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A Comparative Study on the Application of the Force Majeure Clause in International Commercial Contracts between Korea and English in the Era of COVID-19

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Abstract

Purpose – This paper analyzes all possible issues that need to be considered in case disputes occur with regard to force majeure in international commercial contracts through the comparative study between English and Korean during COVID-19.

Design/methodology – This paper belongs to the field of explanatory legal study, which aims to explain and test whether the choice of law is linked to the conditions that occur in the reality of judicial practice. The juridical approach involves studying and examining theories, concepts, legal doctrines, and legislation that are related to the problem.

Findings – English law does not permit general economic impracticability to qualify as a valid force majeure event. If a party asserts that they were prevented from performing the contract, the courts will examine this strictly. Many commercial contracts in a broad range of sectors and industries are chosen by parties to be governed by English law. With COVID-19, there have been discussion of parties being released from performance as a result of force majeure. Meanwhile, under Korean law, a force majeure event should be unforeseeable and beyond a party's control. Since COVID-19 is a known event for future contracts, to avoid the risk that a similar situation in the future is deemed foreseeable and under a party's control, parties must ensure that such a risk is properly addressed in a contract. Therefore, it is necessary to have a new clause to cover a pandemic.

Originality/value – In light of the ongoing unexpected and uncertain economic impacts COVID-19 is expected to bring to the world, it is anticipated that companies will experience an increased number of claims involving force majeure around the world, including English and Korea. As such, taking proactive steps to assess the applicable legal principles, including the concept of force majeure of contract, will help companies be prepared for the financial or legal implications of COVID-19. In this regard, it would be advisable for companies and businesses to take specific actions.

Keywords: COVID-19, English Law, Force Majeure, International Commercial Contract, Korean Law
JEL Classifications: F40, K12, N70, P50

1. Introduction

2020 was a year in which the world experienced an unprecedented crisis. First is the COVID-19 situation. On January 30, 2020, the World Health Organization (WHO) declared the COVID-19 outbreak a global public health crisis, after a case was reported in Wuhan, China in December 2019 (WHO, 2020). Since then, various countries around the world have

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taken measures such as travel bans, export bans, business restrictions, entry and exit restrictions, and quarantines to slow the new virus. As a result, the people of each country experienced great impediments in daily life, especially economic activities, and had a great influence on domestic and foreign legal relations. In particular, considering the global scale and ripple effect of this crisis, the impact on international commercial contract relations due to COVID-19 is enormous. Therefore, it is easy to predict that there will be many international contract disputes related to this situation for the time being. In fact, many cases of COVID-19-related disputes against Chinese contracting parties have already been reported. [1] Recently, there have been reports of related disputes between a Korean company and an Indian company. [2] In the future, it is expected that related contract disputes will continue to arise.

All crisis situations mentioned above can affect contractual. In the event of experiencing such a crisis, the biggest issue for a party with difficulties in performing a contract is to escape from the obligation to fulfill the contract or the responsibility for breach of the obligation. With regard to epidemics such as COVID-19, natural disasters such as floods and wildfires, the first reason for exclusion that can be considered is force majeure (Kim, Kyu-Jin, 2020).

Force majeure has traditionally meant an external cause beyond the control of the obligee party to the contract, such as war or natural disaster. [3] Although there are some differences in each country's legal system, it is generally understood that if it is recognized that the obligee's contractual obligations have become impossible due to such force majeure reasons, the obligee may be exempted from liability, or the contract may be terminated (Uribe, 2011; Mckendrick, 2013). However, countries under civil law such as France, Germany, Korea, and China recognize force majeure itself as a legal principle, but the Anglo-American Law system does not recognize it as a separate legal principle. If there is a force majeure clause in the contract, it is understood as a factual concept that includes a set of circumstances to be governed by the clause (Puelinckx, 1986; Brunner, 2009). In other words, in countries under the civil law system, there is a possibility that the contractual liability can be exempted for this reason even if there is no separate agreement on force majeure in the contract. On the other hand, in the Anglo-American Law system, if there is no separate agreement on force majeure in the contract, it is impossible to claim immunity from force majeure. [4]

In case the contract becomes impossible due to unforeseeable circumstances in an international commercial contract, the parties incorporate relevant clauses such as force majeure and hardship clauses into the contract in advance to clarify a law relation between the parties. However, terms used as requirements for immunity are used differently, such as changes in circumstance, force majeure, hardship, frustration, impediment, and so on. There are also some differences in the effect from a legislative point of view. Therefore, it is difficult

[1] An example of such a dispute is the dispute over the LNG acquisition obligation between CNOOC and Royal Dutch Shell and Total (Bloomberg, 2020).

[2] Standard Retail Pvt. Ltd. and Ors. v. M/s. G. S. Global Corp & Ors., Order dated 8th April 2020 passed in Commercial Arbitration Petition (L) No. 404, 405, 406, 407 & 408 of 2020.

[3] For example, Garner (2019) defined force majeure as "an event or effect that is neither anticipated nor controlled"

[4] Of course, it is not completely identical to the doctrine of force majeure in the Anglo-American law system, but there are similar doctrines such as the principle of frustration of contractual purposes and the doctrine of impracticability.

to determine which concept to use to guarantee immunity due to unexpected changes in circumstances in trade practice (Oh, Hyon-Sok, 2016).

