

Transport and trade connectivity in the age of pandemics:

contactless, seamless and collaborative UN solutions

Proposals for crisis-response provisions in regional
and bilateral transport agreements of the ESCAP
member States



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Chapter 1. Background

The spread of Covid-19, a health issue, generated an unprecedented general crisis, affecting humanity's existence under all its aspects. Successful concepts developed in decades such as "globalization" or "partnerships" are now challenged and questioned because of (i) the initial reactions to this pandemic disease; and (ii) the ways of dealing with pandemics' consequences, under the economic, social, or environmental angles.

One estimated¹ economic impact of Covid-19 on the global logistics industry is a decrease of 6.1 percent in gross value added by the logistics industry. The estimated impact of Covid-19 on logistics markets varies across countries, from a 0.9 decline in China to 18.1 decline in Italy. The global freight forwarding market is expected to shrink by 7.5 percent at worst in 2020 compared with 2019.

Exchanges with immediate or more distant neighbors or partners are essential, and they are not possible without transport. Hence transportation services are vital for all the aspects of our lives: economy, social, health, leisure; this is so much more valid for land modes especially for road transport.

Following the outbreak of the pandemic, rail passenger and rail freight transport have also suffered large decreases in their transport services. The circumstances are beyond the control of railway undertakings that are facing considerable liquidity problems, also considering the scarcity of national budgets, in countries where railway transport is subsidized under one form or another.

Although in many countries trucking was soon after identified as an essential service and exempt from some of the restrictions, many drivers who transported non-essential goods, or who supplied non-essential businesses, were put on hold and lost their revenues. Drivers who kept working faced challenging working conditions: limited washrooms and food stations, and additional quarantine measures on their return home. Additional protocols (such as physical distancing at loading/unloading places, personal protection in parking/rest areas, etc.) introduced to ensure the safety of workers contributed to bottlenecks for freight. For example, in the European Union, trucks formed 37-mile-long lines on the A4 highway after Poland closed its border with Germany in mid-March. In India, the lockdown created a shortage of truck drivers, which resulted in over 50,000 containers piling up in the ports of Chennai, Kamajalar, and Kattupalli.²

Small trucking businesses have been severely hit because they tend not to have any backup, recovery plan, or intermittent operation plan. Lack of technology, as well as tools to follow health guidelines (for example, disinfecting deliveries), further complicate their response. But even top players have experienced a strong impact: in April, both DHL and CEVA Logistics declared Force

¹ Coronavirus: impact on the transportation and logistics industry worldwide - statistics & facts, available at: <https://www.statista.com/topics/6350/coronavirus-impact-on-the-transportation-and-logistics-industry-worldwide/> accessed Oct 21, 2020

² International Finance Corporation, The Impact of COVID-19 on Logistics, available at: https://www.ifc.org/wps/wcm/connect/2d6ec419-41df-46c9-8b7b-96384cd36ab3/IFC-Covid19-Logistics-final_web.pdf?MOD=AJPERES&CVID=naqOED5%C2%A0, accessed

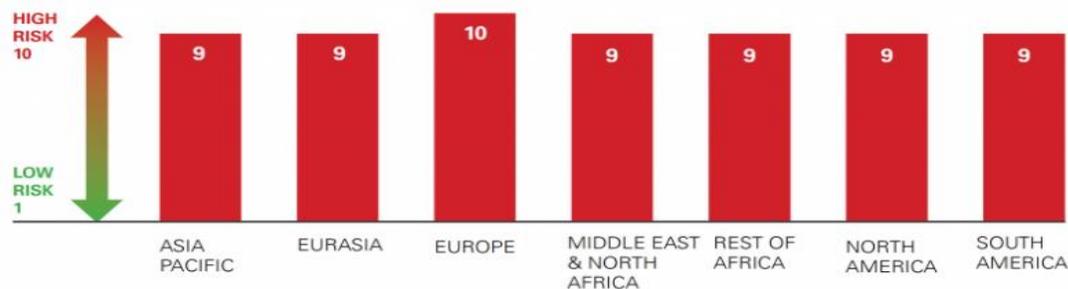
Majeure—a clause that allows contracts to be declared null and void due to acts of God or other unexpected circumstances—on all their contracts due to Covid-19.³

When the pandemic first reached Central Asia, Kazakhstan introduced green corridors for much needed medical goods and food products, lowering the risk management level from red to yellow, as well as introducing a range of tariff and tax deferrals. Its regional neighbours did likewise. In Kyrgyzstan, the government deferred a range of trade-related tariffs and tax payments. In Uzbekistan, the government opened a call centre to help traders with their queries, and used the moment to expand digitalisation in customs and trade procedures. These measures amounted to a concerted effort from regional policy-makers to keep trade flowing. However, in November 2020, trade data for many countries tell a similar story. For example, Uzbekistan and Kazakhstan saw exports fall by 22% and 13% respectively, with the consequences of Covid-19 for the latter compounded by falling global oil prices and the application of OPEC+ cuts. In Turkmenistan, where over 90% of exports are hydrocarbons, the country’s 27% fall in exports to China is likely to create far more immediate pressures than Uzbekistan’s 44% decline, because over 80% of Turkmen exports are destined for China compared to 20% of Uzbekistan’s.⁴

A recent IRU research⁵ shows that in road transport global losses have escalated to USD 679 billion for goods transport, and at least USD 500 billion for passenger transport. The update is particularly disastrous for Europe, where forecast losses for goods transport operators have soared by two-thirds since the summer to USD 125 billion, and stand at USD 94 billion for passenger transport companies.

Insolvency indicators assessed include fixed asset turnover, forecast cash flow and real revenue turning point. Ranked on a risk scale from one to ten, all regions of the world are standing at the highest levels, nine or ten. This points to a looming wave of bankruptcies in road transport, which will have a devastating effect on the global economy and its ability to recover from the pandemic.

Figure 1. Regional overview of the level of business default risk in 2020



Source: Coface, IHS. Markit, October, 2020

³ International Finance Corporation, The Impact of COVID-19 on Logistics, available at: https://www.ifc.org/wps/wcm/connect/2d6ec419-41df-46c9-8b7b-96384cd36ab3/IFC-Covid19-Logistics-final_web.pdf?MOD=AJPERES&CVID=naqOED5% C2% A0

⁴ Available at: <https://www.oecd.org/coronavirus/policy-responses/covid-19-crisis-response-in-central-asia-5305f172/>

⁵ Available at: <https://www.iru.org/resources/newsroom/government-inaction-will-lead-wave-bankruptcies-road-transport-sector>



According to WTO⁶, 80 countries and customs territories have introduced mostly temporary export prohibitions or restrictions as a result of the Covid-19 pandemic as early as on 23 April 2020. Most of these focused on medical supplies (e.g. facemasks and shields), pharmaceuticals and medical equipment (e.g. ventilators), but also additional products, such as foodstuffs and toilet paper.

The unknown triggers unexpected reactions and this was also the case in cross-border transport. In many countries, an immediate unexpected transport development has taken place in reaction to the outbreak of Covid-19: the access of foreign means of transport and their personnel was prohibited. Morals/ethics and human principles aside, one important observation is that, in some cases, based on the treaties binding the two States (registration and host), such suspensions of international transports through lockdowns and border closures were not illegal.

Where an explanation was given, this was that transport is a vector of transmission of the virus thus social/physical distancing would protect host countries from infection; yet, in many cases transport was banned just because there was an "occasion to test", or as an automatic measure before assessing its potential effects.

In general, after the first shockwave, solutions have been found through intense diplomatic effort or following need for and shortage of staple products like food, medicine supplies, raw material, or finished products.

All these solutions were subjective, involving emotions and reactive actions and negotiations; the situation created in transports by Covid-19 would have been much easier to deal with if there were objective frameworks to refer to and to apply.

The present study aims at providing suggestions for a proactive approach so that cases of force majeure are treated in a significantly more sensible manner in the future.

⁶ Available at: https://www.wto.org/english/news_e/news20_e/rese_23apr20_e.htm

Chapter 2. Legal framework for international transport

The fundamental role of treaties in the history of international relations is recognized by the Vienna Convention on the Law of Treaties (done on 23 May 1969, entered into force on 27 January 1980), which has 116 Contracting Parties, 28 of which are regional members of ESCAP. The Convention sets a number of principles that should govern international negotiations of treaties, in the spirit of maintaining international peace and security, developing friendly relations, and achieving cooperation among nations.

Among others, the Convention establishes the pillar-principles that

- A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law, which is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character (“*jus cogens*”).
- Every treaty in force is binding upon the parties to it and must be performed by them in good faith (“*pacta sunt servanda*”).
- A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46 (on the provisions of internal law regarding competence to conclude treaties).

