defined as a condition drafted by the contracting parties in which they agree to renegotiate to amend the contract's provisions when unforeseen events occur. Under a separate agreement or contract clause requiring the parties to (re-) negotiate in good faith, both parties are legally obliged to cooperate efficiently in the (re-) negotiation process. Therefore, the judge or arbitrator cannot determine the extent of the clause in his view. The Commission on Transnational corporations, formed within the framework of the United Nations, adopted this condition within the draft UN draft code of conduct for transnational corporations.[8]

b) *Legislative Stability Condition*

Legislative stability condition takes two forms, an agreement or a legislative one. Contracting parties may expressly stipulate that the law prescribed by the parties at the time of contracting is applicable at any time after the conclusion. On the other hand, this condition can also be fulfilled legislatively, especially in contracts between the state and foreign private persons, as it appears in the legislative texts of the state, according to which the state undertakes not to amend or cancel its law applicable to the contract.[9]

[6] UpCounsel Technologies.

[7] Sunita Kikeri and Aishetu Kolo, *Privatization: Trends And Recent Developments*, Policy Research Working Papers (The World Bank, 2005), 30–45, https://doi.org/10.1596/1813-9450-3765.

[8] United Nations, "United Nations Commission on Transnational Corporations: Information Paper on the Negotiations to Complete the Code of Conduct on Transnational Corporations," *International Legal Materials* 22, no. 1 (1983): 177–191.

[9] Miklós Sebők et al., 'Measuring Legislative Stability: A New Approach with Data from Hungary', *European Political Science* 21, no. 4 (1 December 2022): 491–522, https://doi.org/10.1057/s41304-022-00376-8.

Copyright remains with the author(s) and IRPJ

Article Subject domain:
International Law and Model Contracts

INTERGOVERNMENTAL RESEARCH AND POLICY JOURNAL (IRPJ)

A peer-reviewed, multi-disciplinary journal under the authority of EUCLID / UN Treaty 49006/49007

ISSN: 2663-6832

https://irpj.euclid.int

3. Force Majeure and Contingency Theory

Force majeure is a specific event beyond the control of the contracting parties that cannot be pushed or foreseen, such as pandemics, war, riots, or acts of sovereignty. The purpose of including the force majeure clause in contracts is to completely exempt the debtor from the responsibility for the non-performance. The force majeure clause aims to mitigate impacts or prolong the period necessary for the performance of the obligation or to suspend its performance for a certain period.[10]

3.1. Force Majeure According To Laws

The effects of applying force majeure clauses focus on the automatic termination of the contract by force of law. Force majeure is an accident that cannot be foreseen and is impossible to push. The unpredictability of the accident and the impossibility of pushing it are the two conditions that must be met in force majeure. According to civil laws, if force majeure leads to frustration, the contractual obligation will expire, and the contract will be terminated automatically. Conversely, If the exceptional circumstance delays implementing the obligation, it will be classified as an emergency circumstance.[11]

3.2. Force Majeure Clause In Contracts

The contracting parties aim to maintain and protect the contract by temporarily suspending the performance of the main obligations due to force majeure. The resumption of implementation of the contract after the disappearance of the cause of temporary impossibility is an appropriate action to avoid absolute impossibility.

The contract should have characteristics of lax implementation. Lax implementation means a period between the conclusion of the contract and its completion date. It should be noted that spot contracts are typically completed and settled in short periods, such as purchase goods. Therefore, spot contracts are excluded from the force majeure theory.[12]

3.3. Contingency Theory

Contingency theory requires considering the debtor's position when unforeseen circumstances surround him. Contingency theory arises due to certain emergency circumstances, such as sudden fluctuations in interest rates or exchange rates, extreme difficulty in stabilizing the balance of payments, or a substantial disturbance in supply chains. Contingency theory often occurs during the implementation of the contract, and it often leads to an imbalance in the economic aspect and an imbalance between the work that the contractor will accomplish and the financial compensation that he will take. Hence, the implementation of the obligations becomes burdensome for the contractor.[13]

[10] Van Zyl and Johannes Hendrik, 'The Invocation of Force Majeure in International Commercial Contracts during the COVID-19 Pandemic' (Thesis, North-West University (South Africa)., 2022), 5–13, https://repository.nwu.ac.za/handle/10394/39537.