As can be seen above, when a dispute related to force majeure arises in an international commercial contract relationship, the most problematic part is that the result may differ depending on the applicable law. This can be particularly problematic if the contract does not contain a separate force majeure clause (Kim, Kyu-Jin, 2020).

As described above, in the case of no force majeure clause in the Anglo-American law system, force majeure cannot be claimed, but only frustration, impossibility, and impracticability can be asserted. With these legal principles, it may be difficult to derive the same result as the expected effect under the ordinary force majeure clause. [5]

In addition, even in countries of the continental law system, there may be differences in the specific regulations or legal principles of each country regarding force majeure (Puelinckx, 1986). If a person seeks relief based on a voluntary provision rather than a contractual provision, it may be more difficult to predict how the case will be interpreted, depending on the dispute resolution body, such as a court or arbitral tribunal (Lee, Hoon, 2016). Furthermore, in the case of contracts for the international sale of goods, there is a possibility that the Convention on International Sales of Goods (CISG) will be applied as a governing law. Even if CISG does not apply, when judging an international commercial contract dispute, there is a possibility that the issue is judged using international unification laws such as CISG and UNIDROIT Principles of International Commercial Contract(PICC) due to its international nature.

The purpose of this paper is to examine in detail what should be kept in mind when a dispute over force majeure arises in relation to the above-mentioned issues and other international commercial contracts. In particular, it analyzes whether the COVID-19 situation can be force majeure according to these standards. Based on this, a comparative analysis of the force majeure clause between Korea and the UK is presented and implications are suggested.

2. Overview of the Force Majeure Clause and Requirements

2.1. Overview of the Force Majeure Clause

Force majeure translates literally from French as superior force. In English, the term is often used in line with its literal French meaning, but it has other uses as well, including one that has roots in a principle of French law. In business circles, “force majeure” describes uncontrollable events (such as war, labor stoppages, or extreme weather) that are not the fault of any party and that make it difficult or impossible to carry out normal business (Yang, Chang-Soo and Jae-Hyung Kim, 2015). A company may insert a force majeure clause into a contract to absolve itself from liability in the event it cannot fulfill the terms of a contract (or if attempting to do so will result in loss or damage of goods) for reasons beyond its control. Force majeure is a clause that is included in contracts to remove liability for unforeseeable

[5] In general, the force majeure clause or doctrine of the force majeure has the effect of indemnifying the debtor from liability for delay in performance in a situation of temporary inability to perform. This is an effect that is not generally recognized in doctrine of frustration mentioned above (Puelinckx, 1986).

and unavoidable catastrophes that interrupt the expected course of events and prevent participants from fulfilling obligations. These clauses generally cover natural disasters, such as hurricanes, tornadoes, and earthquakes, as well as human actions, such as armed conflict and man-made diseases.

Force majeure is a common clause in contracts which essentially frees both parties from liability or obligation when an extraordinary event or circumstance beyond the control of the parties, such as a war, strike, riot, crime, epidemic, or sudden legal change prevents one or both parties from fulfilling obligations under the contract. Explicitly excluded is any event described as an act of God, which covers a separate domain and legally differs, yet it is still related to contract law. In practice, most force majeure clauses do not excuse a party's non-performance entirely, but only suspend it for the duration of the force majeure (Kwon, Young-Joon, 2021).

The Korean Supreme Court has narrowly grasped the scope of force majeure. [6] The Supreme Court said that the contractor is not obligated to pay compensation for delay in case the completion of the object is delayed due to force majeure, such as a natural disaster or a sudden change in economic conditions equivalent thereto. It was decided that the so-called IMF crisis and the disruption in the supply and demand of materials were not such a force majeure situation. [7] In addition, the Supreme Court ruled that if the move-in was delayed due to the contractor's bankruptcy (Korean Supreme Court Decision dated December 12, 2013, Case No.2011Da51434), or if the company went through the workout procedure (Korean Supreme Court Decision dated December 12, 2013, Case No.2011Da51434.), it was not a force majeure situation. Although it is a judgment on illegal activities, in the case (Korean Supreme Court Decision dated May 26, 2000, Case No.99Da53247) where a pedestrian was swept away by the river and drowned as the embankment road was lost due to heavy rain, the ruling was that the fact that the torrential rain on the day of the accident corresponds to the maximum rainfall in a frequency of 50 years is not due to force majeure.

A force majeure clause is a contract clause that creates special legal effects, such as waiving liability or suspending performance in the event of a force majeure event. The parties are free to set the conditions and effects of force majeure in accordance with the principle of freedom of contract (Schwartz, 2020). The causes that appear in the force majeure clause are natural disasters (fire, flood, hurricane, typhoon, volcano, earthquake, etc.), man-made disasters (war, warfare, rebellion, revolution, riot, terrorism, etc.), economic disaster (strike, riot, lock-out, go-slow, occupation of factories and premises, etc.), and a government's supreme measures (import ban, port blockade, temporary suspension of foreign exchange transactions or letter of credit transactions, etc.)(Lee, Hoon, 2016). The contract may also state that such force majeure events are illustrative and not restrictive. Regarding the legal effect of force majeure, it is often stipulated that the contracting party shall not be held liable for the non-

[6] The same is true in the context of applying the force majeure clause prescribed in Article 79 (1) of the CISG. There are very few cases in which courts and arbitral tribunals in each country have discharged debts due to force majeure (Cho, In-Young , 2020).

