Matthias Scherer
Economic or Financial Crises as a Defence in Commercial and Investment Arbitration

Abstract | The paper examines the use of economic and financial crises as a defence to the lack of fulfilment of obligations in both commercial and investment arbitration. It begins by looking at the major crises that have occurred in the past thirty years, each time identifying the cases that are associated with the crisis.

The next section of the paper looks at the situation in commercial arbitration, focussing on the use of "change in circumstances" and force majeure as defences, noting that tribunals have set a very high threshold for the defence to succeed. The paper then contrasts this approach in commercial arbitration with that in investment arbitration and notes, in particular, the use of the defence of necessity as a domestic law, treaty-based and customary international law defence. It is noted that tribunals have so far been inconsistent in their approach to deciding on the defence of necessity which is problematic for both investors and respondent states. Finally, the paper concludes that a defence related to economic or financial crises is more likely to succeed in investment arbitration than in commercial arbitration, perhaps even in situations where the damage arises from the same circumstances.

1 The author thanks Ms Irène Léger and Ms Ndanga Kamau, foreign interns with LALIVE for their research assistance.
I. Introduction

14.01. The havoc created by the financial crisis of 2008 has brought about an increase in disputes as companies suffer the backlash. As arbitration has become the favoured dispute resolution mechanism in international contracts, with the notable exception of financing operations, many of the disputes triggered by the crisis will end up in arbitration. Typically, a party, whether a company or a State, will argue that, due to the effect of the crisis, it is unable to meet undertakings made prior to the crisis or that it was forced to take certain measures to alleviate the effects of the crisis. The other party will assert that the crisis should not discharge its counterpart's duty to perform. This paper highlights how international arbitral tribunals have dealt with these types of arguments, both in investor-state disputes and in commercial disputes between private parties.2

14.02. Most domestic laws address situations where an external event materially affects a party's capacity to perform a contract. So do the UNIDROIT Principles of international commercial contracts.3 The paper does not aim to analyse individual laws; instead it takes a holistic approach assessing the legal grounds of individual cases. It focuses on the factual matrix of the case and its assessment by the arbitral tribunal and from these attempts to draw general conclusions. Therefore, the alleged crises will be viewed from two points of view; that of the party and that of the tribunal:

− What were the circumstances that according to the party invoking them, discharged it from its obligations?
− What were the criteria that arbitral tribunals applied to determine whether a party was discharged or not?

II. Illustrative Crises

14.03. It is not uncommon for parties to raise arguments based on an alleged economic crisis in context of international arbitrations. However, in commercial arbitration, published awards are scarce due to confidentiality agreements between the parties.4 The awards in investor-state disputes are more readily available. The present paper identifies some illustrative crises and published awards, but is not a comprehensive study of such cases.5

II.1 Oil Crises in the 1970s6

14.04. The oil crisis in the 1970s began when the Organisation of Arab Petroleum Exporting Countries (OAPEC)7 proclaimed an embargo on oil exports to the US and other Western countries in retaliation for these countries' support of Israel during the Yom Kippur War. The embargo lasted from October 1973 to March 1974. In 1979, the crisis was exacerbated by the Iranian Revolution which saw a change in regime from Shah Mohammad Reza Pahlavi to Ayatollah Khomeini.

II.2 Mexican Financial Crisis From 1994 – 19978

14.05. At the end of 1994, a serious financial crisis broke out in Mexico resulting in a decline of the Mexican peso against the US dollar and an increase in interest rates. In the first half of 1995, the peso declined in value by 96%.9 The crisis continued for several years during which the value of the peso was approximately halved, the rate of inflation reached 38%, and federal revenues to the States and municipalities were greatly affected.10 These events had a significant impact on Mexican banks and industry. In order to avert a collapse of the financial system, the authorities took a series of measures to support banks and depositors and to re-establish their viability.11

II.3 Indonesian Crisis from 1997 – 199912

14.06. The Indonesian crisis was part of the widespread South-east Asian crisis in the late 1990s. The Indonesian economy contracted by 15 percent from

