Roundtable: Contract Enforceability in the Age of Covid-19

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Jurisdiction one: United States

In the US, contract disputes are governed by state law – we focus here on two leading jurisdictions for business disputes, New York and Delaware. Three doctrines may provide a basis for temporarily or permanently excusing performance of contractual obligations: force majeure clauses, material adverse events/change clauses and frustration of contract. The implications of these doctrines for any particular contract or transaction will depend on the applicable law, the specific terms of the agreements and the governing facts.

Force majeure

Force majeure clauses in contracts allocate risk by excusing one party's non-performance when its reasonable expectations have been frustrated owing to circumstances beyond its control[1] and, therefore, are 'applied narrowly'.[2] Such clauses are 'not intended to buffer a party against the normal risks of a contract'.[3]

The applicability of a force majeure provision to a particular set of facts depends in large part on specific contract language, which may relax or tighten the elements of establishing a force majeure and may impose specific notice requirements. Force majeure clauses that specifically excuse non-performance due to outbreaks, epidemics, pandemics, quarantines, travel restrictions and

1 *Macalloy Corp v Metallurg, Inc*, 284 AD 2d 227, 227 (NY App Div 2001); see also *Capital City Gas Co v Phillips Petroleum Co*, 373 F 2d 128, 132 (2d Cir 1967); *United Equities Co v First Nat'l City Bank*, 52 AD 2d 154, 157 (NY App Div 1976); *Kel Kim Corp v Cent Mkts Inc*, 70 NY 2d 900, 902 (NY 1987).

2 *Kel Kim*, 70 NY 2d at 902.

3 *Urban Archaeology Ltd v 207 East 57th St LLC*, No 600827/2009, 2009 WL 8572326, at *5 (NY Sup Ct, 10 September 2009); see *Constellation Energy Servs, Inc v New Water St Corp*, 146 AD 3d 557, 558 (NY App Div 2017) (holding that Hurricane Sandy did not constitute a force majeure event excusing performance under a contract for sale of electricity).

the like provide a stronger basis to argue that the current coronavirus outbreak constitutes a force majeure event than those that do not.[4]

Typically, a party seeking to avoid performance due to a force majeure event must demonstrate that performance has (1) become objectively impossible (2) as a result of an event that could not have been foreseen, unless such event is specifically enumerated in the clause or is otherwise captured by a catch-all provision.[5] Orders imposed by a government may excuse performance if it would be impossible both to comply with the

4 See, eg, *Wyndham Hotel Grp Int'l, Inc v Silver Entm't LLC*, No 15-CV-7996 (JPO), 2018 US Dist LEXIS 52144, at *27 (SDNY, 28 March 2018) (contract enumerating 'epidemic' as a force majeure); *Aukema v Chesapeake Appalachia, LLC*, 904 F Supp 2d 199, 206 (NDNY 2012) (same); *New York v RAM Used Auto Parts, Inc*, No 400463/10, 2014 WL 1315646 (NY Sup Ct, 24 March 2014) (same). Where a contract specifically identifies a pandemic or the like as a force majeure event, characterisations and analyses by the World Health Organization (WHO), Centers for Disease Control and Prevention (CDC), National Institutes of Health and other similar agencies are likely to carry great weight. See, eg, Jamie Gumbrecht and Jacqueline Howard, 'WHO declares novel coronavirus outbreak a pandemic', CNN, www.cnn.com/2020/03/11/health/coronavirus-pandemic-world-health-organization/index.html accessed 11 March 2020. Alternatively, a party could seek to argue that the Covid-19 outbreak constitutes an 'act of God' or a 'catastrophe'. See, eg, *Stroud v Forest Gate Dev Corp, Inc*, No Civ A 20063-NC, Civ A 20464-NC, 2004 WL 1087373, at *5 (Del Ch, 5 May 2004) (clause excusing liability for delays caused by 'fire, strikes, acts of God, or any other reason whatsoever beyond the control of [the drafting parties]' refers to a 'delay-causing event' that was 'not reasonably foreseeable in the ordinary course'). For a different approach that other courts might decline to follow, see *WD on behalf of A & J v County of Rockland*, 101 NYS 3d 820, 824 (NYSup Ct 2019) (permitting a challenge to Rockland County's emergency declaration excluding unvaccinated children from places of public assembly as unauthorised under New York's Executive Law s 24 covering epidemics, because '[i]n a population of roughly 330,000 people, 166 cases is equal to .05% of the population, which does not appear, on the record before the Court, to rise to the level of an "epidemic" as included… under Executive Law § 24' or within *Merriam Webster*'s definition).

