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Do international sanctions constitute force majeure under Swiss law?

There is actually an increasing number of international sanctions affecting international trade. These sanctions are often of such a nature as to call into question the obligations of the parties to a contract. In most cases, they even prevent the normal performance of the contract. For example, goods under embargo can no longer be delivered without violating international sanctions. Payments can no longer be made because any transfer of money in this case is under sanction and therefore prohibited.

Is this a case of force majeure? In our paper of 10 June 2020[1], published in the midst of the coronavirus crisis and on the impact of this crisis on the performance of contracts, we recalled the conception of Swiss law with regard to force majeure clauses.

We pointed out that our law does not contain a definition of the notion of force majeure but that practice and the courts consider it as an extraordinary, unforeseeable and insurmountable external event interrupting the causal link between the breach of contract and the damage caused by this breach. In our paper of 15 February 2021[2], we distinguished the differences between the force majeure clause and the hardship or MAC clause.

As Prof. Sylvain Marchand writes[3], one may wonder about the usefulness of such a clause in Swiss contract law, considering that contractual liability is a liability for fault, the debtor may be released from his liability by proving the absence of fault if his performance is due to force majeure.

We agree with him that the inclusion of a force majeure clause in contracts is essential in order to specify the cases that should be considered as force majeure. This is particularly the case with international sanctions which, in our experience, can often be a case of disagreement between the parties as to their unforeseeability.

Thus, in our opinion, international sanctions should be included either in the contractual definition of this notion, or in an exemplary list or even in checklists providing, for example, that events of a “commercial” nature, events of an “economic” nature or events of a “political” nature fall under the definition of force majeure.

Negotiating these clauses is, however, tricky in practice, especially in the case of the debtor of a pecuniary performance when payment cannot be made because of economic sanctions. For example, we have been confronted with the difficulty of getting a bank that provides credit to admit that the impossibility of honouring the repayment clauses of the credit can fall under the heading of force majeure. It is therefore essential to ensure that these clauses are drafted in advance so as not to have to negotiate them in a hurry. In such cases it is also advisable to remind the other contracting party that the main purpose of the force majeure clause is to set an additional period of time for the debtor to perform, after which the parties may declare the contract terminated, providing in advance for the consequences of such termination.

[1] https://www.wg-avocats.ch/actualites/droit-des-contrats/force-majeure-suisse/

[2] https://www.wg-avocats.ch/actualites/droit-des-contrats/mac-hardship-clausula/

[3] Sylvain Marchand, *Clauses contractuelles. Du bon usage de la liberté contractuelle*, Bâle, Helbing Lichtenhan, 2008, pp. 206 et ss

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Source : https://www.wg-avocats.ch/en/actualites/company-law/do-international-sanctions-constitute-force-majeure-under-swiss-law/