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2 Due to the limited space in this paper, the case law cited is incomplete and merely for the purpose of illustration, rather than exhaustive analysis. The investment arbitration cases cited can be found at: http://ita.law.uvic.ca.
4 "Banks which are confronted with a deteriorating litigation culture in the aftermath of the financial crisis will be eager to conduct their R&D disputes in a confidential manner in order to maintain customer confidence and their general standing in the banking business," Klaus Peter Berger, The aftermath of the financial crisis: why arbitration makes sense for banks and financial institutions, LAW AND FINANCIAL MARKET REVIEW 54 (January 2009).
5 For a more exhaustive discussion see Christoph Brunner, Force Majeure and Hardship under General Contract Principles, COMMENTARY ON THE UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS (S. Vogener & J. Kleinheisterkamp, eds., 2009).
7 Arab members of OPEC plus Egypt and Syria.
8 Related cases: Fireman's Fund Insurance Company v. United Mexican States, ICSID Case No. ARB(AF)/02/1, Award of 17 July 2006. Waste Management Inc v Mexico, ICSID Case No. ARB(AF)/00/3, Award of 30 April 2004.
10 Waste Management Inc v Mexico, Award of 30 April 2004, para 101.
11 Fireman's Fund Insurance Award, para 48 – 49.
12 Related cases: Himipura California Energy Ltd. (Bermuda) v PT (Persero) Perusahaan Listrik Negara (Indonesia), Final Award, 4 May 1999; Karaha Bodas Co. LLC v. Perusahaan Persambangan Misyak Dan Gas Bumi Negara and others, Final award of
1998 to 1999 and millions of workers lost their jobs. The rupiah lost more than 80 percent of its value and the inflation rate exceeded 75%.13

II.4 The Russian Financial Crisis in 199814

14.07. The Russian financial crisis was triggered by the Asian financial crisis that started in 1997. It led to the sudden depreciation of the rouble as a result of mass panic following the joint declaration by the Russian Government and the Russian Central Bank postponing payments for State treasury bills and announcing a six-month moratorium on Russia bank payments to foreign investors. The financial crisis combined with dramatic changes in the political, economic, and legal setting has turned the problem of stability of contractual obligations into "one of the most important legal issues in Russia today."15

II.5 Turkish Economic Crisis in the Early 2000s16

14.08. This crisis was attributed to a failed exchange-rate stabilisation programme designed to combat inflation and various external events such as the Asian and Russian economic crises.

II.6 Ecuador Crisis in the Late 1990s17

14.09. Ecuador’s financial crisis was triggered by successive political and economic events, such as the armed conflict in Peru, the drop in fuel prices, the effects of El Niño, the shutdown of external credit, the collapse of the financial sector, and the change in the monetary system.

II.7 Czech Republic Banking Crisis in the Late 1990s18

14.10. The banking crisis in the Czech Republic was caused by the balance sheets of the largest Czech banks being overburdened with large outstanding debts from the Communist era and bad debts from the post-communist period. This, coupled with tough new regulations taken by the Czech National Bank, resulted in a bank run and serious economic crisis by mid-1998.

II.8 Argentine Crisis in the Late 1990s – early 2000s19

14.11. After the Latin American debt crisis of the mid-1980s, successive Argentine governments took measures to recover. The government of Carlos Menem engineered the privatisation drive of the late 1980s and early 1990s with the gas sector as one of the main targets. The privatisation drive was accompanied by policies to attract foreign investment.20 To this end, in 1991, the Argentine government enacted the Convertibility Law, which pegged the Argentine currency to the dollar, and in 1992 enacted the Gas Law to establish the basic rules for the transportation and distribution of natural gas. In the mid-1990s, Argentina suffered a banking crisis as a result of contagion from the Mexican crisis mentioned above. By the late 1990s, Argentina was recovering from this crisis with help from the World Bank, but another crisis began in 1999 precipitated by Brazil’s devaluation of the real. This led to a series of political, economic and financial events that culminated in a bank run and the enactment of the Emergency Law. The Emergency Law declared a public emergency, abolished the currency board which had pegged the peso to the dollar, put an end to the calculation of tariffs in dollars and stopped the adjustment of tariffs according to the US CPI. The Emergency Law also foresaw the renegotiation of all licences for gas transportation and distribution. The aftermath of the crisis saw a large number of claims made against Argentina, mostly on the basis of bilateral investment treaties. In several cases, Argentina argued that the measures it had taken had been necessary to prevent further harm to its economy.

II.9 Global Financial Crisis of 2008

14.12. The global financial crisis of 2008 was triggered by the U.S. sub-prime mortgages crisis of 2007. This crisis has so far led to an increase in the number of arbitrations throughout the world.