[11] Marel Katsivela, "Contracts: Force Majeure Concept or Force Majeure Clauses," *Uniform Law Review* 12 (2007): 101–117.

[12] Ferdinand E. Banks, "Some Aspects of Petroleum Futures Markets: Open Interest, Clearing Houses and Market Failure," *OPEC Review* 9, no. 2 (June 1985): 149–156, https://doi.org/10.1111/j.1468-0076.1985.tb00296.x.

[13] Laura Maria Franciosi, 'The Effects of COVID-19 on International Contracts: A Comparative Overview', *Victoria University of*

Copyright remains with the author(s) and IRPJ

Article Subject domain:
International Law and Model Contracts

INTERGOVERNMENTAL RESEARCH AND POLICY JOURNAL (IRPJ)

A peer-reviewed, multi-disciplinary journal under the authority of EUCLID / UN Treaty 49006/49007

ISSN: 2663-6832

https://irpj.euclid.int

3.4. Comparison Between Force Majeure and Contingency Theory

The concepts of force majeure and emergency events are differentiated by the severity of impossibility. Although the two concepts are similar in origin, the event that constitutes an emergency may be a force majeure in some circumstances, such as the case of the Corona pandemic.

It is noted that absolute impossibility creates no room for the performance of the obligation. On the other side, emergency events do not result in the automatic termination of the contract, because it makes implementing the contractual obligation only burdensome and not impossible. Implementing the contractual obligation remains possible due to emergency events, but with great difficulty, it threatens to expose the debtor to a huge loss. On the other hand, Force majeure entails the termination of the contract by force of law due to the impossibility of fulfilling obligations, while emergency events reduce the debtor's obligation to a reasonable extent.[14]

The Corona pandemic may make the performance of the obligation impossible or burdensome for the debtor in terms of cash flow payments or implementation rates. Therefore, if the Corona pandemic leads to the absolute impossibility of implementation, the theory of force majeure will be applied. Thus, The contract will be terminated automatically, by force of law. In contrast, the contingency theory will be applied if the Corona pandemic leads to difficulty in implementing the obligation and not impossibility. Then, the judge or arbitrator may, at the request of one of the parties, restore the burdensome obligation to a reasonable extent, suspend the implementation temporarily, decrease it, or increase the corresponding obligation without terminating the contract.[15]

4. Types of Termination of Contracts

4.1. Normal End of the Contract

Construction contracts specify the period for which the contractor must complete the required works without exceeding it. Moreover, it is in the economic interest of the contractor to complete the implementation of the works in the shortest possible period to get maximum profit as soon as possible, improve his commercial reputation, reduce administrative expenses, and improve the efficiency of production rates.

4.2. Mutual Agreement of Termination

Mutual agreement of termination between the parties came in applying the principle that as the parties agree to create the contract, it is also terminated by their agreement. Therefore, Mutual agreement of termination is the application of the principle of free will.

4.3. Optional Termination

The sub-clause (19.6) of Construction Contract 1st Ed (1999 Red Book), refers to optional termination, if the implementation of all ongoing works is suspended for a continuous period of eighty-four days due to Force Majeure of which notice has been given under Sub-Clause (19.2). Also, if suspension

Wellington Law Review 51 (2020): 45–69, https://doi.org/10.26686/vuwlr.v51i3.6610.

[14] P. J. M. Declercq, "Modern Analysis of the Legal Effect of Force Majeure Clauses in Situations of Commercial Impracticability," *Journal of Law and Commerce* 15 (1996 1995): 113–129.

[15] Declercq, 146–157.

Copyright remains with the author(s) and IRPJ

Article Subject domain:
International Law and Model Contracts

INTERGOVERNMENTAL RESEARCH AND POLICY JOURNAL (IRPJ)

A peer-reviewed, multi-disciplinary journal under the authority of EUCLID / UN Treaty 49006/49007

ISSN: 2663-6832

https://irpj.euclid.int

continues for multiple periods, which total more than one hundred forty days due to the same notified Force Majeure, consequently, either party may send the other party a notice of the termination of the contract. Accordingly, the engineer estimates the remaining works' value and issues the final payment.[16]

