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State Entities and Force Majeure

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State Entities



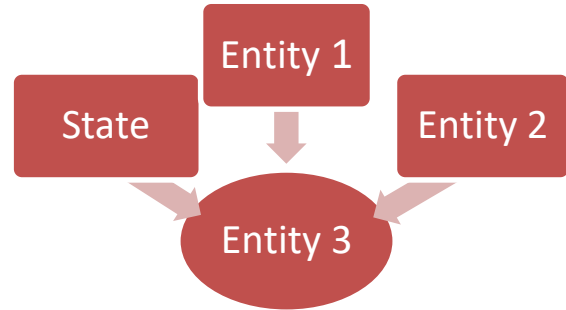
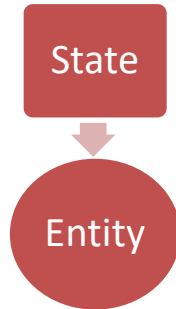
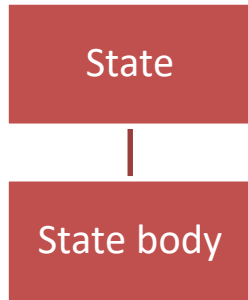
State Entity

Often described as: *any commercial enterprise predominantly owned or controlled by the state or by state institutions, with or without separate legal personality.*

Legal status: under domestic law of the controlling state



Some forms of relations with the State





'Exteriority' issue

Does the State Entity possess legal identity separate from the State?

Does the State control day-to-day operations of the State Entity?

Is the State Entity able to unilaterally make binding decisions in commercial transactions?



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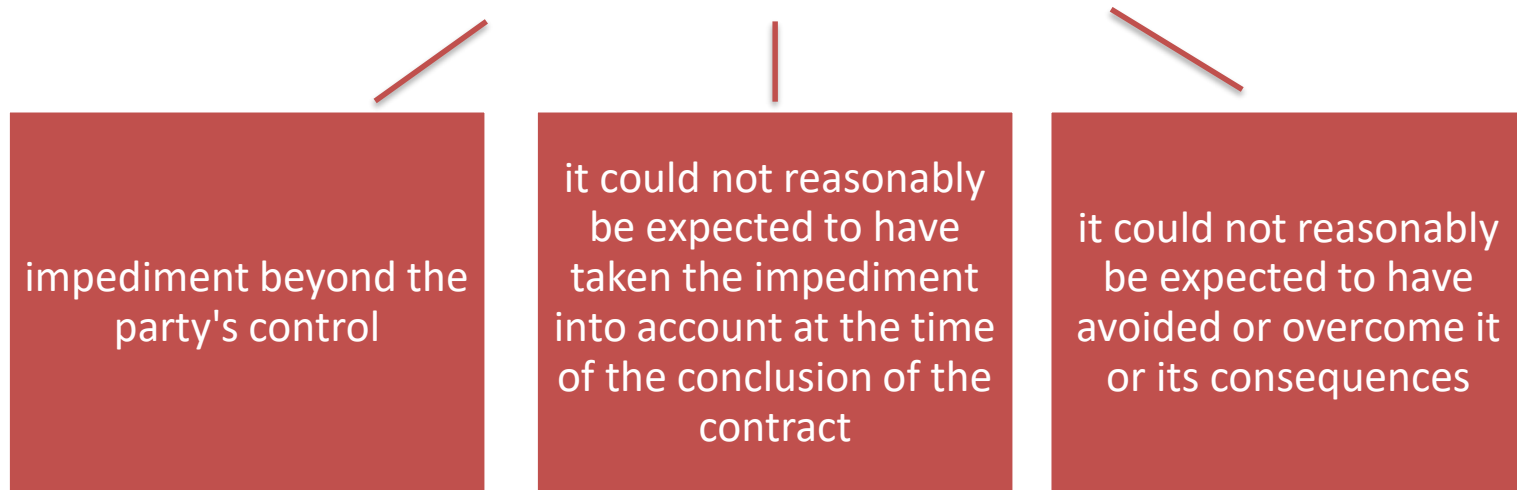
Force Majeure