13 Opening statement of Dr. Adnan Buyung Nasution, lead counsel for PLN, Kompania California Energy Ltd v Indonesia, Final Award of 4 May 1999, para 182.
15 Ibidem.
20 CMS Award, para 53.
14.13. In 2009 most major arbitration institutions noted a considerable rise in the number of arbitration proceedings. The ICC reported a significant increase in 2009, including arbitrations related to hedge funds, investment funds and banks. The Swiss Chamber of Commerce saw as many new cases filed in the first half of 2009 as were filed in the entire year 2008. This is echoed in a similar increase in the LCIA caseload in 2008 which, in the LCIA Director General’s view, “must surely be, at least in part, as a result of the global economic turmoil that we are currently experiencing.” The ICDR saw a 13% rise international filings, with 6 filings pursuant to Article 37 on Emergency Measures of Protection in 2008 and an increase of 18% by the third quarter of 2009. A further increase in cases is predicted, particularly in Dubai. It is worth noting that many claims are still in the process of being evaluated and most of them will only start to emerge two or three years from now.

III. Commercial Arbitration

III.1 Parties’ Arguments Based on an Economic Crisis

14.14. Most parties relied on the doctrine of changed circumstances or clausula rebus sic stantibus, and hardship or force majeure.

III.1.1 Change in Circumstances

14.15. ICC Case No. 11585 arose out of a shareholder agreement according to which an investor from an EU state became a shareholder in a Turkish company. The agreement provided for an earn-out mechanism according to which the seller would reimburse part of the share purchase price in the event that the company did not reach certain Earnings Before Interest and Taxes (EBIT) goals. The company missed the EBIT goals due, amongst other reasons, to the economic crisis in Turkey, its home market. The Turkish shareholders argued that the price adjustment mechanisms provided for in the contract were not meant to apply in circumstances such as the Turkish crisis, and that this change of circumstances had rendered the contractual mechanisms inoperable. It was further argued that the applicable Swiss law recognized the doctrine of changed circumstances, that the parties had never discussed the events (or at least their intensity), and that even if some of the events may have been foreseeable, their dramatic combined impact was not.

14.16. In ICC Case No. 8485 the respondent argued that there had been unforeseen economic changes in the Turkish sugar-cube market, releasing him from his obligation to pay according to Article 6:258 of the Dutch Civil code.

14.17. In an ad hoc case involving a general deterioration on the oil market (OPEC) that resulted in a restriction of oil consumption and thereby also of transportation, a Hungarian enterprise (counter-defendant) referred to changed circumstances, considering that requirements had been met for the application of the rebus sic stantibus rule under Swiss law.

14.18. The respondent in ICC Case No. 2508 took the view that external economic circumstances called for an adaptation of the contract under Swiss law. The world market petroleum prices had tripled since the time of contracting.

14.19. A defendant in an ad hoc case further invoked the clausula rebus sic stantibus as the changes in the situation (the 1973 Oil Crisis) had been impossible to foresee at the time the contract was concluded.

14.20. In ICC Case No. 2216, in order to explain its failure to take delivery of certain quantities of oil as provided for under a contract with a State entity, a Norwegian company invoked a drop in the price of oil between the date of the execution of the contract and the date of the first deliveries.

III.1.2 Force Majeure

14.21. In the Karaha Bodas case, Karaha Bodas Co. (KBC) had contracted with Pertamina, an oil and gas corporation owned by the government of the Republic of Indonesia, and PLN, a State-owned electricity utility, to develop the Karaha Bodas Geothermal Project in West Java, Indonesia. As a result of the Indonesian crisis, the Government issued decrees postponing the project.

24 Statement of Luis Martinez, Vice President of the ICDR, in the OGEIMID discussion on “Effect of business cycle on the business of dispute resolution”.
26 “Amidst the tightening grip of the global financial crisis, an arbitration focused seminar in Dubai this week indicated that the region is possibly on the brink of a massive increase in arbitration activity,” Dubai and UAE to see massive jump in arbitrations in 2009, Clyde & Co Newsletter, 21 January 2009.
29 Unpublished.
ing or putting power projects on hold. KBC gave notice to its co-contractors to the effect that the presidential decree postponing the project constituted an event of force majeure and submitted a revised work plan. PLN sent a letter to KBC stipulating that the latter should abide by the presidential decree and that any further activity would be at KBC's own risk.\(^{35}\)

14.22. In the Himpurna case the defendant PLN pleaded that "the role of the Arbitral Tribunal was limited to leaving the parties to renegotiate the contracts in accordance with the principles that apply when there has been such a fundamental change of circumstances."\(^{36}\) Its plea was that "Indonesian law does not permit the claimant to claim damages for breach of the [contract] in changed circumstances, and that the claimant's duty of good faith as recognised by international legal principles oblige the claimant to renegotiate the terms of the Contract to reflect these changed circumstances."\(^{37}\) The defendant's expert also invoked in the Himpurna case the application of Articles 1244 and 1245 of the Indonesian Civil Code, which contain the basic principles pertaining to force majeure.\(^{38}\)