[7] Korean Supreme Court Decision dated September 4, 2002, Case No.2001Da1386 ; On the other hand, there is a judgment that the negligence of the Housing Mutual Aid Association is not recognized as the failure of the Housing Mutual Aid Association to dispose of the defendant's shares in relation to the IMF was due to force majeure such as the severe deterioration of the construction market (Korean Supreme Court Decision dated Decision dated October 13, 2005, Case No.2005Da21173).

performance if the contracting party defaults or delays the performance of the contractual obligations due to force majeure reasons. In other words, in most force majeure clauses, the force majeure reasons as a condition to indemnify the party who fails to perform its obligations (Schwartz, 2020).

The force majeure clause stipulated in the contract as agreed by the parties individually takes precedence over the general law of force majeure. However, the mere existence of a force majeure clause in a contract does not make the general principle of force majeure impediment. First, the general law of force majeure can be a useful reference standard in the process of writing or interpreting the force majeure clause. For example, when the wording of the force majeure clause is ambiguous and a guideline for interpretation is needed, the general principle of force majeure is useful. In addition, the general legal principle of force majeure is applied supplementally to a part where the rule of force majeure clause does not extend. Therefore, the force majeure clause and the doctrine of force majeure are closely related.

2.2. Requirements of the Force Majeure Clause

The ICC Force Majeure Clause sets out the criteria for being recognized as force majeure. The ICC provides general definitions of "force majeure" and "affected party" in the first paragraph, differently from the 2003 version. Save for minor changes to the wording, the new version retains the majority of the 2003 version's first paragraph, which determines the conditions for the occurrence of a force majeure event. In order for an event to be considered a force majeure under the ICC Force Majeure Clause 2020, all of the following conditions must exist concurrently: a. the impediment is beyond reasonable control; b. the impediment could not have been reasonably foreseen at the time of the conclusion of the contract; and c. the effects of the impediment could not have been reasonably avoided or overcome by the Affected Party (defined as the party affected by the impediment under the ICC Force Majeure Clause 2020)(ICC, 2020; Article7.1.7(1) of PICC).

2.2.1. Impediment is Beyond Reasonable Control

As the first criterion for force majeure to be recognized, the event or circumstance that prevents or impedes the performance of the contractual obligation must be beyond the reasonable control of the party performing the obligation (ICC, 2020; UNIDROIT, 2020). An impediment outside the scope of reasonable control means an objective thing beyond the scope of the violator's influence (Kröl et al., 2020; Schwenzer, 2016). The inability to perform the obligations caused by the individual or internal circumstances of the parties to the performance of the obligations would be difficult to be regarded as due to an impediment beyond the reasonable control (Lookofsky, 2017). Therefore, it is highly likely that impediment outside the scope of reasonable control will be considered by external factors rather than internal factors such as disease of the contracting party, interruption of energy supply, and financial deterioration (UNIDROIT, 2020).

On the other hand, if an impediment recognized as a force majeure is specified in the contract, if the performance of the obligation becomes impossible due to such an impediment, the party performing the obligation can be relieved from the burden of proving

whether the impediment is beyond the scope of reasonable control. This is because the contracting parties consider that the force majeure is acceptable without the need to determine whether the impediment specified in the contract is beyond reasonable control.

2.2.2. Impediment Could Not Have Been Reasonably Foreseen at the Time of the Conclusion of the Contract

As a second criterion for force majeure to be recognized, an event or circumstance that hinders or impedes the performance of the contractual obligation at the time of conclusion of the contract must not have been reasonably foreseen by the party performing the obligation (ICC, 2020). In the case of L-Lysine[8], the contracting parties entered into a lysine sale contract on June 20, 2003. However, the seller delivered only a portion of the contract quantity due to SARS, and the price of lysine rose by more than 200%. Accordingly, the seller asserted that the non-performance due to SARS was force majeure. The arbitral tribunal held that SARS was not an unforeseeable impediment because the seller was able to fully consider the effects of SARS because the contract was concluded two months after SARS occurred. Therefore, an impediment that already exists at the time of conclusion of the contract is unlikely to be judged as unforeseeable (Min, Joo-Hee, 2021).

On the other hand, even if the impediment impeding or hindering the performance of the contractual obligation is beyond the control of the party performing the obligation, if the occurrence of the impediment could be reasonably foreseen, it can be presumed that the party performing the obligation would bear the risk arising from the impediment (Schwenzer, 2016). However, foreseeability does not generally apply to all impediments that may arise, and based on objective criteria, the impediment that the performance party may seek alternatives to is presumed to be a foreseeable impediment (Kröl et al., 2020). In addition, the nature of the contract, the terms of the contract, the characteristics of the goods, and the nature of temporary or lasting impediment can be a criterion for judging whether an impediment is foreseeable (Kröl et al., 2020).

On the other hand, if an impediment recognized as a force majeure is specified in the contract, the party performing the obligation can be relieved of the burden of proving the foreseeability of the impediment, just as there was no need to prove whether the impediment was outside the scope of reasonable control (ICC, 2020).