4.4. Automatic Termination

Since construction contracts are long-term contracts that often take several years to complete, they are expected to be exposed to many unforeseen risks. Many contracting parties include the force majeure clause in contracts, allowing for automatic termination of contracts. According to Subclause (19.6) of the FIDIC Standard Contracts, it is possible to automatically terminate contracts in cases of unforeseen events.[17]

4.5. Judicial Termination Of The Contract

Contract conclusion of adhesion take place as soon as the conditions set by the employer are signed and cannot be negotiated. The stronger party sets conditions predetermined, as they are decided without the need for the other party's opinion. In this case, the employer has the authority to impose its conditions. Contracts of adhesion contain non-negotiable terms; the **second** party cannot propose any amendment, and all it has to do is to accept or reject the offer in one piece. Clauses of adhesion may prevent the other party from asking to amend the contract terms when emergency or force majeure circumstances arise.[18]

The judicial authority can intervene to rebalance contracts and redistribute risks fairly at the request of one of the parties. Judiciary intervention is important in rebalancing the contractual balance, especially contracts of adhesion.

4.6. Termination For Convenience

The employer has the right to terminate the contract unilaterally at any time without reason, when he believes the project is no longer feasible. In return, the employer will pay full compensation. The employer may suspend its implementation if he deems no longer interested in completing the work for any reason. On the contrast, the contractor shall not be entitled to force him to complete the implementation after he has received full compensation. Therefore, the employer can terminate the contract and suspend the performance before completion. Provided that the contractor shall be compensated for all expenses incurred, works accomplished, and damages for loss of profits.

4.7. Termination By Contractor

Unilateral termination is an exception to the general principle of termination of contracts, which states that termination must be by mutual consent.

The contractor cannot terminate the contract unilaterally but remains obligated by implementation until the end, except if he agrees with the employer to terminate it. However, suppose the contractor entrusts the work to a subcontractor; In that case, the main contractor is considered an employer concerning the latter and therefore has the right to terminate

[16] International Federation of Consulting Engineers, *The FIDIC Contracts Guide* [*with Detailed Guidance on Using the First Editions of FIDIC's*], 35–43.

[17] International Federation of Consulting Engineers, 40–52.

[18] Cornell Law School, 'Adhesion Contract (Contract of Adhesion)', LII / Legal Information Institute, accessed 22 February 2023, https://www.law.cornell.edu/wex/adhesion_contract_(contract_of_adhesion).

Copyright remains with the author(s) and IRPJ

Article Subject domain:
International Law and Model Contracts

INTERGOVERNMENTAL RESEARCH AND POLICY JOURNAL (IRPJ)

A peer-reviewed, multi-disciplinary journal under the authority of EUCLID / UN Treaty 49006/49007

ISSN: 2663-6832

https://irpj.euclid.int

the subcontractor of his own will. The contractor has the right to terminate the contract in various cases.

Moreover, according to clause (16) of Construction Contract 2nd Ed (2017 Red Book), the contractor has the right to terminate the contract if specific cases arise.[19]

5. Legal Responses to Coronavirus

The spread of the Coronavirus quickly led the globe to a crisis unprecedented in its breadth and repercussions, which led to it being considered a global pandemic. A pandemic can be defined as an infectious disease that has spread without a suitable drug or vaccine being discovered.[20]

The coronavirus outbreak first occurred in the Chinese city of Wuhan in early December 2019. On January 30, 2020, the World Health Organization officially declared the virus outbreak a public health emergency of international concern. Later, the World Health Organization confirmed the disease converted into a pandemic in March 2020. More than 667 million cases of COVID-19 have been reported in more than 188 countries as of early February 2023, including more than 6.72 million deaths. The United States is the country most affected by the coronavirus pandemic, with over a quarter of confirmed infections.[21]

5.1. Pandemics and International Law

International trade laws did not ignore emergency conditions such as pandemics, and evidence for this is numerous, most notably in Article 79 of the United Nations Convention on Contracts for the International Sale of Goods for the year 1980. However, it did not explicitly refer to emergency conditions. United Nations Convention on Contracts for the International Sale of Goods for the year 1980 referred to the term "conditions," which can be a basis for the debtor's excuse to implement his obligation just because the implementation has become more difficult or unprofitable for him.[22]

5.2. Precautionary Measures In Light Of International Law

Many international instruments protect the rights of states and individuals. One of the most important international instruments is The International Covenant on Economic, Social, and Cultural Rights (ICESCR), which the United Nations General Assembly adopted in 1966, and entered into force ten years later. Article Twelve of the ICESCR stipulates the duty of states to prevent, treat, and combat epidemics. Moreover, ICESCR emphasizes that governments should take necessary measures to ensure service and medical care during epidemics.