III.2 Criteria Applied by Arbitral Tribunals

III.2.1 Change in Circumstances

14.23. Arbitral tribunals have ruled that a mere price fluctuation is not sufficient to justify the release of a party from its contractual obligations or to argue that performance is unprofitable or difficult.\(^{39}\) Tribunals have also invoked Article 6.2.1 of the UNIDROIT Principles, according to which the fact that the mere performance of a contract entails greater economic difficulties for one of the parties is not sufficient justification for accepting a defence of hardship. Tribunals have set a high threshold for the nature of the change in circumstances that is acceptable, in one case requiring "exceptional circumstances"\(^{40}\) and in another case ruling that an unusual accumulation of events over a period of a few years did not reach the degree of "extraordinariness" required.\(^{41}\) These strict requirements were echoed in a tribunal's finding of that the rebus sic stantibus rule could only be applied in "an event of a general character with a catastrophic impact on major parts of the population and which changes essentially its social conditions like war, devaluation, inundation or earthquake."\(^{42}\)

14.24. Tribunals have not accepted change in circumstances as a defence in situations where the contract in question amounted to only small part of the respondent's turnover\(^{43}\) or where the event occurred, or only became known, after the contract had been concluded.\(^{44}\) Similarly, tribunals have not been willing to accept the defence of change in circumstances where events are foreseeable\(^{45}\) and with respect to crises have noted that regional political and economic crises are unfortunately a common occurrence and that for sophisticated businessmen with some experience in international trade foodstuff bans and customs barriers are not foreseeable. A dramatic fall in prices and currency divergence alone did not constitute unforeseeable circumstances\(^{46}\) and neither did the rise in prices as a result of the 1973 oil crisis.\(^{47}\)

14.25. Arbitral tribunals take into account the disruption of the balance between the parties' obligations and have refused the defence of changed circumstances where the balance between the parties' obligations was not drastically affected or destroyed.\(^{48}\) The defence was also refused where the change in circumstances would only affect the other party\(^{49}\) and not the party claiming it. Tribunals have stipulated that change in circumstances can be accepted where the risk of a crisis is not assumed in the contract.

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\(^{36}\) Karaha Bodas Award of 4 May 1999, para 184.

\(^{37}\) Karaha Bodas Award, para 185.

\(^{38}\) Karaha Bodas Award, para 187.


\(^{41}\) ICC Case No. 11585, Unpublished.


\(^{43}\) ICC Case No. 2508; Award of 1976, 1977 JDI 939 and 1 Collection of ICC Awards 292.


\(^{45}\) ICC Case No. 2216 Award of 1974, 1975 JDI 917 and 1 Collection of ICC Awards 225: "attendu que, de la part d'un acheteur aussi avisé que J qui, avant de signer le contrat du ..., est allé jusqu'à informer des résultats de la Conférence de Théran, qui, au moment où il négociait un contrat dudit à 3,15 $ le baril, était bénéficiaire d'un contrat en cours d'exécution à 1, 85 $, ne pourrait être admis à soutenir qu'il n'a pas jugé utile de se prémunir dans le contrat même [...] contre d'éventuelles fluctuations de prix." ICC Case No. 11585, Unpublished, Himpurna § 203, Final Award of 4 May 1999.


\(^{48}\) ICC Case No. 11585, Unpublished.

by the party relying on it. Tribunals view a party’s refusal to negotiate with its counterpart adversely. They require substantive evidence of the impact of the changed circumstances; one tribunal, for example, rejected a general argument that the oil price had increased.

III.2.2 Force Majeure

14.26. The traditional criterion of the force majeure concept is the absolute impossibility of performance. It distinguishes force majeure from hardship, where the performance becomes too onerous but not absolutely impossible.

14.27. In the Himpurna case the tribunal found that “there is no force majeure if the relevant event is not insurmountable.” The defendant had not demonstrated its inability to honour the contract, and its claim had lost credibility in light of the new power project it was able to launch despite the general economic crisis.

III.3 Conclusions

14.28. Arbitral tribunals in commercial cases have almost invariably declined to release a party from its contractual obligations based on changed circumstances and force majeure. However, tribunals appear willing to take into account these pleas when calculating the amount of compensation for lost profits and other damages. Interestingly, the arbitral tribunal in ICC Case No. 2508 found that the prerequisites of Swiss law for an application of the doctrine of changed circumstances should be less rigorous.

