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Schweiz. Vereinigung für Schiedsgerichtsbarkeit
Associazione Svizzera per l'Arbitrato
Swiss Arbitration Association

SCAI

SWISS
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Force Majeure in Supply Chains

Procedural Tools to
Obtain Effective Relief

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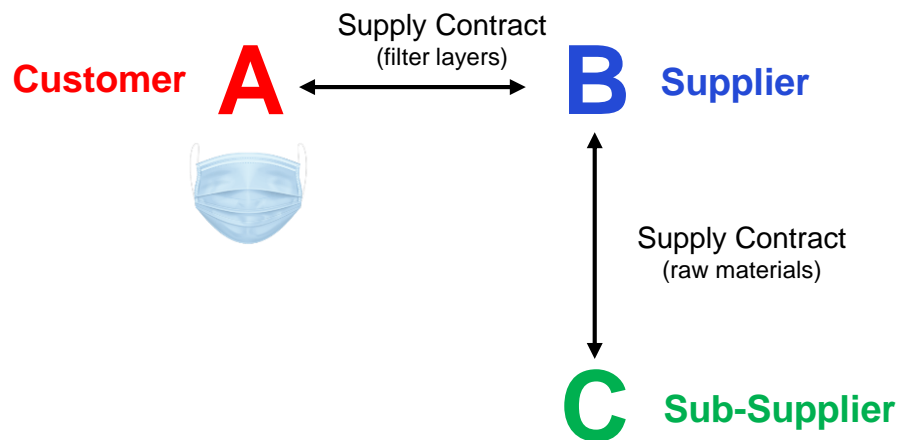
Agenda

1. Case Study: *Force Majeure* in a Supply Chain
2. Emergency Relief in a *Force Majeure* Scenario
3. Avoiding Parallel Proceedings within the Supply Chain
4. Tips for Your Dispute Resolution Clause
5. Q&A



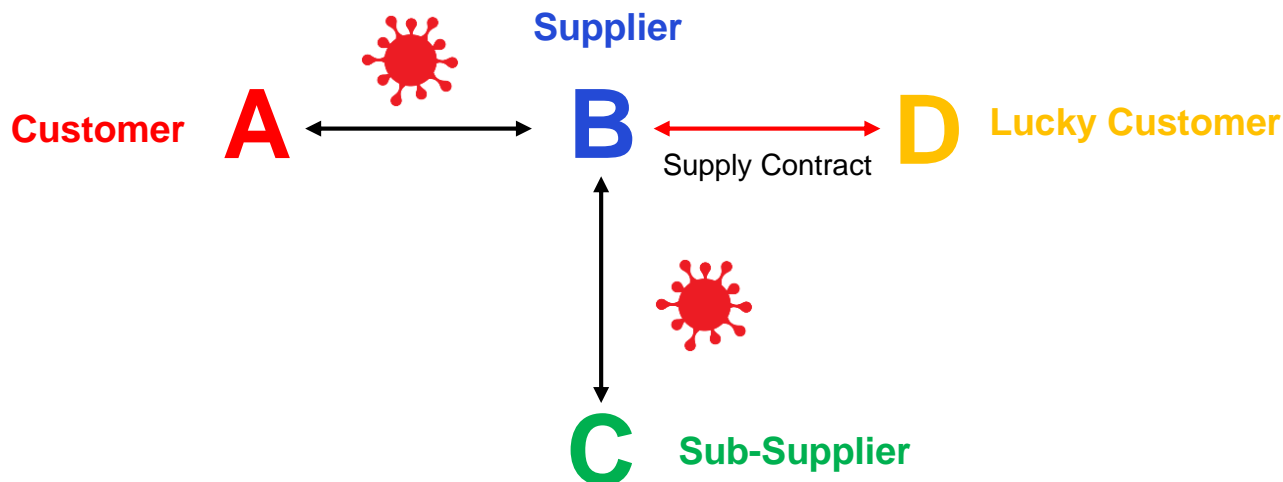
Case Study

- **Customer A** and its **supplier B** are parties to an international supply contract for filter layers for the production of medical masks.
- B is producing filter layers using raw materials from **sub-supplier C**.
- Both the supply contract between A and B and the sub-supply contract between B and C contain arbitration clauses calling for Swiss Chambers' Arbitration Institution (SCAI) arbitration in Geneva.



Case Study (cont'd)

- Last week, C declared *force majeure* to B due to the COVID-19 pandemic and stopped supplying raw materials to B.
- As a result, B is lacking the necessary raw materials to produce filter layers. It has declared force majeure to A and stopped supplying A.
- Yesterday, A learned that B still has some stocks of filter layers, but allocates them to its most profitable contract with **lucky customer D**.
- **Question:** How can A force B to allocate part of its stocks to A?