Force majeure

- Derives from Roman concept *vis maior cui resisti non potest*
- Serves as an exception from the doctrine of *pacta sunt servanda*
- Applies by virtue of contract and/or applicable law

Nowadays, is generally defined as:





Force majeure vs Hardship, Frustration

Hardship constitutes a reason for a change in the contractual program of the parties - where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished, but the aim of the parties remains to **perform** the contract.

Force majeure, however, is invoked in the context of **non-performance**, and deals with the suspension or termination of the contract.

Frustration

The doctrine of frustration of contract and impracticability is developed in the **common law** legal tradition and is not identical to FM.

Ukraine



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Article 14-1 of the Law of Ukraine "On Chambers of Commerce and Industry in Ukraine":

"Force majeure (irresistible/supervening force) are extraordinary and unavoidable circumstances that make it impossible to objectively perform obligations under the terms of the agreement (contract etc.) obligations under the Laws and other regulations, namely: the threat of war, armed conflict or serious threat of such conflict, including but not limited to enemy attacks, blockades, military embargo, acts of foreign enemies, general military mobilization, war, declared and undeclared war, acts of public enemy disturbances, acts of terrorism, sabotage, piracy, invasion, blockade, revolution, rebellion, insurrection, riots, curfews, expropriation, forced removal, takeovers, requisition, public demonstrations, blockade, strike, accident, wrongful actions of third parties, fire, explosion, prolonged outages transport regulated conditions relevant decisions and acts of public authorities, maritime closure of the Straits, embargo, prohibition (restriction) export / import, etc., and are caused by exceptional weather conditions and natural disasters, and namely epidemic, violent storm, cyclone, hurricane, tornado, flood, snow accumulation, hail, frost, freezing seas, straits, ports, passes, earthquake, lightning, fire, drought, subsidence and landslide and other natural disasters, etc."



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State Entities and Force Majeure



Limits to application of FM clauses for state conduct

Could a state entity be discharged of obligation under the contract with a private entity because an action of the controlling state has brought about the event?

And what if:

- a state in its own pecuniary interests purposefully enacts laws and regulations allowing the state entity to be released from an unfavorable contract without consequences?
- a state entity has induced the state into action that make performance impossible?



State entity is not responsible for the state conduct if:

1. It possesses its own legal personality
2. It is not in collusion with the controlling state regarding FM
3. The actions of the controlling state are acts of state or a political decisions of national sovereignty outside of the state's purely pecuniary interest in the commercial transaction



Unpublished ICC Award – test of FM application

ICC case between Western European companies and two Iranian state agencies provides for the test to be met in order for the force majeure to apply to state entities:

The act of the state or government should be the political decision of national sovereignty

It must not have been taken in favor and personal interest of the state or its own enterprise

It must be such that its effects would have been the same regarding private enterprises

In this case the Tribunal considered that, with regard to the third contracting parties, the state enterprise and the Iranian state itself could only be considered as one single entity, so that there was no character of “exteriority”.



Soviet Foreign Trade Arbitration Commission: Jordan Investments Limited v Soiuznefteksport [1960]

- In July 1956 Jordan Investment Ltd (Israel) and All-Union Foreign Trade Corporation Soiuznefteksport (USSR) entered into a contract to provide 650 tons of heavy fuel oil to Israel
- In October 1956 Suez crisis arose
- In November 1956 the USSR Ministry of Foreign Trade refused to issue the necessary export license and further barred performance of the contract
- Soiuznefteksport invoked the force majeure clause
- The Tribunal agreed, since:
 - Under its *lex personalis* Soiuznefteksport possessed a separate legal identity
 - The State's decision had political reasons and reflected more its interests in the Cold War aspects of the Suez Crisis than its interests in Soiuznefteksport's transactions