14.29. In a series of cases arising from its financial and economic crises in the early 2000s, Argentina pleaded necessity based on its domestic law—a plea that no tribunal has accepted. Argentina’s plea was not based on the existence of the recognition of necessity in the Argentine Civil Code or in the law generally, but that economic necessity had been recognised by court decisions to the extent that Congress had declared it and it was temporary and reasonable.

Bilateral Investment Treaties

14.30. A bilateral investment treaty may contain an emergency clause, also known as a non-precluded measures clause or an emergency exceptions clause. The clause is invoked on grounds of "public order" or "essential security", and the effect of invoking it is to wipe away the breach such that the party in breach is deemed not to have breached its obligations. Article XIV of the U.S.–Argentina BIT is an example of an emergency clause. Argentina, in its series of cases following the economic crisis in the early 2000s, also argued that non-discrimination clauses in some of its BITs—such as Article IV(3) in the U.S.–Argentina BIT and Article 4 in the UK–Argentina BIT—should apply.

Customary International Law

14.31. The defence of necessity is available in customary international law. This was confirmed by the International Court of Justice in the Gabčíkovo-Nagymaros Project case.

14.32. The state of necessity has been codified in Article 25 of the ILC Articles on State Responsibility, where it is one of six circumstances precluding wrongfulness found in Chapter V of the Articles. The necessity defence is exceptional; this is emphasised by the fact that it is written in nega-

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51 Karaha Bodas Award para 190, ICC Case No. 2508 Award of 1976, 1977 JDI 939 and 1 COLLECTION OF ICC AWARDS 292.

52 ICC Case No. 1185, Unpublished; ICC Case No. 2508, Award of 1976, 1977 JDI 939 and 1 COLLECTION OF ICC AWARDS 292.


54 Karaha Bodas Award para 197.

55 Karaha Bodas Award para 386, “Having to deal with the circumstances as it has found them, the Arbitral Tribunal has sought to alleviate PLN’s burden as much as possible while respecting the clear contractual entitlements of the claimant under an agreement which by its terms left very little to chance,” ICC Case No. 8251, Award of 1995, XII ICC BULLETIN 1 93 (2001). The arbitral tribunal took into account that the sales achieved by defendant with the customers recruited by claimant in the territory of the former GDR had fallen substantially, due to the political and economic changes resulting from the events of 1989, that the legal and ownership structures of the enterprises had changed, and that some of the enterprises formerly supplied had been wound up.

tive language. In paragraph 1 of Article 25 of the ILC Articles there are two conditions without which necessity may not be invoked and in paragraph 2 there are two situations that are entirely excluded from the defence of necessity. The conditions in Article 25 are cumulative.

14.33. The Commentary of the ILC Articles provides guidance on the application of the necessity defence. Article 25(1)(a) stipulates that the act that a State seeks to excuse should be the only way in which it can safeguard an essential interest from grave and imminent peril. What is an essential interest depends on the circumstances. The interest has to be threatened by a grave and imminent peril, where imminent means that it is proximate. If there is another way to safeguard the interest, then the plea cannot be used because the act has to be the only way to safeguard the interest. Additionally, Article 25(1)(b) stipulates that the act must not impair the essential interest of the other State or States concerned or the international community as a whole.

14.34. These two conditions are sometimes called the affirmative conditions of necessity but even where they are satisfied, a State may not rely on the defence of necessity if the two exceptions in paragraph 2 exist. In Article 25(2)(a), where an international obligation of the State excludes necessity—whether explicitly or implicitly—for example by way of a treaty, necessity cannot be used. In addition, Article 25(2)(b) says that a State may not rely on necessity where it has itself contributed to the situation. This contribution has to be sufficiently substantial and not merely incidental.

IV.1.2 State Parties' Arguments
Events Beyond the Respondent's Control

14.35. In the Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador case, the respondent argued that that its late payment of the claimant's invoices was excused because it was attributable to events over which Ecuador had no control. It further submitted that the claimant was aware of the country's financial difficulties due to successive "catastrophic and unforeseen" political and economic events, such as the armed conflict with Peru, the drop in fuel prices, the effects of El Niño, the shutdown of external credit, the collapse of the financial sector, and the change in the monetary system.

In Defence to a Claim of Expropriation

14.36. In Fireman's Fund Insurance Company v. United Mexican States, the defendant denied that there was any expropriation of the claimant's investment and further emphasized that, while being a sophisticated investor, the claimant made a risky investment in a bank at a time that there was a very serious financial crisis in Mexico.