A's Options to Obtain Emergency Relief v. B

- Risk of considerable, if not irreparable harm to A's business
- Interest of A to obtain effective interim relief
- A's procedural options
 - Application to an Emergency Arbitrator, Art. 43 Swiss Rules
 - Application to competent national courts
- Timing and effectiveness
 - Decision usually rendered within 15 days
 - Orders often complied with voluntarily



Criteria to Obtain Emergency Relief

- Emergency Arbitrator must have *prima facie* jurisdiction
- Typical criteria applied by the Emergency Arbitrator
 - Risk of serious harm
 - Possibility of success of case on the merits
 - Time factor/urgency
 - Balance of interests
- Type of Measures
 - No closed categories of interim measures
 - Performance measure possible



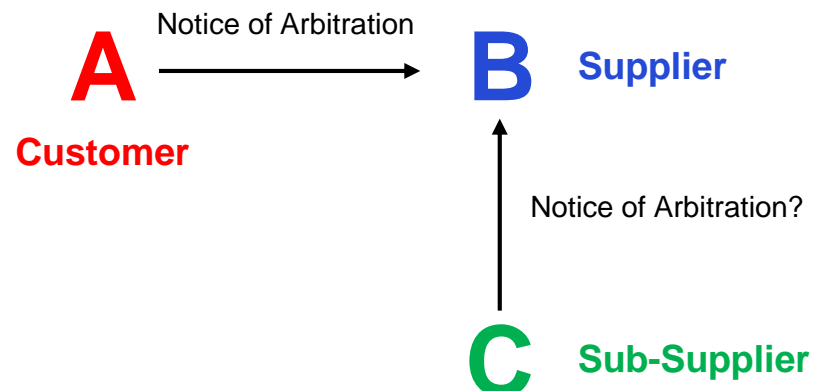
Applying the Criteria to A's Request v. B.

- Assessment of A's Request for Performance Measure
 - Allocation of reduced production output between customers in *Force Majeure* situation
 - Balance of interest test between A and B
 - Consideration of all factual circumstances
- Practical Tips
 - Collect evidence: Identify and document cause of supply problem
 - Ask how your supplier allocates remaining output of stock



Case Study (cont'd)

- Customer A files a Notice of Arbitration against Supplier B, seeking damages and an order that B continue supplies.
- A argues that C's failure to supply B does not constitute *force majeure*. B wants to hold C liable for any damages it may have to pay to A.
- After analyzing C's *force majeure* notice in more detail, B doubts its validity and withholds payments for previous supplies as "security".
- C threatens B with arbitration.
- **Question:** How can B prevent parallel arbitrations?

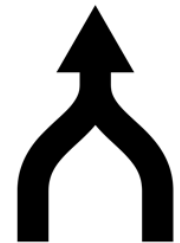


Supplier's Options of Avoiding Parallel Proceedings

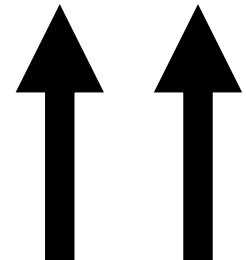
- Supplier has an interest in avoiding parallel proceedings:
 - Risk of conflicting positions and decisions
 - Risk of inconsistent timing
 - Duplicated costs



- Options of Supplier to avoid parallel arbitrations:
 - Consolidation of proceedings
 - Joinder of C into arbitration with A

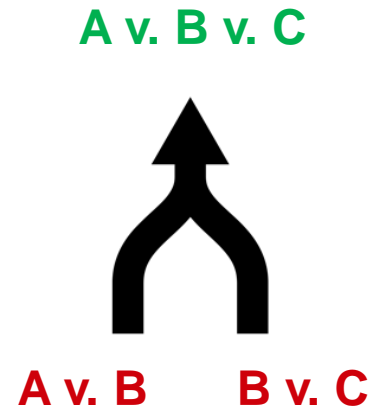


- A and C may prefer separate proceedings:
 - Choice of arbitrators
 - Confidentiality



Consolidation of Arbitrations A v. B and B. v. C

- Article 4(1) Swiss Rules is liberal:
 - Consolidation possible if different parties
 - Parties' consent not always required
- SCAI Court decides (with good sense)
- Requirements:
 - Two arbitrations pending
 - Consultation of all parties and arbitrators
 - Consideration of all circumstances



Joinder of Sup-Supplier C in Arbitration A v. B

- Article 4(2) Swiss Rules is liberal:
 - Consent not always required for joinder
 - Different types of joinder possible
- Arbitral Tribunal decides on joinder
- Requirements (many areas of unsettled law):
 - Request by Supplier B (most likely scenario)
 - Consent by C or essentially identical arbitration agreement at least between B and C?
 - Consent by Customer A?
 - Consideration of all circumstances



REQUIRED

Tips for Dispute Resolution Clauses

- Pathological arbitration clauses are unhelpful and parties are well advised to carefully draft their arbitration clauses
- If you are in the middle of the supply chain:
 - Ensure that the arbitration clauses in your upstream and downstream contracts are consistent
 - Chose arbitration rules with a liberal approach to consolidation and joinder (e.g., Swiss Rules)



Q&A



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