The modern legal framework is a complex mix of (i) international multilateral treaties, usually elaborated under the auspices of global organizations (United Nations, World Customs Organization, World Trade Organization, etc.); (ii) regional and sub-regional treaties, negotiated and concluded under the auspices of regional (UNESCAP, UNECA, etc.) or sub-regional (ASEAN, EU, SCO, etc.) organizations; and, (iii) bilateral treaties/agreements, which are the formal expression of (existing or wished for) ties between trade or other nature partners, whether they are geographically neighbors or not.

1. Legal framework for international road transport

The negotiation and conclusion of agreements is the exclusive competence of sovereign nations willing to be bound by their provisions. In (sub)regions where legal or economic integration has yet to be achieved, bilateral agreements remain the most impactful instruments in a wide array of sectors, with transport as a top example. This is why having clear and comprehensive bi- or multi-lateral transport agreements is of utmost importance for the unhindered international movement of goods, services, and people.

Although the first truck was built by Daimler only in 1896, road transport has been holding for the last century the most important part of all modes of transport notably for the distribution of goods. This is mainly due to being geographically the farthest reaching, and commercially the most flexible mode, adapting to the location and requirements of the clients. Also, trucking as a small family business has always and everywhere been one of the basic factors in the development of the private sector.

Aware of the advantages brought to economies by unhindered transport across borders and in response to the realities of road transport, countries have concluded transport agreements between them; the majority of international transport treaties cover bilateral road transport between countries.

In general, the overarching goal of the international road transport agreements is to set the conditions under which goods and persons can be transported by one party to or through the territory of another party, and from/to the territory of a third party. The main result of such agreements are traffic and transit rights granted to parties' vehicles and crews; in most of the cases, traffic and transit are not free and illimited but subject to permits issued by the parties to each other, subject to various criteria.

2. ESCAP's work on international agreements

For decades, ESCAP has been seeking ways to assist their member economies in their development and regional integration efforts; among others, the organization has advocated for transport facilitation in Asia and the Pacific and provided their members with applicable solutions to achieve a smoother movement of goods and people across borders. Since 2007, these solutions included model bi- and multi-lateral agreements designed to cover most of the characteristics/issues that could arise in international land transport.

The 2007 study "Towards a Harmonized Legal Regime on Transport Facilitation in the ESCAP Region"⁷ analysed the legal regimes in force in the region and recognized that bilateral agreements have vital importance for all ESCAP economies, and much more so for the landlocked member countries of ESCAP. It revealed that countries in the ESCAP region have signed a large number of road transport bilateral agreements, with the main objective to facilitate the commercial exchanges between them; some countries had signed about thirty such agreements since 1990ies.

The study concluded that observing and complying with too many agreements with different content represents a challenge for all the stakeholders and may cause difficulties notably for transport operators and their personnel. Also, proper management and implementation of such numerous agreements require tremendous time and capacity and institutional building for both public and private sectors.

Another finding of the study was that few existing bilateral agreements were clearly structured, while others did not follow a logical sequence of issues or covered issues of a different nature in the same article.

In order to assist countries in the ESCAP region in improving and harmonizing bilateral agreements, the study proposed a list of essential elements that should be considered for inclusion in a bilateral agreement on transport facilitation. The list of the elements could not be exhaustive as each negotiation has its specificities depending on the interests of the parties concerned. Also, the study proposed a standardized framework agreement on international bilateral road transport.

In 2011, the "Monograph Series on Facilitation of International Road Transport in Asia and the Pacific"⁸ confirmed the findings of the 2007 study concerning the bilateral road transport

⁷ Available at: https://www.unescap.org/sites/default/files/pub_2489_fulltext.pdf

⁸ Available at: <https://www.unescap.org/sites/default/files/pub-2607-fulltext.pdf>

agreements, took stock of developments and went into further details analyzing the factors on which the smooth flow and efficiency of international road transport depends: infrastructure, transport operations, means of transport, crew/driver, goods/cargo, passenger, and traffic rules.

The “Monograph” suggested improving the formulation and management of bilateral agreements by making and maintaining a comparative account of the agreements, which would lead to the development of a standardized structure or template with model clauses for bilateral agreements on international road transport. That could help to reduce differences between bilateral agreements and to better align them with international conventions and subregional agreements, implicitly contributing to the achievement of the goal to facilitate transport across borders. The “Monograph” also proposed a Regional Strategic Framework for Facilitation of International Road Transport⁹, meant to help by providing general direction to regional member countries and their development partners when formulating facilitation policy, agreements, programmes, and projects as well as related measures. Among others, in view of the difficulties that were faced by many countries in the region in the management and implementation of numerous bilateral agreements on international road transport, the “Monograph” suggested the development of a model guideline with a recommended standard structure for bilateral agreements on international road transport.

Encouraged by the interest of members, ESCAP collected land or multimodal transport agreements concluded by or relevant to their member countries and published them as a Database of Agreements Related to International Road Transport, which was made publicly available¹⁰.

The conclusions of the two studies from 2007 and 2011, together with the interest raised by the database among the member countries, led to the elaboration of three models, adopted at the Ministerial Conference on Transport, held on 5-9 December 2016, in Moscow: a Model Bilateral Agreement on International Road Transport, a Model Subregional Agreement on Transport Facilitation, and a Model Multilateral Permit for International Road Transport.

The Model Bilateral Agreement on International Road Transport¹¹ has been elaborated on the foundation of previous studies and based on the finding that countries in the ESCAP region use quite different approaches to arranging international road transport operations, especially in respect of traffic rights. These countries were not prepared at the same time and to the same extent for granting the right of performing international road transport operations throughout the territory of a given country without any permits needed, hence the model was proposed in three options, with various levels of liberalization.

The model focused on supporting countries to improve transport facilitation, hence it does not include clauses on force majeure or mutual assistance.

The Model Subregional Agreement on Transport Facilitation¹² has been elaborated to serve as a common framework for subregional agreements on transport facilitation. It provides a checklist of issues that are typically contained in subregional agreements on transport facilitation. The focus

⁹ The Regional Strategic Framework for the Facilitation of International Road Transport was adopted by ESCAP member States at the Ministerial Conference on Transport held in Bangkok in March 2012

¹⁰ Available at: <https://tadb.unescap.org/>

¹¹ Available at:

<https://www.unescap.org/sites/default/files/Model%20Bilateral%20Agreement%20on%20Transport.pdf>

¹² Available at:

<https://www.unescap.org/sites/default/files/Model%20Subregional%20Agreement%20on%20Transport%20Facilitation.pdf>

of the model has been on international road transport; hence the checklist of issues to be covered is related to a larger extent to road transport than to other modes. The Model proposes a structure and a brief description of the main structural elements and specific substantive issues that would be covered by a subregional agreement with a focus on international road transport. In terms of establishing conditions for granting traffic rights and permit system, the Model recommends potential Contracting Parties to consider the existing bilateral agreements on international road transport concluded among them to avoid legal conflicts between the provisions of bilateral agreements and the negotiated subregional agreement, and find the way to make both types of legal instruments compatible.

This Model too focused on supporting countries to improve transport facilitation, hence it does not include clauses on force majeure or mutual assistance.

The Model Multilateral Permit for International Road Transport¹³ was recommended at a moment when insufficient transport facilitation measures were still one of the most serious issues. Existing regional, sub-regional, bilateral and multilateral agreements that include transport facilitation provisions were not implemented at the desired level. The level of harmonization of technical standards for vehicles or qualification standards for drivers was still low, and transport permits (if any) were issued for one single trip along one designated route by one specified individual vehicle.

Notwithstanding the quality and applicability of the proposed solutions, the degree of facilitation in international road transport remained sub-optimal for a long time because of various and very complex reasons of historic, cultural, or economic natures. However, in time, the private sector, notably the road transport industry from most of the countries which were already bound by bilateral agreements have identified practical ways to make operations smoother (e.g. swap of trailers at border). However, the effects of Covid-19 pandemic came on top of the “traditional” obstacles to transport facilitation, and countries were not prepared to deal with such a crisis.

It was difficult to anticipate the dimension and the implications of crises such as pandemics or major disasters on international transport at the time of drafting the solutions proposed to facilitate transport, and this is why practices in case of force majeure were not suggested for inclusion in any of the model agreements. Mutual assistance was also deliberately omitted from the model clauses suggested, because somehow this was taken for granted. The Covid-19 pandemic revealed the importance of addressing the issue of extraordinary situations and disruptions through the clauses covering Force Majeure or other means.