2.2.3. Effects of the Impediment Could Not Have Been Reasonably Avoided or Overcome by the Affected Party

The third criterion for force majeure to be recognized is that the performing party must not have been able to reasonably avoid or overcome the effect of the event or circumstance that hindered or impeded the performance of the contractual obligation (ICC, 2020; Article7.1.7(1) of PICC). Even if the impediment that hinders or impedes the performance of the contractual obligation is beyond the control of the performance party or is unpredictable, it is not recognized as a force majeure if the performance party can take reasonable measures (Kröl et al., 2020; Lookofsky, 2019). In order to determine whether it is reasonable to

[8] China March 5th, 2005 CIETAC Arbitration Award.

overcome the impediment, it may be considered whether the alternatives taken by the performing party are fundamentally different from the contractual obligations (Kröl et al., 2020). For example, even if a change of voyage to overcome an impediment would incur a significant increase in cost, it would not be considered a force majeure, probably because the change of voyage would not fundamentally change the nature of the original contractual obligation (Schwenzer, 2016). Therefore, the party performing the obligation has no choice but to carry the burden of fulfilling the contractual obligation by seeking a reasonable and timely alternative that can achieve the purpose of the contract by overcoming the impediment even if the cost increases. In other words, if there is an alternative that can reasonably avoid or overcome the impediment, or if there is an alternative but does not utilize it, force majeure will not be recognized (Min, Joo-Hee, 2021).

3. Relationship between COVID-19 and Force Majeure

3.1. Outline

If it is impossible for one party to fulfill its obligations due to COVID-19, it can be judged whether force majeure is recognized based on the three criteria mentioned above (Min, Joo-Hee, 2021).

First, it is unlikely that the unprecedented global chaos caused by COVID-19 is not an impediment beyond the control of the obligated party (Berger and Behn, 2020). This is because, in order to prevent the spread of COVID-19, measures such as border closures, import and export bans, and restrictions on the movement of people and goods have been implemented in countries around the world, making it impossible for contracting parties to fulfill obligations. On the other hand, the inability to fulfill obligations caused by personal circumstances such as illness was not considered to be an impediment beyond the scope of reasonable control (Lookofsky, 2017). If death or illness caused by COVID-19 has had a significant impact on the performance of obligations, it will be judged on a case-by-case basis, but there remains room for an impact that is beyond control (Kiraz and Üstün, 2020). However, if an impediment, such as COVID-19, is contractually specified as a force majeure, the obligated party may be recognized as a force majeure without having to prove that COVID-19 is beyond its reasonable control (ICC, 2020).

Second, the foreseeability of impediment is judged based on the conclusion of the contract (ICC, 2020; Article7.1.7(1) of PICC). The WHO declared a pandemic of COVID-19 on March 11, 2020. If the contract was concluded prior to the WHO declaration of a pandemic, it is highly likely that the obligatory party could not have foreseen the inability to fulfill its obligations due to COVID-19 (UNIDROIT, 2020). However, if the performing party's premises were already affected by COVID-19 before March 11, 2020, it may be considered that the foreseeability of non-performance due to COVID-19 exists (UNIDROIT, 2020).

However, each country's response measures caused by COVID-19 can be another impediment. It is true that it is difficult to predict the change in the situation due to the emergence of the mutant virus in the future because the countermeasures of each country are changing every moment and the intensity of the measures varies from country to country as the 3rd epidemic has passed since the WHO's pandemic declaration (UNIDROIT, 2020).

Therefore, since the contract was signed after the WHO declaration of a pandemic, it is difficult to conclude that the impediment caused by COVID-19 is a foreseeable impediment (Min, Joo-Hee, 2021).

Third, due to COVID-19, as measures such as border closures, import/export bans, and control of shipping and air routes were taken, fulfilling contractual obligations to the contracting parties became excessive or was impossible. Also, because the impact of COVID-19 varied from country to country, it was impossible to predict the type, timing, and intensity of measures to be taken in each country. Therefore, it is highly likely that the measures taken due to COVID-19 could not reasonably be deemed to avoid or overcome the effect of the impediment that hindered or impeded the performing party from performing its contractual obligations (UNIDROIT, 2020). However, even in such circumstances, the party performing the obligation should seek a reasonable alternative, unless it is of a fundamentally different nature from the contractual obligation (Kröl et al., 2020; Lookofsky, 2017). If a pier or airport is closed due to COVID-19 and goods cannot be transported according to the original plan, the voyage must be changed to allow the goods to be transported, even at significant costs. If the party performing the obligation does not choose an alternative that exists because of the cost increase (Schwenzer, 2016; UNIDROIT, 2020), this is because it will be decided that it has not adequately responded to a situation that can reasonably avoid or overcome the effect of the impediment.

3.2. Relation between COVID-19 and Material Adverse Change Clause

In the context of the acquisition of a target company or business, a clause which aims to give the buyer the right to walk away from the acquisition before closing, if events occur that are detrimental to the target company. Material adverse change (MAC) clauses (hereinafter referred to as a 'MAC clause') are a common feature of public and private acquisition documents. In the context of lending transactions, it is a clause which acts as a “catch all” provision and aims to allow the lender to call a default if there is an adverse change in the borrower's position or circumstances (for example, a large negative variation shown in successive financial statements of the borrower). MAC clauses are a common feature of facility agreements. Although they are always heavily negotiated, MAC clauses are not commonly used to default a borrower.

MAC clause are for specific companies, such as mergers and acquisitions contracts or project finance contracts, that involve a certain time interval between the conclusion of a contract and the closing of a transaction.[9] It is a contract clause that allows the contractual relationship to be terminated when a significant change in circumstances that negatively affects the company occurs in the contract.

Given the current situation, sellers may be reluctant to agree to a MAC clause. At the same time, buyers may insist on one if the transaction requires a split exchange and completion. The bargaining power of the parties will go a long way to determining who wins. Either way, the drafting of such a clause and the ability to trigger it will be a key focus for all parties.