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14.37. The claimant in Eudoro Armando Olguín (Peru) v. Republic of Paraguay argued that, within the context of the financial crisis, the actions of the Republic of Paraguay were equivalent to expropriation of the claimant's investment. The claimant contended that there were a number of omissions on the part of Paraguay in regard to the obligations of its accounting bodies in matters of financial supervision.

In Defence to the Claim of a Violation of Fair and Equitable Treatment

14.38. In Waste Management Inc v. Mexico, while not denying that the City of Acapulco may have breached the Concession Agreement, the defendant denied that these breaches, individually or collectively, rose to the level of conduct in violation of NAFTA Article 1105 (fair and equitable treatment). The tribunal decided in relation to the defence that the City's financial plans were severely affected by the Mexican financial crisis.

Doctrine of State of Necessity and Emergency Exceptions

14.39. Argentina is a good example of a country that has invoked the state of necessity and treaty emergency exceptions in several cases in defence of the measures that it took to deal with the financial crisis in the early 2000s. It has pleaded necessity under domestic law, treaty provisions and under customary international law.

Unjust Enrichment

14.40. The Tribunal in CMS v Argentina pointed out that even though Argentina did not plead unjust enrichment, this was an underlying claim in some of its arguments particularly the argument that the dollar-based tariff would result in unfairness and unreasonableness, or more importantly that tariffs would have been excessive either in the domestic or the export markets.

"Imprévision" and Hardship


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59 Duke Energy Award, para 234.
60 Duke Energy Award, para 212.
61 Duke Energy Award, para 116.
62 Eudoro Armando Olguín, para 64 (Unofficial English translation).
63 Eudoro Armando Olguín, para 68 (Unofficial English translation).
64 Waste Management, para 76.
65 Waste Management, para 112.
66 CMS, Award of 12 May 2005, para. 218.
67 CMS, Award of 12 May 2005, para 221-222.
IV.2 Approach of Arbitral Tribunals
Necessity and Emergency Exceptions

Domestic Law

14.42. The plea of necessity as found in domestic law has not been accepted by any of the tribunals dealing with the issue in the series of Argentinean cases.

Treaty Law

14.43. The approach of tribunals with respect to the defence of necessity contained in treaty law has been inconsistent, with tribunals in *LGE & E* and Continental Casualty accepting Argentina’s defence based on Article XI of the U.S.–Argentina BIT and rejecting it in *CMS*, *Enron* and *Sempra Energy*. Necessity was also rejected by the tribunals in *BG Group* and *National Grid* based on Article 4 of the U.K.–Argentina BIT. The divergence in findings has largely depended on the approach the tribunals have used with respect to the relationship between Article XI of the U.S.–Argentina BIT and Article 25 of the ILC Articles on State Responsibility.

14.44. In *CMS*, the tribunal only looked at Article XI briefly after concluding that the conditions of necessity in Article 25 ILC Articles had not been met. In contrast, the *LGE & E* tribunal used Article XI of the U.S.–Argentina BIT as a starting point and concluded that Argentina could rely on the state of necessity defence for a certain period of time. The tribunal used the conditions in Article 25 ILC Articles to analyse whether Article XI could be relied upon and concluded that the conditions had been met.

14.45. The tribunal in *Continental Casualty* used a different approach in analysing Argentina’s defence. It noted that it could determine whether Argentina’s invocation of Article XI was justified simply by analysing Article XI, without importing the conditions in Article 25 of the ILC Articles. Instead, the tribunal looked to GATT/WTO case law for a definition of “necessary” as found in Article XI. The tribunal’s justification was that the origin of Article XI was in the Friendship, Commerce and Navigation (FCN) Treaties concluded by the U.S. and that the modern-day embodiment of these treaties was the GATT/WTO.

14.46. The tribunals have, however, been united in finding that Article XI applies to economic emergencies and that it is not self-judging. A third important question of whether the treaty standard imports the customary international law standard remains unresolved as only *Continental Casualty* and the Annulment Committee in *CMS* have found this to be the case.

14.47. Tribunals have uniformly rejected the invocation of Article IV(3) of the U.S.–Argentina BIT and Article 4 of the U.K.–Argentina BIT as grounds for necessity. They have found that both these clauses are simply non-

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discrimination clauses there to ensure that measures adopted by the Argentinean government in respect to losses suffered in an emergency are not different from those suffered by nationals or other foreign investors.69

Customary International Law

14.48. The state of necessity in customary international law should only be used in exceptional circumstances and this has been reflected in the findings of tribunals that have looked at whether Argentina has satisfied the conditions stipulated in Article 25 of the ILC Articles.70 Thus far, only the tribunal in *LGE & E* has found that the cumulative conditions of Article 25 have been met. Other tribunals have found that some of the conditions have been met but the defence has failed overall because the conditions are cumulative.