¹³Available at:

<https://www.unescap.org/sites/default/files/Model%20Multilateral%20Permit%20for%20International%20Road%20Transport.pdf>

Chapter 3. Force Majeure

1. The overall concept

Language-wise, Force Majeure is defined by West's Encyclopedia of American Law, edition 2, as "an event that is a result of the elements of nature, as opposed to one caused by human behavior". According to the Collins Dictionary of Law (W.J. Stewart, 2006) force majeure is "an event that no human foresight could anticipate or which, if anticipated, is too strong to be controlled. Depending on the legal system, such an event may relieve a party of an obligation to perform a contract.

Scholars and other experts have long debated and came to more detailed definitions of force majeure, in which pandemics are explicitly included. For example¹⁴, force majeure may be:

- i) war, whether declared or not, or any other armed conflict, military or non-military interference by any third party state or states, act of terrorism or serious threat of terrorist attacks, or
- ii) civil riot, sabotage or piracy, strike or boycott, or
- iii) act of government, requisition, nationalisation, or any other acts of authority whether lawful or unlawful, blockade, siege or sanction, or
- iv) accident, fire, explosion, or
- v) natural disaster such as, but not limited to, storm, cyclone, hurricane, earthquake, landslide, flood, drought, or
- vi) plague, epidemic, pandemic, other viral outbreak, including any acts or orders of governments or public authorities based thereon, or
- vii) any event similar to the ones listed under i) to vi) above".

A force majeure event often triggers a state of emergency, thus special attention has been given by experts to clarifying the differences between force majeure and emergency, and there seems to be a harmonized view on the subject.

In Armenia¹⁵, under current legislation and legal practice, force majeure is described as a circumstance that:

- by its nature, is extraordinary in public relations,
- in the given circumstances was unavoidable for the legal parties, and
- led directly to non-fulfillment or improper fulfillment of obligations (cause-and-effect relationship, causality).

In the context of Covid-19 pandemics, the state of emergency has been declared in Armenia on March 16, 2020, decision that led, in particular, to restrictions on the freedom of movement of persons and the right to free economic activity. Like in many other countries, restrictions imposed

¹⁴Available at: https://www.trans-lex.org/944000/_/force-majeure/.and-commentary-to-it

¹⁵Available at: <https://www.mondaq.com/litigation-contracts-and-force-majeure/1019292/pandemicstate-of-emergency-the-impact-on-contractual-relations>



and measures applied during the state of emergency raised various legal issues, in particular, whether the impact on contractual relations should be assessed as force majeure, what criteria should be selected, and what are the possible legal consequences.

No circumstances are presumed to qualify as force majeure by the virtue of law: the contract concluded between the parties sets those events that will be qualified as such. The requirements of force majeure, which need to be met, are the unforeseeability at the time of the conclusion of the contract and the extraordinary character of the event. Nevertheless, the below listed event is not and may not be qualified as force majeure events:

- violation of responsibilities by the debtor's counterparties,
- lack of necessary products in the market, or
- lack of necessary monetary funds upon the debtor.

In this regard, it is necessary to take into account how the "force majeure" is formulated in the contract, in particular, whether a final list is provided, or the wording makes it possible to consider other circumstances that correspond to the definition used. For instance, if according to the stipulation in the contract only "an earthquake and flood are considered to be force majeure", the courts, applying the legal rules of interpretation of the contract, will not consider any other circumstances as force majeure.

According to the general rule, there is a liability for non-performance of the obligation provided that there is a fault of the party, except for persons engaged in business activities. In that case, if there is a nonfulfillment of an obligation of party to a business contract, the absence of fault is not a ground not to be held liable. However, if the entrepreneur is able to prove that the fulfillment of its obligation was impossible due to a force majeure event (extraordinary and unpredictable under those certain circumstances), the person will be released from liability.

Special attention should be paid to the fact that force majeure, according to existing regulations, does not exempt from the performance of obligations, but releases from liability arising from non-performance of obligations. For example, a lessee cannot be exempt from paying rent under a lease agreement just because its employees did not visit the place of work, because (a) the lessor continued to perform the duties of possession and use of the territory, (b) owned the territory and used the lessee, because at least the lessee's belongings continued to occupy the territory, and (c) the lack of funds from the lessee does not release him from the obligation to pay rent.

According to the legal practice developed in Armenia, the extraordinary and unforeseeable character of the event in each case should be considered and assessed in the framework of the nature of the specific obligations and conditions of its execution. Each contract and the individual obligations deriving from it must be evaluated in accordance with each circumstance of the state of emergency, for example, in the light of restrictions, conditions, and consequences of pandemic.

In Japan¹⁶, the Japanese government lifted the Covid-19 state of emergency for the entire country on May 25, 2020. However, the pandemic's impact is continuing to cause various legal issues in Japan, as well as throughout the world. The discussion is whether the Covid-19 outbreak constitutes a "force majeure" event and whether a business operator who fails to perform a contractual obligation due to the impact of Covid-19 is exempted from liability under Japanese law.

¹⁶ Available at: <https://www.lexology.com/library/detail.aspx?g=1bec16ff-437c-490e-8ac4-b610f13f964b>



Under the Civil Code of Japan, the term “force majeure is not defined, but is generally construed as “an event or circumstance caused by an external cause beyond the parties’ control that cannot be prevented even with due care to prevent it.”. Also, the Civil Code does not stipulate general rules on the exemption of liabilities on the ground of "force majeure". However, in order to claim for damages and/or to terminate a contract based on default, the default must be "attributable to the obligor”. As commonly understood, default caused by force majeure cannot be “attributable to the obligor”; therefore, a general rule is that the obligor is released from its liabilities for damages and the obligee cannot terminate the contract. In this respect, under Japanese law, “force majeure” should be considered as a sub-category of the event which is not “attributable to the obligor”. Force majeure is not provided as an independent ground for exemption from contractual liability.

Articles of Civil Code referring to the subject are discretionary provisions and the agreement of the parties take precedence over rules under those articles. Thus, if parties agree on exemption of liabilities based on force majeure event, the application and consequence of the force majeure will be determined based on the agreement. However, even in this case, the court would carefully determine whether the default was caused by force majeure in the similar manner as it does in case where there is no force majeure clause.

Although Covid-19 is not the first worldwide virus spread in recorded history, it is the first time for the business to be affected at this magnitude. Similar to other developed countries, Japanese companies have expanded their business overseas and there are many international transactions governed by Japanese law, therefore close attention should be paid to the court cases related to Covid-19 which might start to accumulate soon, as possibility that the court changes its past position in exemption of liability based on force majeure event cannot be excluded.

In English law¹⁷ (United Kingdom), which has been a source of inspiration for many legal systems around the world, a provision on force majeure is not implied, and, accordingly, will only apply in contracts where the parties have expressly stipulated it, and on the conditions specified in the force majeure clause. Thus, it all comes down to the criteria specified in the contract and their interpretation. As a rule, the absence of a reasonable opportunity to foresee the circumstances at the time of concluding the contract, a causal link between the event of force majeure, and inability to perform is the conditions for recognition of the fact of force majeure. The consequences of recognition of the fact of force majeure also depend on the terms of the contract, for example, it can be either a temporary suspension of obligations by the parties, which, after a certain timeframe, allows one or both parties to terminate the contract, or the right of a party to terminate the contract right away.

In Kazakhstan,¹⁸ the possible impact of the Covid-19 pandemic and the state of emergency on the performance of contractual obligations, have been analysed by country’s Supreme Court, which issued clarifications on the subject. According to the Supreme Court, the state of emergency is regarded as a force majeure. Subsequently, the President of Kazakhstan signed the Law on Amendments to Certain Legislative Acts, which, inter alia, amends paragraph 2 of Article 359 of the Civil Code, according to which a state of emergency shall be recognized as a force majeure, along with such occurrences as natural disasters, military actions, etc. However, in order to be

¹⁷ Available at: <https://www.sorainen.com/publications/coronavirus-as-force-majeure-how-to-do-business-with-china-in-an-emergency-situation/>

¹⁸ Available at: <https://www.dentons.com/en/insights/articles/2020/july/10/important-changes-in-the-regulation-of-force-majeure-in-kazakhstan>

exempted from liability for failure to perform an obligation, a party must, in addition to the presence of a force majeure circumstance, prove a causal link between that circumstance and the impossibility of performing its obligation. This means that, notwithstanding the changes made to the Civil Code, the state of emergency is not a ground that automatically exempts a party from liability for failure to perform the obligation. The party that invokes the state of emergency as the ground for exemption from liability bears the burden of proving that the state of emergency made it impossible to perform such an obligation.