It is inevitable that the COVID-19 pandemic will have significant financial consequences.

[9] The closing of a transaction is also called closing, and it means that the performance of contractual obligations, such as the payment of money and transfer of rights, is completed.

However, whether current events trigger a MAC clause will ultimately depend on the factual matrix and the wording of the MAC clause. The lack of cases where English courts have interpreted MAC clauses increases this uncertainty. As far as we are aware, to date the English courts have never been asked to decide if a MAC provision has been properly invoked as a result of epidemic or pandemic events (for example, the SARS epidemic in 2003, the swine flu pandemic in 2012, or MERS outbreaks starting in 2012).

The leading English authority, Grupo Hotelero Urvasco v Carey Value Added [2013] EWHC 1039 (Comm), suggests that material adverse change requires a permanent impact rather than a temporary one. Although assessing that position may be less than straightforward, since it appears it is very hard to predict how long the pandemic (and its effects) will last. The availability of the government's financial assistance to companies may also affect the position. It is more likely that a MAC clause can be engaged in the current situation where it has been specifically drafted to include deterioration in the target company's business and general prospects within a defined period of time (for example that financial year). It is also worth bearing in mind that parties that entered into transactions after the start of the COVID-19 pandemic may find it harder to invoke a MAC clause as they will need to show that there has been a material change that they did not know about at the time they entered into the agreement, such that that while they were aware of the pandemic, the circumstances surrounding it have themselves materially changed. Finally, a party thinking about declaring a material adverse change should be aware that if they wrongfully declare this and engage a MAC clause, they risk becoming liable to the other party for a repudiatory breach of contract, which could have expensive consequences.

Generally, MAC provisions have been interpreted narrowly and there has been a high bar to a finding that a MAC has occurred. At the same time, the COVID-19 pandemic appears to be a truly singular event, with the potential to have an extreme impact on companies, and arguably is unlike the types of events that the courts have evaluated in the past with respect to MAC provisions. General advice as to whether the COVID-19 pandemic is a MAC is not possible as in each case the analysis will depend on the specific wording of the provision at issue and the effects on the particular company. Importantly, the evaluation may change over time to the extent the pandemic does not resolve in the relative near-term. It should be kept in mind that the COVID-19 pandemic may affect many other provisions of agreements as well, such as bring-downs of representations and warranties (some of which will not be subject to a MAC standard), covenants to operate in the ordinary course, end dates, and others.

Rather, in practice, it is sometimes specified in the reason for exception to ensure that the epidemic is not a cause for a significant negative change. If such an exception is provided, it is highly likely that COVID-19 is a contagious disease, and the risk posed by COVID-19 is likely to be interpreted as borne by the buyer (Miller, 2020). In the end, it is expected that there will not be many cases in which the buyer will be able to leave the contractual relationship due to the outbreak of COVID-19 itself (Kwon, Young-Joon, 2021).

In most cases, it will be an important issue whether a number of negative situational changes resulting from the COVID-19 crisis, such as economic hardship or government regulatory action, are significant negative changes. However, in practice, changes in circumstances due to amendments to laws or various governmental actions are listed as

exceptions to the MAC clause in many cases, so that the buyer bears the risks (Young-Jae and Byung-Hoon Hwang, 2014). If so, a case where the MAC clause applies and the buyer can get out of the contractual relationship is highly likely to be limited to cases where the economic value of the target company has been significantly reduced due to COVID-19. In this case, if a quantitative standard for judging whether the target company's economic value has deteriorated is set in the contract, it is sufficient to judge it according to that standard. [10]

However, market risk or systemic risk, such as a case where the value of the target company also falls due to the overall economic downturn, is often stipulated as an exception to the MAC (Shin, Young-Jae and Byung-Hoon Hwang, 2014), and even if there is no such stipulation, the buyer is subject to the risk of economic fluctuations as described above. It is common to accept and enter into a transaction. Therefore, for a target company's economic depreciation to be judged as a materially negative change, such a devaluation must be able to be assessed as a risk specific to the target company. In other words, it must be the case that the economic value of the target company has significantly decreased even though the economy is not in general recession, or the target company is negatively affected in a particularly disproportionate manner despite the overall economic downturn. In fact, as an exception to the MAC clause, an economic crisis that affects the overall economy is stipulated, and the buyer bears the risk, but as a reason for exclusion, an unbalanced negative impact occurred only to the target company or the industry to which the target company belongs (these are called disproportionality exclusions[11])(Kim, Ji-Ahn, 2020). However, COVID-19 is more likely to be evaluated as the cause of the overall economic downturn rather than the cause of disproportionately negative impacts only on a specific company or the industry to which it belongs. In this regard, it is seemed that there are not many situations where the MAC clause is applied and the transaction is actually closed in the COVID-19 situation (Kwon, Young-Joon, 2021).

4. Comparision of Application of the Force Majeure Clause between Korean and English Law

4.1. Korean Law

Korea's courts also recognize the principle of force majeure, which operates to release parties from contractual obligations. The event in question, however, must be 'unforeseeable and unavoidable'. Furthermore, just because an event is unavoidable, it does not per se constitute a force majeure event. Under Korean law, therefore, a party may not be able to rely on a statutory force majeure defense if the event in question was foreseeable (Christie et al., n.d.).