[19] International Federation of Consulting Engineers, *The FIDIC Contracts Guide* [*with Detailed Guidance on Using the First Editions of FIDIC's*], 72–76.

[20] Jennifer Robinson, "Pandemics: Definition, Prevention, and Preparation," April 18, 2022, accessed Jan 9, 2023, https://www.webmd.com/cold-and-flu/what-are-epidemics-pandemics-outbreaks.

[21] World Health Organization, 'Coronavirus Disease (COVID-19) Pandemic', accessed 19 February 2023, https://www.who.int/europe/emergencies/situations/covid-19.

[22] Commonwealth Secretariat, 'United Nations Convention on Contracts for the International Sale of Goods', in *The United Nations Convention on Contracts for the International Sale of Goods* (*Vienna, 1980*), by Muna Ndulo, Explanatory Documentation Prepared for Commonwealth Jurisdictions (Commonwealth, 1991), 38, https://doi.org/10.14217/9781848594890-11-en.

Copyright remains with the author(s) and IRPJ

Article Subject domain:
International Law and Model Contracts

INTERGOVERNMENTAL RESEARCH AND POLICY JOURNAL (IRPJ)

A peer-reviewed, multi-disciplinary journal under the authority of EUCLID / UN Treaty 49006/49007

ISSN: 2663-6832

https://irpj.euclid.int

Due to the spread of the Coronavirus epidemic. Most countries resorted to imposing exceptional precautionary measures. It is worth noting that the International Covenant on Economic, Social, and Cultural Rights (ICESCR) allows states to restrict the exercise of some basic rights in exceptional emergencies that threaten public security and safety.[23]

5.3. Impact Of The Corona Pandemic On International Trade

Many ccountries around the world faced the fait accompli with the outbreak of the Corona pandemic. In the subsequent days, the governments were forced to respond quickly and take strict and unusual measures. Later, Many Countries imposed a total or partial curfew and unprecedented restrictions on travel. In addition to the impact of the Corona pandemic on health, it may have legal consequences on contractual obligations.

All governmental measures in dealing with the Corona crisis do not fall under the government's discretionary authority classification, but are necessary duties imposed by international laws and local constitutions on governments. Governments commute to protecting rights and freedoms, facilities, and ensuring that basic commodities are reasonably priced and available in sufficient quantities, to all without discrimination.

5.4. Corona Pandemic as Force Majeure

According to the sub-clause (19.1) of Construction Contract 1st Ed (1999 Red Book), force majeure is an exceptional event or circumstance. That clause stipulates four conditions; Force majeure should be beyond the parties' control; The parties should not be aware of it before contract conclusion; the parties should not be able to avoid or override it, and it should not have been caused by one of the contracting.[24]

The unexpected coronavirus disease (COVID-19) outbreak prompted the United Nations World Health Organization in March 2020 to explicitly declare it a pandemic. Therefore, the coronavirus pandemic (COVID-19) can be considered as an unforeseen event.[25]

It is worth noting that the construction contract first edition (1999 Red Book) mentioned the term “epidemic” as a force majeure. Clause (19) of Construction Contract 1st Ed (1999 Red Book), which was titled "force majeure," has been replaced by clause eighteen of the Construction Contract Second Edition of FIDIC (2017 Red Book) by the title of "exceptional events." It is worth noting that the definition and examples remained the same as they were in the 1999 Edition, with minor differences. The amendment was not limited to specified definitions and examples, but left the door open to any other exceptional event to which those conditions apply.[26]

5.5. Release From Performance Under The Law

[23] ‘International Covenant on Economic, Social and Cultural Rights’, OHCHR, accessed 19 February 2023, https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights.

[24] International Federation of Consulting Engineers, *The FIDIC Contracts Guide* [*with Detailed Guidance on Using the First Editions of FIDIC's*], 76–89.