According to an analysis at Grant Thornton Estonia¹⁹, if a party is unable to fulfill its contractual obligation, the breach may be excusable due to force majeure. However, it would be a misconception that, due to the emergency in the country, force majeure applies to every contract and no one is responsible for a breach of obligations. However, it is necessary to observe each case separately and to determine whether, in a case, the restrictions imposed in an emergency have become decisive for the performance of a particular contractual obligation. For example, it is impossible to sell goods if it takes place only on the spot in a shopping center since such shops must be closed. However, sales in other locations and platforms can continue. Crossing the state border and access to the islands is allowed for people who are involved in the transport of goods and raw materials and who do not have any symptoms of the disease. It must therefore be held that the declaration of an emergency and the accompanying restrictions have not led to a situation in which it is impossible for sellers and carriers of goods to fulfill their obligations.

It is necessary to keep in mind the general principle, according to which a violation of the obligation to pay money is in principle never excusable. If the company's activities are restricted due to an emergency and the association is unable to provide any of its services due to force majeure, non-performance of all existing contracts is not automatically excused. This means that if, for example, the existence of certain goods ordered from third parties is normally essential for the provision of the service, the financial obligation arising from the contract with the supplier must be fulfilled (provided, of course, that the goods are properly made available to the customer). This means that even if the company is in financial difficulties due to force majeure, the financially difficult situation is not a direct basis for breach of contract and the person is not released from liability.

In conclusion, the analysis of the excusability of an infringement is based on the circumstances of each case, i.e. force majeure does not apply in every situation simply because an emergency has been declared in the country. Certainly, an emergency does not release anyone from a financial obligation. Payment of the fee may be refused only if the other party has not fulfilled its contractual obligations. The debtor must do everything reasonably possible to fulfill his contractual obligations. Force majeure can only be relieved of liability for the duration of the emergency. If the debtor is released from liability due to force majeure, the creditor has the right to cancel the contract.

Kasaroglu Law Office (Turkey) expressed a view²⁰ that “an evaluation must be made on a case-by-case basis in order to determine whether the requirements for the existence of force majeure are satisfied by the declaration of force majeure, just like for any other force majeure event. In that

¹⁹ Available at: <https://www.grantthornton.ee/en/insights1/is-the-emergency-situation-a-force-majeure-which-exempts-from-fulfilling-contracts/>

²⁰ Available at: <http://www.kasaroglu.av.tr/en/31218/Is-it-Possible-to-Consider-the-Declaration-of-State-of-Emergency-as-a-Force-Majeure-Event>



respect, merely the declaration of a state of emergency cannot be regarded as a legitimate ground to plead force majeure by the breaching party”.

In Romania, authorities have declared a State of Emergency after the outbreak of Covid-19 (force majeure) and subsequently put in place measures to accompany Small and Medium Enterprises in their recovery process. According to PriceWaterhouse Coopers,²¹ the scope of the Force Majeure Notice is to facilitate the burden of proof between the professionals (traders), following that the force majeure will produce the legal effects provided by the Civil Code. On the other hand, obtaining the Certificate for Emergency Situations concerns small and medium-sized enterprises, causing legal effects in the contractual relations with their co-contractors (e.g. deferred payment of the rent, of the utility services, limiting the legal effects of the force majeure invoked by the latter and the inapplicability of penalties by the public authorities) and, in addition, if they will be granted through other future normative acts, it is possible to attract the holder’s eligibility for various tax exemptions or benefits. Both Certificates for Emergency Situations and Force Majeure Notices will constitute a strong evidence regarding the force majeure case, but without instituting an absolute presumption in this regard. In case of dispute, the courts will have the last word in assessing the occurrence of the legal effects of a force majeure situation, based on a case-by-case analysis.

In India²², the concept of force majeure has neither been defined nor specifically dealt with under the Indian statutes; however, the legislators have to some extent dealt with this concept in Section 32 of the Indian Contract Act, 1872: “Enforcement of contracts contingent on an event happening –Contingent contracts to do or not to do anything if an uncertain future event happens, cannot be enforced by law unless and until that event has happened. If the event becomes impossible, such contracts become void.”

The bottom line for any business or commerce is the contract entered into by the parties. From a contractual perspective, a force majeure clause provides temporary reprieve to a party from performing its obligations under a contract upon the occurrence of a force majeure event.

The essential ingredients of force majeure clauses are as follows:

- an unexpected/unforeseen intervening event occurred;
- the parties to the agreement assumed that such an event will not occur;
- such an event has made the performance of the obligations under the contract impossible or impracticable;
- the parties have taken all such measures to perform the obligations under the agreement or at least to mitigate the damage; and
- the affected party claiming relief under force majeure will have the burden of proof to show that the force majeure event has affected such party's performance of the contract.

In Indian Jurisprudence force majeure is often mixed up with the doctrine of frustration of contract, although these are different concepts.

A force majeure clause may include acts of Government, war, acts of God, or any other events or circumstances as may be incorporated by the parties in the contract prior to its execution. In order

²¹ Available at: <https://www.pwc.ro/en/romania-crisis-centre/legal/force-majeure/force-majeure-and-emergency-situations-in-the-context-of-covid-1.html>

²² Available at: <https://www.mondaq.com/india/litigation-contracts-and-force-majeure/930674/force-majeure-in-times-of-covid-19-challenges-and-the-road-ahead>



for a party to have the benefit of force majeure, it shall have to fulfill the conditions specified in the force majeure clause. The contract is not terminated but the performance of the contract is suspended during the time the supervening event constituting force majeure exists. After such a force majeure event ceases to exist, the party who has taken the benefit of this force majeure has to perform its part of the contract. In the event of failure of the party who has to perform its part of the contract post such force majeure event, the other party shall have the right to terminate the contract. Force majeure is a contractual remedy and the terms and conditions constituting the force majeure clause are decided by the parties prior to the execution of the contract.

The frustration of a contract is the happening of an act (after the execution of contract) outside the contract and such act makes the performance of contract impossible. The frustration of contract is a statutory remedy. Section 56 of the Indian Contract Act enshrines the doctrine of frustration of contract. The bottom line to it is "impossibility". Section 56 has to be interpreted in a practical form and not a liberal sense. The contract would come under Section 56 even if there is not an absolute impossibility, but the contract has fundamentally changed which the parties had not contemplated at the time of the agreement.

Whether the situation of Covid-19 and the subsequent lockdowns would be covered under Section 32 or Section 56 of the Indian Contract Act, 1872 shall depend on the fact whether the contract contains the force majeure clause or not. However, it is to be noted that a Memo²³ by the Govt. of India states that: "A doubt has arisen if the disruption of the supply chains due to spread of coronavirus in China or any other country will be covered in force majeure clause. In this regard, it is clarified that it should be considered as a case of natural calamity and force majeure clause may be invoked whenever considered appropriate, following due procedure."

The pertinent point is that this memo gives rise to force majeure in respect of contracts dependent on supply chains, however, the courts may not apply the same principles in all commercial contracts. Therefore, the questions which shall be considered by judiciary:

- whether there lies a force majeure clause in the contract in question or not; and
- whether this pandemic has affected the fundamental basis of the contract.

The analysis of the aforesaid memo shows that a very limited purview has been covered by this Memo. It does provide blanket protection to all commercial contracts. If the answer to point 1 above is affirmative, the force majeure clause may be invoked. If the answer to Point 1 above is negative, it will amount to the frustration of the contract under Section 56 of the Indian Contract Act, 1872.

However, such government notifications are only restrictive in nature. The bottom line as to whether a party can have the benefit of force majeure or not shall depend on the contractual provisions. The events constituting force majeure event stipulated in the contract shall be considered to determine whether the performance of the contract may be suspended or will stand frustrated.

The situation on account of the outbreak of coronavirus, the subsequent lockdowns and restriction on movement as declared by the Government, and a halt to the economic activities is something which no reasonable and average contracting party could have foreseen. Based on the current

²³ Memo No. F. 18/4/2020 PPD dated 19-02-2020, available at: <https://doe.gov.in/sites/default/files/Force%20Majeure%20Clause%20-FMC.pdf>

jurisprudence as it stands, the exceptional circumstances may only result in litigation in a chain of commercial contracts. It is then a matter of interpretation by the courts whether a contract containing a force majeure clause would cover such restrictions in movement and lockdowns imposed by the Government.

2. Force Majeure clause in existing international agreements

Most of the international agreements which include a reference to force majeure focus on the commercial implications of breaking a contract: the force majeure clause protects the debtor from liability for non-performance if their non-performance is caused by an external, unforeseen, and unavoidable event. Performance under the contract must have become physically or legally impossible for the party invoking the force majeure defense. Examples relevant for Asia and the Pacific region include the ASEAN Framework Agreement on Multimodal Transport (2005)²⁴ and the Greater Mekong Subregion Cross-Border Transport Facilitation Agreement (1999)²⁵.