The concept of force majeure is recognized under Korean law. Although there is no statutory definition of force majeure, including what specific events may constitute a force

[10] See, Akorn, Inc. v. Fresenius Kabi, AG, 2018 WL 4719347 (Del. Ch. Oct. 1. 2018), aff'd. 198 A. 3d 724 (Del 2018).

[11] In this case, the conclusion of the case may vary depending on how the target company's industry sector is defined. Travelport Limited and others v. WEX Inc.[2020] EWHC 2670 (Comm) sentenced in the UK, addressed this issue.

majeure event, the term does appear in several Korean statutes, such as the Korean Civil Code and the Korean Commercial Code. Korean court case precedents are an important source in this regard, as Korean courts have established a set of criteria for recognizing the concept of force majeure under Korean law. Separately, the specific wording of the terms and conditions included in a force majeure clause in a contract is also considered to be important as well, since contracting parties are free to agree upon the scope and inclusion of a force majeure clause under Korean law in principle.

With respect to the basic concept of force majeure, the Korean Supreme Court has held that: "(i) force majeure is an event in which the grounds for the occurrence of such an event lies outside the scope of control of the affected party, and (ii) despite the affected party's ordinary efforts/customary measures, the occurrence of such an event was impossible to anticipate or prevent" (Supreme Court Decision dated July 10, 2008, Case No. 2008Da15940). Under common law, the effect of a force majeure event is largely known to depend on the wordings of the provision agreed upon by the contracting parties, which typically grants a party a right to suspend performance during the time of a force majeure event. While in Korea, court case precedents have mostly dealt with cases with issues on whether or not a force majeure event would fully exempt a party from performing its obligation under a contract, or from being held responsible for damages arising out of breach of contract(Lee & Ko, 2020).

The following are some of the representative rulings by Korean courts regarding force majeure.

In a case where a company had to suspend construction work and evacuate from the site due to the Korean government's issuance of a travel restriction order (along with a limitation to the usage of passports) against Libya, the court found that such an event constituted a force majeure event (Seoul Central District Court Decision dated July 6, 2018, Case No. 2017GaHap545837);

In a case where there was a record-breaking rainfall amount (i.e., an amount which occurs only every once in 600 or 1,000 years) that was more than the planned flooding level (whereby the level was designed based on the record of 100 years of rainfall amount), the court found that such an event constituted a force majeure event (Supreme Court Decision dated October 23, 2003, Case No. 2001Da48057);

In a case where the delivery of raw materials was delayed due to the Asian financial crisis of 1997, the court, while recognizing that natural disasters, along with sudden changes to the economic situation which also amounted to a natural disaster, constituted force majeure events in general, found that the delay of the delivery of raw materials at issue due to the Asian financial crisis did not constitute a force majeure event (Supreme Court Decision dated September 4, 2002, Case No. 2001Da1386); and

In a case where the amount of snowfall reached a level that occurs once in a hundred years, the court found that such an event did not constitute a force majeure event, since it was possible to anticipate the snowfall and avoid or mitigate the losses by establishing appropriate contingency plans (Daejeon District Court Decision dated April 19, 2006, Case No. 2004 GaHap3493).

Based on the above rulings, Korean courts are likely to take the following factors into consideration when determining whether an event qualifies as a force majeure event: (i)

whether the event at issue occurred outside the contracting parties' scope of control and whether such an event was foreseeable at the time the contract was executed; and (ii) whether the event at issue directly impacted the affected party's performance of its contractual obligations (causal link). In addition, the affected party's efforts to mitigate the effects of the force majeure event (or to find alternative methods for performing its contractual obligations) may also be taken into consideration by Korean courts as well. Whether the COVID-19 outbreak and/or the recent governmental regulations and restrictions qualify as a force majeure event should therefore be determined based on the above criteria based on a case-by-case analysis.

As a general matter, however, force majeure protection may not be invoked solely based on a mere increased possibility of default (or delay), or whether there are changed contractual considerations (such as where there are additional considerations the affected party has to take into account for performing its obligations due to the potential force majeure event)(Lee & Ko, 2020).

4.2. English Law

Parties to English law contracts incorporate force majeure provisions into their agreements to account for the limited application of the doctrine of frustration. As a contractual remedy, force majeure must be expressly written into a contract to apply.

Typically, force majeure suspends the affected party's contractual obligations for the duration of the force majeure event while keeping the contract alive. Sometimes, the contract provides for termination if the suspension exceeds a specified time period. The three core elements of a force majeure clause are:

1. a description of circumstances or events beyond the reasonable control of the parties which will qualify as force majeure events, typically including a specific, non-exhaustive list (e.g. "pandemic", "earthquakes", "flooding");

2. the impact that a qualifying force majeure event must have on the affected party's ability to perform its obligations under the contract (e.g. "hinder", "delay", "prevent"); and

3. the consequences of a force majeure event on the parties' obligations, including whether their performance can be excused or if the party is entitled to terminate the contract.

Parties should not assume that they will be automatically able to rely on a force majeure clause merely because one has been included in the contract. In reality, parties must carefully draft force majeure clauses to ensure they are valid.

Force majeure clauses provide certainty to the questions being faced by turning them into ordinary construction of contract questions, in contrast with common law doctrines, which require resort to general legal principles and detailed case law. In addition, the existence and scope of the force majeure clause is very likely to affect any argument about frustration. That is because, if the contract contemplates the supervening event or type of event, it cannot be said that the supervening event renders performance of the contract radically different from that contemplated at the time of contracting (3VB Barristers, n.d.).