[25] Riyanti Djalante et al., “Review and Analysis of Current Responses to COVID-19 in Indonesia: Period of January to March 2020,” *Progress in Disaster Science* 6 (April 2020): 567–583, https://doi.org/10.1016/j.pdisas.2020.100091.

[26] Chouragade, “Analysis Of Live Contract Using Fidic And Mospi Guidelines And Preparation Of Risk Management For The Project,” 110–148.

Copyright remains with the author(s) and IRPJ

Article Subject domain:
International Law and Model Contracts

INTERGOVERNMENTAL RESEARCH AND POLICY JOURNAL (IRPJ)

A peer-reviewed, multi-disciplinary journal under the authority of EUCLID / UN Treaty 49006/49007

ISSN: 2663-6832

https://irpj.euclid.int

According to the sub-clause (19.7) of FIDIC's Silver Book (and the Red and Yellow Books) allows for release from performance in two cases; first, where an irresistible event prevents performance; and second, where the governing law so provides.[27]

The parties will be discharged to fulfill the obligations, if any event or circumstance beyond their control leads to the impossibility of performance, or leads under the contract's governing law to exempt a party from continuing to perform the contract.

5.6. Jurisprudence In The Context Of Corona Pandemic

In 2016, the French Nimes Court ruled that strong physical infection resulting from pandemics that arose after the conclusion of the contract could not be avoided. The court emphasized that those irresistible pandemics could exempt the debtor from his obligations.[28]

6. Recommendations and Conclusion

Implementing the international contract is not always easy for its parties, as contingency circumstances, or force majeure may occur beyond their control. Emergency circumstances may make the implementation impossible or make this implementation burdensome to one of the parties or both of them.

6.1. Recommendations

At the pre-contract negotiation stage, agreeing on drafting the force majeure clause in international contracts is necessary. A force majeure clause can be defined as a contractual provision to relieve the debtor completely, mitigate its contractual obligation, prolong the required performance period, or suspend its performance for a certain period. The force majeure clause can include epidemics, wars, hostilities, revolutions, insurrections, civil war, and civil commotion. The force majeure term also included strikes, factory or facility closures due to force majeure, and strikes of labor disturbances.

International trade has many risks and issues that may prevent the contracting parties from fulfilling their obligations. One of the most critical issues of International contracts is the impossibility of foreseeing damage. Foreseeing damage is an estimated criterion. Unforeseeable damage is sudden damage that cannot be predicted. Foreseeing damage is one that the expert contractor cannot know when it occurred and cannot push or avoid.[29] The idea of relying on the element of expectation goes back to the theory of reasonable expectations, which originates in common law (Anglo-American). Consequently, the binding force of the contract is limited to the limits of the creditor's logical expectations relating to the performance of its obligations. The expectation criterion is also important in preventing the termination of many international trade contracts that have been exposed to

[27] International Federation of Consulting Engineers, *The FIDIC Contracts Guide* [*with Detailed Guidance on Using the First Editions of FIDIC's*], 47–58.

[28] Erika Rickard, 'How Courts Embraced Technology, Met the Pandemic Challenge, and Revolutionized Their Operations | The Pew Charitable Trusts', 1 December 2021, https://www.pewtrusts.org/en/research-and-analysis/reports/2021/12/how-courts-embraced-technology-met-the-pandemic-challenge-and-revolutionized-their-operations.

[29] Mahmoud Reza Firoozmand, "Force Majeure Clause in Long-Term Petroleum Contracts: Key Issues in Drafting," *Journal of Energy & Natural Resources Law* 24, no. 3 (August 2006): 423–432, https://doi.org/10.1080/02646811.2006.11433445.

Copyright remains with the author(s) and IRPJ

Article Subject domain:
International Law and Model Contracts

INTERGOVERNMENTAL RESEARCH AND POLICY JOURNAL (IRPJ)

A peer-reviewed, multi-disciplinary journal under the authority of EUCLID / UN Treaty 49006/49007

ISSN: 2663-6832

https://irpj.euclid.int

risks beyond the usual expectation, where the debtor is not liable for unforeseen risks.[30]

6.2. Conclusion

The rules of international trade are consistent with the expectations of contracting parties and maintain the contractual balance in international contracts. The rules of international trade create a proper means of dealing with non-performance, which prevents the termination of the contracts.