An interesting finding is that even international treaties with high relevance to transport and with wide geographical coverage do not include definitions of force majeure and where there is a reference to force majeure, this is focused on the commercial implications of such cases.

For example, there is no reference to force majeure in the

- Convention on the contract for the international carriage of goods by road (CMR)²⁶, with 58 Contracting Parties
- International Convention on the Harmonization of Frontier Controls of Goods (1982)²⁷, with 58 Contracting Parties
- Customs Convention on Containers (1972), with 40 Contracting Parties

The Customs Convention on the International Transport of Goods under Cover of TIR Carnets (TIR Convention, 1975)²⁸ with 76 Contracting Parties includes only one reference in Article 41, stating that “when it is established to the satisfaction of the Customs authorities that goods specified on the manifest of a TIR Carnet have been destroyed or have been irrecoverably lost by accident or force majeure or that they are short by reason of their nature, payment of the duties and taxes normally due shall be waived.” There is no definition of force majeure in the Convention.

One of the best known international treaties relevant for transport facilitation, the International Convention on the simplification and harmonization of Customs procedures (revised Kyoto Convention), with 124 Contracting Parties, refers to force majeure in the same sense as the TIR Convention, e.g. “where a Customs offence occurs as a result of force majeure or other circumstances beyond the control of the person concerned and there is no question of negligence or fraudulent intent on his part, no penalty shall be applied provided that the facts are duly established to the satisfaction of the Customs”. There is no definition of force majeure in the Convention.

²⁴ Available at:

https://tadb.unescap.org/KHM/mulat_BRN_IDN_KHM_LAO_MMR_MYS_PHL_SGP_THA_VNM_2005_eng.pdf

²⁵ Available at: https://tadb.unescap.org/KHM/mulat_CHN_KHM_LAO_MMR_THA_VNM_1999_eng.pdf

²⁶ Available at: https://www.unece.org/fileadmin/DAM/trans/conventn/cm_r_e.pdf

²⁷ Available at: <https://www.unece.org/fileadmin/DAM/trans/conventn/ECE-TRANS-55r2e.pdf>

²⁸ Available at: <https://www.unece.org/fileadmin/DAM/tir/handbook/TIRConventionENFRRU.pdf>

The situation is significantly different in the private sector, where entities are very specific in protecting their business. One pertinent example could be the Standard Trading Terms and Conditions of DHL Global Forwarding (Hong Kong) Ltd (2018)²⁹, which define force majeure in a very detailed manner, as “any circumstances that are (i) beyond the reasonable control of the party claiming Force Majeure, (ii) reasonably unforeseeable and (iii) of such a nature as to prevent or prohibit that party’s performance (including, without limitation, any of the following: fire, flood, epidemic, earthquake, storm, tidal wave or other acts of nature; riot, war, hostility,, public disturbance or acts of public enemies, strike or lock-out or other forms of industrial action or work stoppage or individual actions; prohibitions by or acts of governments or public agencies; and failure or interruption of public or private transportation or other utilities).

Almost 200 treaties (bi- and multi-lateral agreements) were analyzed for the purpose of the present study, but very few of them include a force majeure clause (Table 1 below). In general, the description of the nature of force majeure or emergencies remains rather general, including issues affecting public health, public order, and national security. In a negative approach, this lack of precision may give room to parties to decide to suspend the implementation of the agreement for any subjective (minor) reason that could be interpreted as affecting the crucial sectors of health, order, and security.

Table 1. Agreements that include a reference to force majeure

<p>Transit Trade Agreement between the Governments of the Islamic Republic of Afghanistan and the Islamic Republic of Pakistan (APTTA, 2010)</p> <p><i>Article 55 (Suspension of the agreement)</i></p> <p>[...]</p> <p><i>2. Either Contracting Party may temporarily suspend the application of the Agreement, only in case of force majeure or emergencies affecting public health, public order and national security.</i></p> <p>[...]</p>
<p>Agreement between the Government of the Republic of Tajikistan and the Government of the Islamic Republic of Afghanistan on Transport and Transit of Cargo and Passengers, 2005</p> <p><i>Article 9</i></p> <p><i>Each contracting party, in the force majeure situations, can temporally postpone implementation of provisions of this agreement and shall implement it again without delay when the force majeure becomes normal. [...]</i></p>
<p>Motor Vehicles Agreement for the Regulation of Passenger, Personal and Cargo Vehicular Traffic between Bangladesh, Bhutan, India, and Nepal, 2015</p> <p><i>Article IX (Force Majeure)</i></p> <p><i>In case of over-stay in any Contracting Party due to vehicle breakdown, accident, repair work or other unforeseen circumstances including natural calamities or disasters, a member of the</i></p>

²⁹Available at: <https://www.dhl.com/content/dam/dhl/local/hk/dhl-global-forwarding/documents/pdf/local-hk-dgf-standard-trading-conditions-nov18.PDF>

driver crew will notify to the competent authority of that Contracting Party for the required period.

ASEAN Framework Agreement on Multimodal Transport, 2005 (Cambodia, Indonesia, Lao People's Democratic Republic, Malaysia, Myanmar, Philippines, Singapore, Thailand, Viet Nam)

Article 12

Notwithstanding the provisions of Article 10, the multimodal transport operator shall not be liable for loss, damage or delay in delivery with respect to goods carried if he proves that the event which caused such loss, damage or delay occurred during that carriage is one or more of the following circumstances:

a. force majeure

[...]

Memorandum of Understanding between the Royal Government of Cambodia and the Government of the Kingdom of Thailand on the Exchange of Traffic Rights for Cross Border Transport through the Aranyaprathet-Poipet Border Crossing Points, 2008

Article 15 (Suspension of the MoU)

Each party to the MoU may temporarily suspend wholly or partly the application of the MoU with immediate effect in the case of emergencies affecting its national safety and security. [...]

Greater Mekong Subregion Cross-Border Transport Facilitation Agreement, 1999 (China, Lao People's Democratic Republic, Myanmar, Thailand, Viet Nam)

Article 1 (Definitions)

For the purpose of this Annex, the following meanings shall apply to the underlined terms:

[...]

(d) Force Majeure: circumstances resulting in injury, loss, damage, or delay that the carrier could not foresee and avoid, and the consequences of which the carrier was unable to prevent or control.

[...]

Article 15 (Exoneration of Carrier Liability)

(a) The carrier shall be relieved of liability to the extent that the accident, loss, delay, or damage was caused by:

(i) force majeure;

[...]

Article 8 (Incidents En Route)

(a) Loss, Destruction, or Shortage of the Cargo En Route

[...]

(ii) The payment of duties and taxes normally due shall be waived for the goods specified in the Transit and Inland Customs Clearance Document, which are established to the satisfaction of

the Customs Authority to have been destroyed or to have been irrecoverably lost by force majeure en route, or to be short by reason of their nature.

[...]

(d) Extension of Time Limits

If the transport operator is unable to timely complete the transport operation under the regime of this Annex in the territory of the Host Country or to discharge the Transit Customs Document, due to force majeure or other reasonable cause, he/she is to file a request for extension with the Host Country Customs Authority before the expiry date. The Host Country Customs Authorities will grant such extension if they are satisfied that the timely completion of the transport operation and/or discharge of the Transit and Inland Customs Clearance Document was/were prevented by force majeure or other reasonable cause.

Agreement between the Government of the Kyrgyz Republic and the Government of the Republic of Tajikistan on International Road Transport, 2013

Article 16.

In the event of road accidents or the termination of international road transport due to force majeure, authorized bodies of the Parties, on the territory of the state of which this case occurred, provide the necessary and timely assistance and notify the authorized bodies of the other Party about it. Road traffic accident is regulated in accordance with national legislation of the Party where the incident occurred.

The force majeure clause in three of the seven agreements allow the parties to suspend the implementation of the agreement. In the other four treaties, the clause protects the parties in case of breaching a commercial contract or in case of over-stay on each other’s territory.

Clauses on mutual assistance are not a common feature of the agreements analyzed. In cases where they exist, the content covers either the administrative assistance aiming to prevent Customs fraud (e.g. Section 4 of the Transit Trade Agreement between the Governments of the Islamic Republic of Afghanistan and the Islamic Republic of Pakistan (APTTA, 2010)) or the assistance in case of traffic events like accidents or breakdowns (e.g. ECO transit transport framework agreement, ASEAN framework agreement on the facilitation of inter-state transport, Agreement between the Government of the Kyrgyz Republic and the Government of the Republic of Tajikistan on International Road Transport)

3. Force Majeure clause in future agreements

Pandemics are, undeniably, force majeure cases, but they are unfortunately not the only threats to the continuity, predictability, and reliability of transport operations. Other major events disrupting "normality" in transport may occur in the future; for example, emergencies generated by climate change: increased frequency of extreme events (hurricane, tornadoes, etc.), wildfires, flooding, extreme drought.