Tribunals’ Findings on other Issues
The Crisis Should not be an Assumed Risk

14.49. Was the investment speculative or imprudent? Was the investment made after the country suffered economic difficulties?

14.50. In *Eudoro Armando Olguin (Peru) v. Republic of Paraguay*, the tribunal felt that prudence should have prompted a foreigner arriving in a country that had suffered severe economic problems to be much more conservative in his investments,71 and that it was not reasonable for him to seek compensation for the losses he suffered on making a speculative, or at best, a not very prudent, investment.72

14.51. In *Fireman’s Fund Insurance Company v. United Mexican States*, the arbitral tribunal examined the situation before the investment was made as well as the commercial risk. It pointed out that at the time of the purchase, BanCreer was in a delicate financial condition (i.e., a “troubled bank”) and Mexico was in the process of recovering from a major financial crisis. The claimant therefore took a commercial risk that its investment could be adversely affected, in light of its desire to have an “admission ticket” to the “personal lines” insurance business in Mexico. In consequence the claimant could not contend that Mexico somehow had the obligation to preserve the value of its investment when there was very little value left.73

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69 See for example: *CMS Award* para 375, *BG Group Award* para 382.
70 ILC ARTICLES ON STATE RESPONSIBILITY, II/2 YEARBOOK OF THE INTERNATIONAL LAW COMMISSION (2001).
73 § 179 – 183, Award of 17 July 2006.
The Events Should be Unforeseeable

14.52. In the Duke Energy case, the tribunal noted in relation to the application of the force majeure doctrine that the testimony of one of the witnesses for the respondent had shown that the financial crisis was foreseeable.74

14.53. The tribunal pointed out in Eudoro Armando Olguín (Peru) v. Republic of Paraguay that the claimant was "an accomplished businessman, with a track record as an entrepreneur going back many years and experience acquired in the business world in various countries," and that he was not unaware of the situation in Paraguay.76

14.54. The tribunal in CMS applied the requirements of the theory of imprévisison laid out by the French Conseil d'État in the Gaz de Bordeaux case and held that the risk was "foreseeable and actually foreseen", given that the tariff included both the devaluation as well as the country risks.77 It further repeated that because the events were foreseeable and foreseen, other traditional legal excuses such as force majeure were not applicable.78

The Party Invoking the Defence Should not Have Contributed Itself to the crisis

14.55. The tribunal also stated in Eudoro Armando Olguín (Peru) v. Republic of Paraguay that "the claimant contributed significantly, within his own individual circle of action, to the occurrence of the facts that he is also conscious."79

14.56. Article 25(2)(b) of the ILC Articles also stipulates that the State invoking the defence should not have contributed to the crisis situation. Of the tribunals that have addressed the issue, the LG&E tribunal was the only one to find that Argentina had not contributed to the crisis.

IV.3 Conclusions

14.57. The defence of economic or financial crisis in investment arbitration has been accepted in two known cases, LG&E (for a limited period) and Continental Casualty, but rejected in CMS, Enron, Sempra, BG Group and Nat-ional Grid. In Saluka v. Czech Republic, the State's measures were not unlawful as such, but only became so when they were applied in a discriminatory manner.

14.58. In Waste Management Inc. v. Mexico, the arbitrators did not accept financial constraints as an excuse, but took them into account in relation to the defendant's performance of its obligations. They noted that the City of Acapulco was in a situation of genuine difficulty, and that it had sought alternative solutions to the problems both parties faced, without finding them. They concluded that "the failure to pay can be explained, albeit not excused, by the financial crisis which meant that at key points the City could hardly pay its own payroll."80 The defence was rejected in Duke Energy, Fireman's Fund and Eudoro.

V. Comparison of the Crisis Defence in Investment Disputes and in Commercial Arbitration

14.59. The difference in the nature of commercial and investment arbitration appears to lead to different results when an economic crisis is invoked as a defence. First, it can be noted that international principles are relied on in investment arbitration whereas in commercial arbitration the arbitrators invariably rely on domestic law, even though they sometimes seek guidance from transnational rules such as the UNIDROIT Principles.81 Second, even if the doctrines invoked in commercial and investment cases are different, the standards applied by the arbitrators share some of the same requirements. The requirement of unforeseeability of the event is, for example, common to both commercial and investment arbitration. Other requirements in the two regimes are similar, such as the requirement that the risk is not assumed within the contract, which is analogous to the requirement that the BIT does not enable the defence, as found in Article 25(2)(a) of the ILC Articles. Additionally, the boulevard of circumstances in a commercial context can be compared to the safeguard of an essential interest in investment arbitration. It is also common between commercial and investment arbitration that force majeure, or hardship, and necessity claims are exceptional and that parties do not invoke them unless in extreme circumstances.82 Moreover, most arbitral awards involving force majeure issues are not published.83