A force majeure clause is based on the agreement. Its requirements and effects will be those stipulated by the parties in the contract. Subject to the express language in each case, you should have in mind the following issues.

First, the party seeking to rely on the force majeure clause will bear the burden of proof to

(i) demonstrate the scope of the clause and (ii) demonstrate that the facts in question fall within that scope. [12]

Second, non-performance must be due to circumstances both beyond the control of the party and for which the party had not assumed responsibility. This will usually be implied if not an express term. [13]

Third, there must therefore have been no reasonable steps which could have been taken to avoid or mitigate the supervening event or its consequences. This ties into self-induced impossibility, which runs through all three of these doctrines.

It is convenient to make a couple of observations here.

Compliance with UK government guidance following the outbreak of COVID-19 is likely to be relevant. For instance, a performance date under a contract may fall during a time when UK government guidance applies. This may lead to complexity in cases where performance is dependent on different sectors of the economy, where some sectors in the supply chain are permitted under UK government guidance to work, but other sections are not.

If the non-performing party has not complied with government guidance or other good practice then that may debar that party from relying on force majeure. [14] A COVID-19 example might be for force majeure to be disallowed if a regime is introduced permitting businesses to operate where employees have been regularly tested, but the employer elects not to have its employees tested.

Fourth, although it will in each case depend upon the particular wording of the force majeure clause, many clauses exclude foreseeable and/or foreseen events. This requirement, where present, will have to be construed with some common sense.

While in every case it is foreseeable with sufficient reflection that even a highly rare natural disaster, war, pandemic or other event might occur (as such things are physically possible and have some historical precedent), the parties cannot have intended such a broad meaning of foreseeability, otherwise the force majeure clause would never be satisfied and have no effect. Instead, and taking from the listed events often intended to be covered (riot, earthquake, flood, etc.), the question is likely to be that the parties would have to foresee the particular event with some degree of specificity beyond general.

In the COVID-19 context, parties contracting before the first wave of the pandemic are not likely to have reasonably foreseen the pandemic in the relevant sense (save in the grey area of contracts entered into after developments in the Wuhan province began to be reported in the international media, but before it became local news and before the impact was felt worldwide). In contrast, it will be hard to argue force majeure with respect to contracts entered into after the pandemic started. Even if the parties contracted in the period between waves of the pandemic, when restrictions were relaxed, the prospect of a second wave was

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[12] See, for example, Great Elephant at [31] (Longmore LJ). That said, if the facts at first analysis are shown to fall within the scope of the clause, the burden may then shift to the party relying on a carve out to prove that the facts actually fall into the carve out, based on the evidential practice that the party who asserts must prove: see, by analogy, Travelport at [279] and [311] (Cockerill J).

[13] See Fyffes Group Ltd v. Reefer Express Lines Pty Ltd [1996] 2 Lloyd's Rep 171 at [196] (Moore-Bick J), describing this as a "presumption" (that is, a rebuttable presumption as to the construction of the clause).

[14] See e.g. the example given in Peel (2021) of a farmer who failed to spray his potato crop, that then died of disease.

reasonably foreseeable and, unless the parties directly address that possibility in their contractual terms, the parties will likely be taken to have accepted that risk and cannot escape it through general force majeure wording.

Where the force majeure clause does not expressly exclude foreseeable and/or foreseen events, we have not found an English authority which says that there would be an implied term to that effect. Further, it would be odd if this were an implied requirement for a force majeure clause since this is not a requirement in the common law of frustration and force majeure clauses generally seek to capture a wider array of events than frustration. However, the more foreseeable an event, the more it might be preventable or avoidable, and thereby be a risk assumed by the relevant party or at least within its control or due to its fault (depending upon the circumstances, fault is not likely to be important in the COVID-19 context).

Fifth, the formalities specified in the contract are important. Notice invoking force majeure may need to be given in a particular way, or in a particular time period, or the event or consequences may need to be certified by an independent state or other body.[15] There are two key points to be considered.

The first is that formalities only matter if "framed as a condition precedent". That will be a question of construction in each case.

The second is that, even if framed as a condition precedent, formalities can be waived. Waiver is an omnibus term which catches a range of different doctrines including forbearance, election, and estoppel. As Lord Wilberforce said in Bremer, this is fact-sensitive and "turns upon an analysis of the communications passing between [the parties]".

However, even if there is an arguable waiver, many contracts contain no oral variation clauses. No oral variation clauses now take effect according to their terms (MWB Business Exchange Ltd v. Rock Advertising Ltd [2018] UKSC 24). The extent to which this decision tracks across to a no oral waiver clause is likely to vary depending on exactly which waiver doctrine is being invoked.

Sixth, the consequences of a force majeure clause will also depend on the express terms of the clause. Normally, parties agree to suspend performance, or excuse liability for non-performance, rather than provide for an automatic discharge of the contract. Sometimes, a long stop date is included. Other times there is no long stop. In the latter scenario, parties facing indefinite suspension will want to consider their ability to terminate at common law, by express provision or by implied provision.