Little attention is given to the domino effect of suspending a transport agreement because of force majeure in our present world, where economies and nations are highly dependent on each other: shortage in medicine/drugs, sterilizers and protection materials, equipment, staple foods, raw



materials, finished products, impossibility to get specialized medical assistance abroad, etc. Each of these could become or generate threats to public health or order or security, which means additional force majeure cases. None of the approx. 200 agreements analysed includes accompanying measures to keep the agreement working, in force majeure cases.

These are good reasons to envisage including a more detailed force majeure clause in the existing or to-be-negotiated agreements on land transport. Such a clause should be generic, covering all the potential force majeure cases, and dealing with each element of the sequential stages that compose international road transport, in a holistic approach.

The main elements to be tackled when formulating a detailed force majeure clause could be the:

- definition of the scope
- human element
- transport mean (vehicle, wagon, etc.)
- infrastructure
- procedures/processes
- documents
- cooperation and mutual assistance

A. Definition of the scope

Detailed practices for a force majeure clause could cover only the unexpected cases, those which occur without intention/willingness of any of the parties. More specifically:

- accident, fire, explosion, or
- natural disaster such as, but not limited to, storm, cyclone, hurricane, earthquake, landslide, flood, drought, or
- plague, epidemic, pandemic, other viral outbreak.

Procedures for humanitarian transport and logistics could be excluded from the object of specific transport agreements, because those are multidisciplinary, multi-sectoral arrangements, too complex to be framed as “transport only” issues.

The force majeure clause could also include cases of:

- war, whether declared or not, or any other armed conflict, military or non-military interference by any third party state or states, act of terrorism or serious threat of terrorist attacks, or
- civil riot, sabotage or piracy, strike or boycott, or
- act of government, requisition, nationalisation, or any other acts of authority whether lawful or unlawful, blockade, siege, or sanction.

However, detailed practices for such cases should therefore not be included in a transport agreement as such a sectoral agreement may not realistically cover their specifics.

B. The human element

For most transport personnel flexible working arrangements are not possible: drivers, warehouse operators, mechanics, train crew cannot work online, neither can they telecommute. The same applies to control/enforcement officers from traffic or border police, Customs, infrastructure



administration (roads, rail tracks, ports, etc.). All these professionals are essential for the movement of goods and people both nationally and across borders, hence their health should be protected.

The force majeure clause could contain a commitment by the parties to specific protection measures, including but not limited to:

- providing their respective transport workers with instructions and adequate personal protection equipment
- providing, on their respective territories, safe and secure parking and rest spaces, with decent sanitary facilities
- training their personnel on behavior and elementary rules to follow for cases of force majeure

Although such a clause would not be negotiated specifically for the case of pandemics, some parties may wish to go into further detail about protecting their transport personnel, in which case other measures could be added to this section, such as:

- minimising unnecessary contact at all points by using electronic advanced information or pre-booking e.g. for passport control, loading and unloading, etc.
- where possible having the same small groups of workers load or unload vehicles
- enabling each other's drivers to access health and social facilities when required, consistent with other instructions
- instructing drivers to stay in their vehicles where this does not compromise their safety and safe working practice
- transport workers should not be subject to mandatory quarantine or similar travel restrictions, without prejudice for competent authorities to apply measures aiming to minimise the risk of contagion (for example requiring those workers to pass through disinfecting tunnels if needed)
- defining a minimum necessary health check at borders such as measuring transport worker's body temperature and asking max. three questions related to their health during a certain number of days prior to the trip. These checks should not imply transport workers leaving their workplace, vehicle, etc.
- reminding transport workers the basic rules to follow while they are on the territory in which the force majeure occurred. Possibly preparing short leaflets and hand them to the drivers at the entry point
- procedures for repatriation of transport personnel

C. Means of transport (vehicle, wagon, etc.)

The condition of vehicles used for the transport of goods and passengers is important at all times, but so much more in cases of force majeure. For example, roadworthiness may play a crucial role in saving goods and lives in the event of a natural disaster; also, cleanliness of a vehicle may limit the spread of germs, viruses, etc. The parties negotiating a force majeure clause in their transport agreement could include therein measures like:

- agree on a set of minimum technical and safety features to be inspected at origin, and commit to recognize these inspections at border crossing and destination



- setting norms of compliance with environmental legislation in force in their respective territories
- agree on possible derogations for force majeure situations
- jointly design and implement cleaning and disinfecting protocols at origin, border crossing points, and destination (establishing disinfecting stations, etc.)
- defining procedures for safe temporary storage of transport means and goods transported, in case of drivers become unable to drive (because of disease or natural disaster)

D. Infrastructure

A major concern in any force majeure/crisis case is to ensure the distribution of essential commodities. There are few (if at all) entirely self-sustained economies left in today's globalized world; hence, in any force majeure case, ways to keep borders open for freight have to be identified. A detailed force majeure clause in the transport agreement could include:

- designating specific routes (“green lanes”) to be used in case of force majeure. When choosing those routes, parties should consider elements like the actual connectivity of the route, the time reasonably necessary to transit the territory, condition of infrastructure, existence of rest areas, food supply and facilities, possibilities of control en route
- directing international transport through dedicated entry/exit border points where parties might have mobilized capacity for carrying out border and health checks, in terms of facilities, equipments, and human resources. For railway transport of goods, these could also be the points where locomotive and crews are switched
- designating specific loading/unloading places in connection with the “green lanes”

Ideally, the designating routes, entry/exit points, loading/unloading places, and facilities should be part of the major networks agreed as priorities for development by all ESCAP members: Asian Highway, Trans-Asian Railway, Dry Ports, and major multimodal transport corridors.

E. Procedures

Clear and simple procedures are the backbone of any efficient process; therefore, the parties negotiating a force majeure clause in their transport agreement should include reference to elements like:

- acts or orders of governments or public authorities based on force majeure cases should be notified immediately to the other party
- while keeping control of the operations, procedures should be simplified. Parties could discuss and agree on possible deviation/derogation from the “normal” regulations. For example, parties may envisage limiting the roadside checks en route or “softening” restrictions on operation of heavy goods vehicles: traffic during night, weekends and public holidays, driving/rest times, pollution norms
- agree on measures to be taken on their respective territories, for example using a convoy system on the designated routes
- parties may agree on jointly developing/encouraging the development of e-platforms where freight and transport would meet
- defining a list of transports that should be given priority in case of force majeure: medical supplies, fresh food, transport of people for medical assistance, etc

F. Documents

Pandemics or natural disasters generate disfunctions not only in international transport but also in national systems managing identity documents or attestation/certification of professional competence. Under crisis circumstances, renewals or extension of validity may become impossible: the issuing authority suffers from shortage of human resources or has taken measures to limit contact with the public, etc. Parties negotiating a force majeure clause should consider referring to

- jointly developing e-documents (such as e-consignment notes) and simplified templates for documents required for control purposes
- drivers should be allowed to fill in the required documents at control points without leaving the cabin
- recognizing and accepting documents with validity expired during the crisis, such as ID cards, driving licenses, certificates of professional competence. This should be done only for a short, limited period of time and upon confirmation of exceptional extension of validity by the issuing party

G. Cooperation and mutual assistance

All the treaties include an explicit or implicit article in which the parties commit to cooperate and lend each other assistance in matters pertaining to the treaty. However, cooperation between the parties is even more important in dire circumstances, such as natural disasters or pandemics, or other force majeure cases. Parties negotiating a force majeure clause should be precise in describing the manner of assisting each other:

- agree on the obligation to timely inform each other of acts or orders of governments or public authorities based on force majeure cases
- include lines of reporting, possibly by thematic area or subject
- include, to the extent possible, contact persons with name, position, and contact details
- set rules for communication: direct contact between ministries, diplomatic channels, etc
- assistance for repatriation of transport personnel, transport means, and goods and persons transported, in case of force majeure

Chapter 4. ESCAP’s database on agreements

ESCAP collected land or multimodal transport agreements concluded by or relevant to their member countries and publishing them in a database publicly available (<https://tadb.unescap.org/>).

ESCAP database was highly useful and the main source of information for the present study report. However, judging on the number of visitors, the database does not enjoy yet the appreciation and recognition it would deserve. This may be because:

- the page is difficult to find for a reader who does not know this database exists
- availability of some treaties in one language only, which may prevent access of a large category of readers including researchers
- old formats of the documents, that are not the most user-friendly
- a certain focus on road transport

A few actions could be considered, in order to make the database become a reference product of ESCAP and a public good, to a larger extent than it currently is:

- consultation with selected stakeholders
- structuring the database around main thematic areas covered by the existing agreements
- re-vamping the database but keeping the country-centered approach

An early step could be to launch a consultation process with selected governments and private sector entities, as well as with experts who are part of ESCAP’s networks. Such consultation should not be excessively bureaucratic and formal, in order to avoid being perceived as a burden and the “questionnaire saturation”. It should focus on identifying the needs of the public when consulting the database.