14.60. It can therefore be concluded that, whereas the defence of an economic crisis has been accepted in investment arbitration,84 although not without

75 Duke Energy Award, para 237.
76 Eudoro Armando Olguín Award, para 237.
77 CMS Award, para 224 – 225.
78 CMS Award, para 227.
79 Eudoro Armando Olguín Award, para 73 (Unofficial English translation).
80 Waste Management Inc v Mexico, para 115.
82 "The general trend in ICC arbitrations has been to interpret excuse doctrines strictly and to accept a plea of force majeure or of rebus sic stantibus only reluctantly," David W. Rivkin, Lex Mercatoria and Force Majeure, in TRANSATIONAL RULES IN INTERNATIONAL COMMERCIAL ARBITRATION 161 (1993); "The above-mentioned ICC cases clearly demonstrate the tendency for international arbitrators to interpret force majeure in a very restrictive way," Werner Melis, Force majeure and hardship clauses in international commercial contracts in view of the practices of the ICC Court of Arbitration, JOURNAL OF INTERNATIONAL ARBITRATION 1, 212(1984).
83 Hubert Konarski, Force majeure and hardship clauses in international contractual practice, RDAI/IBJ 4, 405 (2003).
84 In LG&E and Continental Casualty.
Economic or Financial Crises as a Defence in Commercial and Investment Arbitration

Dále autor poznává, že rozhodčí tribunály doposud nebyly jednotné ve svém přistupu k výkladu obrany stavem noze, která je problematická jak pro investora, tak pro žalovaný stát.

Nakonec autor dochází k závěru, že procesní ohrana založená na předmětných argumentech souvisejících s ekonomickými nebo finančními krizemi, má mnohem vyšší pravděpodobnost úspěchu v investičním rozhodném řízení než v klasických obchodních sporách řešených v rámci rozhodčího řízení, a to dokonce velmi pravděpodobně i v případech, kdy škoda vznikla ze stejných okolností.

Klíčová slova: rozhodčí řízení | rozhodčí nález | force majeure | těží | ICC | ICSID | investice | dohody o ochraně investic | Principy UNIDROIT | stav noze.

POL. [Kryzys Gospodarczy lub Finansowy jako Obrona w Arbitrażach Handlowych i Inwestycyjnych]

Artykuł dopatruje się podczas kryzysu gospodarczego i finansowego jako obrona przeciwko wywiązywaniu się z obowiązków w arbitrażach handlowych i inwestycyjnych. Zajmuje się różnymi kryzysami gospodarczymi i z tym związanych przypadkami a w zależności na podejścia trybunali arbitrażowych stwierdza, iż obrona oparta na kryzysie gospodarczym lub finansowym odnosi większego sukcesu w arbitrażach inwestycyjnych niż handlowych.

FRA. [Les crises économiques ou financières utilisées comme argument de défense dans les arbitrages commerciaux et en matière d'investissement]

Cet article examine l'utilisation des crises économiques et financières en tant qu'argument justificatif de la non-exécution des obligations dans les procédures d'arbitrage commercial et en matière d'investissement. Il évoque différentes affaires survenues dans un contexte de crise économique, et sur la base des décisions adoptées par les tribunaux, en conclut qu'une défense fondée sur un argument de crise économique ou financière a plus de chance d'être efficace dans le cadre d'un arbitrage en matière d'investissement que d'une procédure commerciale.

RUS. [Маттиас Шерер | Экономический и финансовый кризисы, как средства защиты в коммерческом или инвестиционном арбитраже]

В статье описывается использование экономических и финансовых кризисов как средств защиты при невыполнении обязательств, как в коммерческом так и в инвестиционном арбитраже. Статья рассматривает различные экономические кризисы и связанные с ними судебные разбирательства, основываясь на случаях рассмотренных арбитражами и делающих вывод, что защита со ссылкой на экономический или финансовый кризис может быть более чем вероятно иметь успех в инвестиционном или коммерческом арбитраже.
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Second Decade Ahead: Tracing the Global Crisis

Editors

Alexander J. Bělohlávek
Professor
at the VŠB–TU
in Ostrava
Czech Republic

Naděžda Rozehnalová
Professor
at the Masaryk University
in Brno
Czech Republic

Juris Publishing