Czarnikow v Centrala Handlu Zagranicznego Rolimpex [House of Lords, 1979]

- In 1974 Rolimpex (Polish state enterprise) and Charnikow (English company) entered into a Contract for sale and purchase of sugar
- Rolimpex partially performed the Contract, but in late 1974 Polish Government banned all exports of sugar due to projected shortfalls
- Rolimpex invoked force majeure clause, providing for release from the contractual obligation if delivery was *'prevented or delayed directly or indirectly by government intervention ... beyond the seller's control'*
- Arbitrators rejected contention that force majeure was created by Rolimpex, and noted that: *'in any event, force majeure could only apply when the government's action was for public purposes and not merely to avoid the consequences of a particular contract'*
- Arbitral award was further confirmed by English courts and House of Lords found that under Polish law Rolimpex has its own legal personality and it unilaterally made decisions regarding its commercial transactions. It also found that the ban was an action of the state wholly separate from the interests of Rolimpex under the contract



ICC case No.4600: Asian creditor v. French debtor

- French company was acquired, shortly after the signing of an international contract with an Asian company, by a French state organization
- French company was then forbidden by confidential ministerial instructions to perform the contract and to disclose those instructions to the Asian partner.
- state entity invoked force majeure clause in the contract
- The creditor has relied on the well-known Air France case (1971), where it was said that:

“It would be extremely shocking if a national company like Air France, or a fortiori, a public organization were allowed to protect itself behind its public law status in order to evade its contractual obligations...If such a solution was excepted, it would become all too easy for enterprises with special (public) status to be excused from performing their contracts. It would suffice for them to provoke a withdrawal from authorization and thereafter to rely on force majeure.”

**ICC Award No. 4462 :
National Oil Corporation (Libya) v. Libyan Sun Oil Company,
Inc. (U.S.A.) [1991]**



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- National Oil Corporation (NOC) (wholly owned by the Libyan Government) and Sun Oil (a Delaware corporation and a subsidiary of Sun Company, Inc.) executed an Exploration and Production Sharing Agreement ("EPSA") in November 1980 to carry out and fund an oil exploration program in Libya.
- In December 1981, Sun Oil invoked the *force majeure* provision contained in the EPSA and suspended performance: "*22.1 Excuse of Obligations. Any failure or delay on the part of a Party in the performance of its obligations or duties hereunder shall be excused to the extent attributable to force majeure. Force majeure shall include, without limitation: Acts of God; insurrection; riots; war; and any unforeseen circumstances and acts beyond the control of such Party.*"
- Sun Oil alleged that a **State Department order prohibiting the use of United States passports for travel to Libya prevented its personnel, all of whom were U.S. citizens, from going to Libya.** Thus, Sun Oil believed it could not carry out the EPSA "in accordance with the intentions of the parties to the contract"
- In 1985, the ICC Arbitral Tribunal held that **there had been no *force majeure*** within the meaning of the EPSA.



ICAC at the Ukrainian Chamber of Commerce and Industry case: Russian company v. Ukrainian state entity [2015]

- the parties have executed a contract for supply of goods
- the contract provided for the force majeure clause: ***“If the force majeure event lasts for more than 3 months, the parties can terminate the present contract”***.
- the parties agreed that force majeure events include the decisions of state bodies
- in 2014, the Ukraine’s State service of export control terminated the license for the export of goods under the Contract
- the Ukrainian state entity has provided the Certificate attesting the moment of the occurrence of the force majeure circumstance with no estimated date of its end
- the Arbitral tribunal has decided that the Contract did not provide for the procedure of the contract termination
- the Arbitral Tribunal also indicated that the force majeure circumstances do not have the element of “finality” and referred to the Award of Arbitration Court of the Chamber of Commerce and Industry of Budapest, where it stated **that the relations between the parties “freeze” and renew when the force majeure circumstances disappear**



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