This article highlighted the principle of f *Pacta Sunt Servanda*. This Principe was intended to preserve the contract and enhance its binding force. Thus, the flexible concept of *Pacta Sunt Servanda* is most appropriate in the field of international trade.

This article was keen to clarify the basic conditions for justifying termination of international contracts, which is force majeure or a material breach, as this article clarified the concept of force majeure and emergency circumstances, as well as the material breach and the elements of each.

7. REFERENCES AND BIBLIOGRAPHY

Banks, Ferdinand E. 'Some Aspects of Petroleum Futures Markets: Open Interest, Clearing Houses and Market Failure'. *OPEC Review* 9, no. 2 (June 1985): 149–61. https://doi.org/10.1111/j.1468-0076.1985.tb00296.x.

Chouragade, Navin. 'Analysis Of Live Contract Using Fidic And Mospi Guidelines And Preparation Of Risk Management For The Project'. University of Hyderabad, 2016.

Commonwealth Secretariat. 'United Nations Convention on Contracts for the International Sale of Goods'. In *The United Nations Convention on Contracts for the International Sale of Goods* (*Vienna, 1980*), by Muna Ndulo, 39–60. Explanatory Documentation Prepared for Commonwealth Jurisdictions. Commonwealth, 1991. https://doi.org/10.14217/9781848594890-11-en.

Cornell Law School. 'Adhesion Contract (Contract of Adhesion)'. LII / Legal Information Institute. Accessed 22 February 2023. https://www.law.cornell.edu/wex/adhesion_contract_(contract_of_adhesion).

Declercq, P. J. M. 'Modern Analysis of the Legal Effect of Force Majeure Clauses in Situations of Commercial Impracticability'. *Journal of Law and Commerce* 15 (1996 1995): 213.

Djalante, Riyanti, Jonatan Lassa, Davin Setiamarga, Aruminingsih Sudjatma, Mochamad Indrawan, Budi Haryanto, Choirul Mahfud, et al. 'Review and Analysis of Current Responses to COVID-19 in Indonesia: Period of January to March 2020'. *Progress in Disaster Science* 6 (April 2020): 100091. https://doi.org/10.1016/j.pdisas.2020.100091.

Firoozmand, Mahmoud Reza. 'Force Majeure Clause in Long-Term Petroleum Contracts: Key Issues in Drafting'. *Journal of Energy & Natural Resources Law* 24, no. 3 (August 2006): 423–38. https://doi.org/10.1080/02646811.2006.11433445.

Franciosi, Laura Maria. 'The Effects of COVID-19 on International Contracts: A Comparative Overview'. *Victoria University of Wellington Law Review* 51 (2020): 413. https://doi.org/10.26686/vuwlr.v51i3.6610.

Fucci, Frederick R. 'Hardship and Changed Circumstances as Grounds for Adjustment or Non-Performance of Contracts Practical Considerations in International Infrastructure Investment and Finance'. *American Bar Association*, 2006. https://xdocs.net/documents/hardship-and-changed-circumstances-as-practical-considerations-in-international.

Hague Conference on Private International Law. 'Principles on Choice of Law in International Commercial Contracts'. Accessed 26 January 2023. https://www.hcch.net/en/instruments/conventions/full-text/?cid=135.

International Federation of Consulting Engineers. *FIDIC Construction Contract 1st Edition 1999*. 1. ed. Lausanne: FIDIC, 1999.

[30] Firoozmand, 432–438.

Copyright remains with the author(s) and IRPJ

Article Subject domain:
International Law and Model Contracts

INTERGOVERNMENTAL RESEARCH AND POLICY JOURNAL (IRPJ)

A peer-reviewed, multi-disciplinary journal under the authority of EUCLID / UN Treaty 49006/49007

ISSN: 2663-6832

https://irpj.euclid.int

Katsivela, Marel. 'Contracts: Force Majeure Concept or Force Majeure Clauses'. *Uniform Law Review* 12 (2007): 101.

Kikeri, Sunita, and Aishetu Kolo. *Privatization : Trends And Recent Developments*. Policy Research Working Papers. The World Bank, 2005. https://doi.org/10.1596/1813-9450-3765.