Recently, ESCAP has worked on establishing a sub-regional “Database of Agreements on International Road Transport and International Railway Transport in China-Central Asia-West Asia Economic Corridor”, which is a very good starting point for considering a re-vamping of the existing regional database. This study identified the most common barriers in the subject sub-region (Table 2), but these can also be easily found almost everywhere in Asia and the Pacific.

Table 2. Common non-physical barriers to international road transport in the CCWA Economic Corridor

Inconsistent and complicated border-crossing formalities and procedures
Large numbers of documents
Repeated inspections by different authorities
Less than transparent rules and regulations
High and numerous charges for entry or transit
Non-conformity with conventions to which the countries are parties
Less implementation of subregional agreements

Slow progress in the introduction of new technologies, including ICT
Restrictions on foreign carriers for the use of domestic routes and operations including short validity of transport permits
Different technical standards including vehicle weights and dimensions
Lack of simplified insurance arrangements for vehicles
Shortage of skilled professional staff involved in international road transport operations
Different traffic regulations including variation in signals
Restrictive visa requirements for driver and crew
Incompatible working hours at borders
Different locations of various control stations
Escort or large cash (bond) deposit for transit of goods
Restrictive requirements for temporary importation of transport vehicles

The study also summarizes the main thematic areas of cooperation tackled in bilateral agreements between the countries of the CCWA Economic Corridor (Table 3), implicitly suggesting that if those areas were dealt with properly, the barriers would be less in number. The study suggests grouping the regional agreements by thematic area. Such a presentation of the regional database would definitely have value for the reader in quest of specific provisions related to e.g. weights and dimensions of vehicles, or insurance, etc. Such reader could be a transport operator or an authority needing immediate information on one of these aspects governed by the agreement between their country and another one. However, organizing the regional database along main thematic areas may prove to be a labour intensive, time-consuming task for ESCAP secretariat.

Table 3. Main thematic areas of cooperation in bilateral agreements within the CCWA Economic Corridor

Transport permits for goods
Transport permits for passengers
Transport of dangerous goods
Conditions for transport
Representative office(s) or branch(es) of carrier
Driver's license
Weights and dimensions of vehicles
Prohibition of internal transportation (cabotage)
Taxes and charges

Customs formalities
Transport control and monitoring of compliance
Application of national legislation
Infringements
Intergovernmental mechanisms for road transport facilitation
Relationship with other treaties and agreements
Tariffs
Safety and security
Insurance
Sanctions
Simplification and Harmonization of Customs Procedures
Environment

The current structure of the database, centered on the country, is easy to use, once the reader accessed it.

It may be useful to include the legal instruments recommended by ESCAP Resolution 48/11 in the list of agreements to which a country is a party. Among others, this would make easier for the countries to make the assessment of compliance between the obligations they assumed in multilateral compared to other treaties respectively.

In the same logic, countries would benefit if they found the model agreements in the database: if they want to make a candid analysis of the correspondence between their treaties in force and the model, or if they plan to draft, negotiate and conclude new agreements.

Another simple way of organizing the database could be inspired by the similar effort to collect bilateral road freight transport agreements that have been made by the World Trade Organization, which has collected over 600 treaties; the text of these agreements is contained in the LIBRA (List of Bilateral Road Agreements) database³⁰, which is freely accessible to the general public (Figure 2).

³⁰ Available at: https://www.wto.org/english/tratop_e/serv_e/transport_e/transport_land_e.htm

Figure 2. Database on road transport agreements

Database on Road Transport Agreements												
Party A	Party B	Region A	Region B	Date of Signature	Date of entry into force	Traffic Eurostat 2005 load-unload (million tonnes per year)	Share Tot #TrafEuro	Traffic transtools 2005 Load-unload	Share Tot Traf Transtool	Weblink	PDF	Extra
Afghanistan	France	EECA	OECD	17-04-78							pdf	
Albania	Belarus	EECA	EECA									
Albania	Denmark	EECA	OECD								pdf	
Albania	Finland	EECA	OECD	26-05-83	31-01-85							
Albania	France	EECA	OECD	16-01-71	01-04-71	N.D	N.D	N.D	N.D	http://www.doc.diplomatie.gouv.fr/		
Albania	Netherlands	EECA	OECD	14-09-94	01-05-95						pdf	
Albania	Spain	EECA	OECD	10-04-03	25-06-04						pdf	
Albania	Sweden	EECA	OECD	31-03-95	04-05-05					http://treaties.un.org/doc/Publication		
Albania	Switzerland	EECA	OECD							http://untreaty.un.org/unts/144078	pdf	
Albania	UK	EECA	OECD	09-02-93	03-07-95						pdf	
Algeria	Belgium	MENA	OECD	29-03-94	01-08-99						pdf	
Algeria	Jordan	MENA	MENA	29-05-97								
Algeria	Switzerland	MENA	OECD								pdf	
Algeria	Spain	MENA	OECD		18-06-04							
Argentina	Bolivia	LAC	LAC		26-09-90						pdf	ALADI/AAP/A14TM/3
Argentina	Brazil	LAC	LAC		26-09-90						pdf	ALADI/AAP/A14TM/3
Argentina	Chile	LAC	LAC		26-09-90						pdf	ALADI/AAP/A14TM/3
Argentina	Paraguay	LAC	LAC		26-09-90						pdf	ALADI/AAP/A14TM/3
Argentina	Peru	LAC	LAC		26-09-90						pdf	ALADI/AAP/A14TM/3
Argentina	Uruguay	LAC	LAC		26-09-90						pdf	ALADI/AAP/A14TM/3
Armenia	Greece	EECA	OECD	18-06-96	09-06-97						pdf	
Armenia	Romania	EECA	EECA	25-03-96	03-02-98						pdf	
Austria	Belarus	OECD	EECA	15-10-96	15-10-96					http://www.ris.bka.gv.at/Dokumente	pdf	
Austria	Belgium	OECD				0.5						
Austria	Bosnia-Herzegovina	OECD	EECA		01-05-03					http://www.ris.bka.gv.at/Dokumente	pdf	
Austria	Bulgaria	OECD				0						
Austria	Croatia	OECD	EECA							http://www.ris.bka.gv.at/Dokumente	pdf	
Austria	Czech Republic	OECD	EECA	26-05-98	01-03-01					http://www.ris.bka.gv.at/Dokumente/BgbPdf/2002_89_3/2002_89_3.pdf	pdf	
Austria	Denmark	OECD	OECD									
Austria	Estonia	OECD	EECA							http://www.ris.bka.gv.at/Dokumente	pdf	
Austria	France	OECD				0.8						
Austria	Germany	OECD				12.2						
Austria	Greece	OECD				0.1						

Source: WTO

Although this implies a tremendous effort and resources, in order to ease the research, the treaties should be published in the same format, allowing the search by tag words.

Irrespective of the solution that would be eventually embraced for the structure of ESCAP's regional database, Governments have an important role to play in the process of adding value to the existing database, as they are the generous providers of copies of treaties concluded by them or to which they acceded. Therefore, governments should be reminded this important role and be urged to provide the secretariat with copies of their bilateral transport agreements.

Chapter 5. Conclusions and recommendations

The further development of Covid-19 and its further impact on the transport sector are difficult to predict. Although not desirable, it could be reasonably predicted that Covid-19 will unfortunately not remain the unique crisis in the decades to come. Other major events disrupting "normality" in transport may occur in the future; for example, emergency situations generated by climate change: increased frequency of extreme events (hurricane, tornadoes, etc.), wildfires, flooding, extreme drought. All these events are potentially significant threats to the continuity, predictability, and reliability of transport operations.

People hear more and more that "things will never be the same as before Covid" and this might be true to a significant extent. However, the known and proven advantages of an "open world", with various degrees of freedom of movement for people, goods, services, and capital, make it worth fighting to keep alive values earned in the process of development, such as multilateralism, cooperation, institutional mutual support, and assistance.

Transport has to be kept high on the development agenda for it is the vital link between demand and offer, be it in industry, leisure, social or other areas

These are good reasons to envisage including a more detailed force majeure clause in the existing or to-be-negotiated agreements on land transport.