COVID-19, unfortunately, may not be the last pandemic we experience in our lifetimes. Going forward, drafters will want to think carefully as to how to allocate the precise scope of risks with respect to future pandemics. There is no doubt there will be cases where the start date of the COVID-19 pandemic in the UK is disputed, and expensive expert evidence may be required to resolve the issue. Such disputes will be eliminated if force majeure clauses identify which body is determinative for deciding questions as to the start and finish and impact of the pandemic (the World Health Organisation or the UK government)(3VB Barristers, n.d.).

In the recent judgment of MUR Shipping BV v. RTI Ltd [2022] EWHC 467 (Comm), the English Commercial Court allowed an appeal from the appellant ship owners on the proper

[15] The leading case is Bremer Handels GmbH v. Vanden Avenne Izegem PVBA [1978] 2 Lloyd's Rep 109.

construction of the force majeure clause in the context of Russian sanctions. The dispute related to the ship owners' reliance on the force majeure clause in a Contract of Affreightment in response to the charterers' difficulties in payment of freight in US dollars as a result of US sanctions on Russia. Amongst other things, the clause stated that the relevant event would only be considered force majeure if it could not be overcome by the reasonable endeavors of the party affected. The Court consequently held that the obligation to exercise "reasonable endeavour" to overcome a force majeure event did not require the ship owners to accept non-contractual performance by the charterers (Lum and Yip, 2022).

The Commercial Court's decision raises a number of practical consequences in respect of the drafting and invocation of force majeure clauses.

Whilst a party obliged to make 'reasonable endeavours' to overcome the effect of a force majeure clause will have to prove that it used its reasonable endeavors to prevent, or at least mitigate, the effects of the force majeure event, that is only required to the extent that those endeavors are aligned with contractual performance; there is no requirement for a party to accept anything other than contractual performance. Consider carefully the wording used when drafting a force majeure clause. Whether the clause is triggered will depend on its proper interpretation which requires reference to the words the parties have actually used, not their general intention (Coastal (Bermuda) Petroleum Ltd v. VTT Vulcan Petroleum SA (No 2) (The Marine Star) [1996] 2 Lloyd's Rep 383). Here, the Court deemed the wording included in the force majeure clause under the COA, "any rules or regulations of governments or any interference or acts or directions of governments" and "restrictions on monetary transfers and exchanges" sufficiently covered the issue of sanctions. While the Court has helpfully clarified that 'reasonable endeavours' does not include accepting non-contractual performance (however easy that might be), there remains considerable uncertainty about the scope of the term generally. For more analysis on how the Courts interpret the term, see the article: "Best endeavours" vs "reasonable endeavours": not two sides of the same coin (Stephenson Harwood LLP, 2022).

5. Conclusions

The term force majeure is often found in the Korean Civil Code and many other related statutes, there is no concrete definition of its meaning, nor significant scholarly discussion on its specific elements and effects. Current jurisprudence does not clearly distinguish force majeure from a related term, "without fault", by considering only the elements of unforeseeability and unavoidability, which are prerequisites for faults. However, force majeure is different from "without fault" in that it can exempt a party from obligations even in cases of strict liability. Although force majeure is applied only under very restrictive and exceptional conditions, the unprecedented nature of the COVID-19 pandemic increases the applicability of force majeure to contract relations. As a comparison, Germany does not have any substantive article enacted; the same 3 elements are discussed by jurisprudence and scholars. Common law deals with this issue according to the principle of frustration, which allows a party to terminate a contract in cases of impossibility, frustration of purpose, or illegality (Cho, In-Young, 2020).

For example, under Korean law, a force majeure event should be unforeseeable and beyond a party's control. Since Covid-19 is a known event for future contracts, to avoid the risk that a similar situation in the future is deemed foreseeable and under a party's control, parties must ensure that such a risk is properly addressed in a contract. Therefore, it is necessary to have a new clause to cover a pandemic or epidemic. When drafting or negotiating such clauses, it is important to exclude a foreseeability element from the definition. The definition should be broad in order to cover guidelines, notes, or interpretations from governments or international organizations. In addition to a new clause, to mitigate risks, a party must pass risks related to the epidemic to subcontractors and vendors, including the governing law.

In English law, force majeure is a creature of contract and not of the general common law; it is a contractual term that arises solely on the basis of an express provision included in a contract (typically as a boilerplate provision) and cannot be implied. The parties to a contract, therefore, have the freedom to agree what will amount to force majeure for the purpose of their contract and what the consequences will be if such an event happens (Broom and Brennan, 2020). Although the term "force majeure" is universally used and as a result looks very familiar, its legal definition can be different depending on contracts and applicable laws. In addition, it should be noted that although force majeure is recognized as a legal principle in many countries of the continental law system such as France and China, it is not accepted as a legal principle in common law countries such as the United Kingdom or the United States. Even if the law of a country where the law of force majeure is recognized is the law governing the contract, it is merely a voluntary rule, and if the parties agree otherwise, such agreement shall take precedence over the law.

Therefore, if force majeure is a problem in international commercial contract relations, the specific contents such as whether there is a force majeure clause in the contract and, if so, what is the definition of force majeure in the clause, should be first identified. Therefore, the surest way to prepare for a force majeure dispute in international commercial contract relations is to prepare a force majeure clause in advance.

Although no force majeure clause is to be seen in a contract, it still might be possible to invoke force majeure under the domestic law of the forum state if its governing law recognizes it. Therefore, it is always recommended for international commercial contracts to have a separate clause which allows contracting parties to invoke force majeure, and also parties are recommended to carefully consider how to allocate their risks through such contractual clauses in the era of COVID-19.

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