OHCHR. 'International Covenant on Economic, Social and Cultural Rights'. Accessed 19 February 2023. https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights.

Perez, Oren. 'Using Private-Public Linkages to Regulate Environmental Conflicts: The Case of International Construction Contracts'. *Journal of Law and Society* 29, no. 1 (March 2002): 77–110. https://doi.org/10.1111/1467-6478.00212.

Rickard, Erika. 'How Courts Embraced Technology, Met the Pandemic Challenge, and Revolutionized Their Operations | The Pew Charitable Trusts', 1 December 2021. https://www.pewtrusts.org/en/research-and-analysis/reports/2021/12/how-courts-embraced-technology-met-the-pandemic-challenge-and-revolutionized-their-operations.

Robinson, Jennifer. 'Pandemics: Definition, Prevention, and Preparation', 18 April 2022. https://www.webmd.com/cold-and-flu/what-are-epidemics-pandemics-outbreaks.

Sebők, Miklós, Bálint György Kubik, Csaba Molnár, István Péter Járay, and Anna Székely. 'Measuring Legislative Stability: A New Approach with Data from Hungary'. *European Political Science* 21, no. 4 (1 December 2022): 491–521. https://doi.org/10.1057/s41304-022-00376-8.

Tanrıvermiş, Harun. 'Possible Impacts of COVID-19 Outbreak on Real Estate Sector and Possible Changes to Adopt: A Situation Analysis and General Assessment on Turkish Perspective'. *Journal of Urban Management* 9, no. 3 (September 2020): 263–69. https://doi.org/10.1016/j.jum.2020.08.005.

United Nations. 'United Nations Commission on Transnational Corporations: Information Paper on the Negotiations to Complete the Code of Conduct on Transnational Corporations'. *International Legal Materials* 22, no. 1 (1983): 177–91.

UpCounsel Technologies. 'International Contracts: Everything You Need to Know'. UpCounsel, 28 October 2020. https://www.upcounsel.com/international-contracts.

World Health Organization. 'Coronavirus Disease (COVID-19) Pandemic'. Accessed 19 February 2023. https://www.who.int/europe/emergencies/situations/covid-19.

Zyl, Van, and Johannes Hendrik. 'The Invocation of Force Majeure in International Commercial Contracts during the COVID-19 Pandemic'. Thesis, North-West University (South Africa)., 2022. https://repository.nwu.ac.za/handle/10394/39537.

Copyright remains with the author(s) and IRPJ

Article Subject domain:
International Law and Model Contracts

INTERGOVERNMENTAL RESEARCH AND POLICY JOURNAL (IRPJ)

A peer-reviewed, multi-disciplinary journal under the authority of EUCLID / UN Treaty 49006/49007

ISSN: 2663-6832

https://irpj.euclid.int

Publisher Information: The Intergovernmental Research and Policy Journal (IRPJ) is a unique interdisciplinary peer-reviewed and open access Journal. It operates under the authority of the only global and treaty-based intergovernmental university in the world (EUCLID), with other intergovernmental organizations in mind. Currently, there are more than 17,000 universities globally, but less than 15 are multilateral institutions, EUCLID, as IRPJ's sponsor, is the only global and multi-disciplinary UN-registered treaty-based institution.

IRPJ authors can be assured that their research will be widely visible on account of the trusted Internet visibility of its ".int" domain which virtually guarantees first page results on matching keywords (.int domains are only assigned by IANA to vetted treaty-based organizations and are recognized as trusted authorities by search engines). In addition to its ".int" domain, IRPJ is published under an approved ISSN for intergovernmental organizations ("international publisher") status (also used by United Nations, World Bank, European Space Agency, etc.).

IRPJ offers:

1. United Nations Treaty reference on your published article (PDF).
2. "Efficiency" driven and "author-focused" workflow.
3. Operates the very novel author-centric metric of "Journal Efficiency Factor."
4. Minimal processing fee with the possibility of waiver
5. Dedicated editors to work with graduate and doctoral students.
6. Continuous publication i.e., publication of articles immediately upon acceptance
7. The expected time frame from submission to publication is up to 40 calendar days.
8. Broad thematic categories
9. Every published article will receive a DOI from Crossref and is archived by CLOCKSS.

Copyright remains with the author(s) and IRPJ