There are two basic principles to be considered when drafting and negotiating such a clause:

a. The availability of goods and essential services must be ensured in any circumstances. For that, international transport flows must be reliable, effective and efficient; these cannot be achieved if procedures and processes are improvised at the very time of the crisis (pandemics, natural disaster, humanitarian emergency, etc). Decision-makers and transport practitioners should plan and prepare responses for such events before they occur, as a safe way to ensure that resources are deployed appropriately, and all the requirements for unhindered transport across borders are known, understood, and realistic-hence achievable.

b. The transport process from origin to destination is made of sequential stages, with various stakeholders involved: government authorities (public health, customs, border police, inspection/certification, etc), manufacturers, transport and logistics companies, and, of course, transport personnel: drivers, mechanics, crew etc. All these form a chain made of close links, which is as strong as its weakest element. Therefore the procedures for keeping the international transport functioning should be designed with a focus on a holistic approach that looks at all the links in the sequence and never loses sight of their interdependence.

Pandemics and natural disasters are, without any doubt, major disturbing factors of transport. In order for transport to keep fulfilling its role, parties to bilateral or multilateral treaties should prepare a minimum set of provisions to be included in a force majeure clause in their agreement. Such a clause should be detailed to the extent it remains applicable: the measures and practices included therein should be realistic and reflect the actual (but ambitious) capabilities of the parties.

It is rather difficult to believe that a large number of the existing agreements would be re-negotiated in the short- and medium-term to amend them so as to include a detailed force majeure clause.



However, the situation created by the Covid-19 outbreak, with blockage of transports at borders and all the deriving inconvenience, prove that such a clause is needed. One feasible solution is to include the detailed force majeure clause in the existing agreements as a separate annex (model attached as Annex 1).

But, whichever solution is chosen, parties must remain aware of the principle that every treaty in force is binding upon the parties to it and must be performed by them in good faith (“pacta sunt servanda”).

Annex

Model Annex on Force Majeure clause

This model aims at providing a starting point in the negotiation of a detailed Force Majeure clause in any new transport agreement or when revising an existing agreement.

In case of a new agreement, the Model can be included as an article of the agreement, with the title “Force Majeure”.

In case of revising an existing agreement, the Annex will have to be referred to in the agreement, by including an article titled “Force Majeure” indicating that “the procedures in force majeure cases are detailed in Annex XYZ to the present agreement.”

Model Annex on Force Majeure

1. Definition of the scope

Detailed practices for a force majeure clause could cover only the unexpected cases, those which occur without intention/willingness of any of the parties. More specifically:

- accident, fire, explosion, or
- natural disaster such as, but not limited to, storm, cyclone, hurricane, earthquake, landslide, flood, drought, or
- plague, epidemic, pandemic, other viral outbreak.

The force majeure clause could also include cases of:

- war, whether declared or not, or any other armed conflict, military or non-military interference by any third party state or states, act of terrorism or serious threat of terrorist attacks, or
- civil riot, sabotage or piracy, strike or boycott, or
- act of government, requisition, nationalisation, or any other acts of authority whether lawful or unlawful, blockade, siege or sanction.

However, detailed practices for such cases should therefore not be included in a transport agreement as such a sectoral agreement may not realistically cover their specifics.

Procedures for humanitarian transport and logistics could be excluded from the object of specific transport agreements, because those are multidisciplinary, multi-sectoral arrangements, too complex to be framed as “transport only” issues.

2. The human element

The force majeure clause could contain a commitment by the parties to

- provide their respective transport workers with instructions and adequate personal protection equipment



- provide, on their respective territories, safe and secure parking and rest spaces, with decent sanitary facilities
- train their personnel on behaviour and elementary rules to follow for cases of force majeure

Although such a clause would not be negotiated specifically for the case of pandemics, some parties may wish to go into further detail about protecting their transport personnel, in which case other measures could be added to this section, such as:

- minimising unnecessary contact at all points by using electronic advanced information or pre-booking e.g. for passport control, loading and unloading etc
- where possible having the same small groups of workers load or unload vehicles
- enabling each other's drivers to access health and social facilities when required, consistent with other instructions
- instructing drivers to stay in their vehicles where this does not compromise their safety and safe working practice
- transport workers should not be subject to mandatory quarantine or similar travel restrictions, without prejudice for competent authorities to apply measures aiming to minimise the risk of contagion (for example requiring those workers to pass through disinfecting tunnels if needed)
- defining a minimum necessary health check at borders such as measuring transport worker's body temperature and asking max. three questions related to their health during a certain number of days prior to the trip. These checks should not imply transport workers leaving their workplace, vehicle etc.
- reminding transport workers the basic rules to follow while they are on the territory in which the force majeure occurred. Possibly preparing short leaflets and hand them to the drivers at the entry point
- procedures for repatriation of transport personnel

3. Means of transport (vehicle, wagon etc)

The condition of vehicles used for the transport of goods and passengers is important at all times, but so much more in cases of force majeure. For example, roadworthiness may play a crucial role in saving goods and lives in the event of a natural disaster; also, cleanliness of a vehicle may limit the spread of germs, viruses, etc. The parties negotiating a force majeure clause in their transport agreement could include therein measures like:

- agree on a set of minimum technical and safety features to be inspected at origin, and commit to recognize these inspections at border crossing and destination
- setting norms of compliance with environmental legislation in force in their respective territories
- agree on possible derogations for force majeure situations
- jointly design and implement cleaning and disinfecting protocols at origin, border crossing points, and destination (establishing disinfecting stations, etc)
- defining procedures for the safe temporary storage of transport means and goods transported, in case of drivers become unable to drive (because of disease or natural disaster)



4. Infrastructure

A major concern in any force majeure/crisis case is to ensure the distribution of essential commodities. There are few (if at all) entirely self-sustained economies left in today's globalized world; hence, in any force majeure case, ways to keep borders open for freight have to be identified. A detailed force majeure clause in the transport agreement could include:

- designating specific routes (“green lanes”) to be used in case of force majeure. When choosing those routes, parties should consider elements like the actual connectivity of the route, the time reasonably necessary to transit the territory, condition of infrastructure, existence of rest areas, food supply and facilities, possibilities of control en route
- directing international transport through dedicated entry/exit border points where parties might have mobilized capacity for carrying out border and health checks, in terms of facilities, equipments, and human resources. For railway transport of goods, these could also be the points where locomotive and crews are switched
- designating specific loading/unloading places in connection with the “green lanes”

Ideally, the designating routes, entry/exit points, loading/unloading places, and facilities should be part of the major networks agreed as priorities for development by all ESCAP members: Asian Highway, Trans-Asian Railway, Dry Ports, and major multimodal transport corridors.

5. Procedures

Clear and simple procedures are the backbone of any efficient process; therefore, the parties negotiating a force majeure clause in their transport agreement should include reference to elements like:

- acts or orders of governments or public authorities based on force majeure cases should be notified immediately to the other party
- while keeping control of the operations, procedures should be simplified. Parties could discuss and agree on possible deviation/derogation from the “normal” regulations. For example, parties may envisage limiting the roadside checks en route or “softening” restrictions on operation of heavy goods vehicles: traffic during night, weekends and public holidays, driving/rest times, pollution norms
- agree on measures to be taken on their respective territories, for example using a convoy system on the designated routes
- parties may agree on jointly developing/encouraging the development of e-platforms where freight and transport would meet
- defining a list of transports which should be given priority in case of force majeure: medical supplies, fresh food, transport of people for medical assistance, etc

6. Documents

Pandemics or natural disasters generate disfunctions not only in international transport but also in national systems managing identity documents or attestation/certification of professional competence. Under crisis circumstances, renewals or extension of validity may become impossible: the issuing authority suffers from shortage of human resources or has taken measures to limit contact with the public, etc. Parties negotiating a force majeure clause should consider referring to



- jointly developing e-documents (such as e-consignment notes) and simplified templates for documents required for control purposes
- drivers should be allowed to fill-in the required documents at control points without leaving the cabin
- recognizing and accepting documents with validity expired during the crisis, such as ID cards, driving licenses, certificates of professional competence. This should be done only for a short, limited period of time and upon confirmation of exceptional extension of validity by the issuing party

7. Cooperation and mutual assistance

All the treaties include an explicit or implicit article in which the parties commit to cooperate and lend each other assistance in matters pertaining to the treaty. However, cooperation between the parties is even more important in dire circumstances, such as natural disasters or pandemics, or other force majeure cases. Parties negotiating a force majeure clause should be precise in describing the manner of assisting each other:

- agree on the obligation to timely inform each other of acts or orders of governments or public authorities based on force majeure cases
- include lines of reporting, possibly by thematic area or subject
- include, to the extent possible, contact persons with name, position, and contact details
- set rules for communication: direct contact between ministries, diplomatic channels, etc
- assistance for repatriation of transport personnel, transport means, and goods and persons transported, in case of force majeure

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