5 *Kel Kim Corp*, 70 NY 2d at 900; *Sher v Allstate Ins Co*, 947 F Supp 2d 370, 383 (SDNY 2013); *Kolodin v Valenti*, 115 AD 3d 197, 200 (NY App Div 2014); *Team Mktg USA Corp v Power Pact, LLC*, 41 AD 3d 942–43 (NY App Div 2007) (discussing 'enumerated, unforeseeable events').

order and to perform under the contract.[6] Changes in the economy do not usually excuse performance, as they are considered 'an inherent part of all sophisticated business transactions'.[7] While dramatic economic changes may be hard to predict, they 'are never completely unforeseeable'.[8] To be a force majeure, an event must have an effect beyond the contract or parties at issue: a party's duty to perform is not discharged if the event that rendered it unable to perform would not likewise have prevented others from performing.[9] The non-performing party may also have to demonstrate that it made an effort to perform notwithstanding the force majeure,[10] and its performance may only be excused for so long as those conditions persist and prevent performance.

New York and Delaware courts look to precedent when resolving contract disputes – and there is none to guide them here. To date, no US court has had to decide whether, in what circumstances and under what contractual language a pandemic or epidemic will constitute a force majeure event, and there are no written opinions to look to in adjudicating Covid-related disputes. Whether an obligor's reasonable conclusion that it cannot perform without imposing substantial health risks on employees or others satisfies the requirement of objective impossibility is an issue that courts will be confronting against a background where compelling facts would appear to excuse performance, and general precedent would tend to require it nonetheless. How those disputes are resolved remains to be seen – and to be litigated.

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6 See, eg, *Trump on the Ocean, LLC v Ash*, No 005274/2009, 2009 WL 2619233, at *4 (NY Sup Ct, 25 August 2009) (finding government entity's refusal to grant a variance, when one was required and without which would be impossible to construct a building under already approved plans by the deadline, constituted a force majeure event under a clause that included 'unforeseen restrictive governmental laws, regulations, acts or omissions'); *Duane Reade v Stoneybrook Realty, LLC*, 63 AD 3d 433, 434 (NY App Div 2009) (holding that temporary restraining order prohibiting construction of a building constituted a 'governmental prohibition' beyond a landlord's control that allowed for added time to perform under the lease); *Burnside 711, LLC v Nassau Reg'l Off-Track Betting Corp*, 67 AD 3d 718, 719–20 (NY App Div 2009) (holding that a force majeure clause, which excused performance in the event of 'governmental action or inaction', relieved the defendant from its obligation to pay rent after an amendment to a local zoning ordinance prevented the premises from being used as an off-track betting parlour, because 'the reasonable expectations of the parties [to use the premises as an off-track betting parlour] have been frustrated due to circumstances beyond the control of the parties').

7 *Route 6 Outparcels, LLC v Ruby Tuesday, Inc*, 88 AD 3d 1224, 1226 (NY App Div 2011).

8 *Ibid.*

9 *United States v Wegematic Corp*, 360 F 2d 674, 675–76 (2d Cir 1966); *407 E 61st Garage, Inc v Savoy Fifth Ave Corp*, 244 NE 2d 37, 41 (NY 1968) ('[W]here impossibility or difficulty of performance is occasioned only by financial difficulty or economic hardship, even to the extent of insolvency or bankruptcy, performance of a contract is not excused').

10 *Phillips Puerto Rico Core, Inc v Tradax Petroleum Ltd*, 782 F 2d 314, 319 (2d Cir 1985).

Material adverse effect/material adverse change

A material adverse effect (MAE) or material adverse change (MAC) clause contemplates a change in circumstances that significantly reduces the value of an enterprise, transaction or venture. MAE clauses allow buyers or investors to avoid completing a transaction if there is a significant change in the counterparty's business or underlying assets. MAE clauses are often heavily negotiated and, accordingly, their applicability may depend on the language of the specific MAE clause at issue.

In the absence of specific controlling language, courts set a high bar when asked to consider whether a circumstance constitutes an MAE. Most courts have imposed two requirements:

1. the change in circumstances must be an event that will cause a significant effect, viewed over a long duration of years (not months) – not just a 'short-term hiccup';[11] and
2. the change must pose a substantial threat to the overall financial health of a target or a venture.[12]

Since the inception of the pandemic, multiple parties have filed complaints about alleged MAEs due to Covid-19.[13] However, to date, no US court decision has tested an MAE provision against the circumstances presented, or that may be presented, by a pandemic like Covid-19.

Contract frustration

In the absence of a contractual provision directly addressing the consequences of unanticipated risks, parties may seek to avoid contractual obligations based on the common law doctrine of frustration of contract (or frustration of purpose). Such frustration can occur when both parties are

11 See, eg, *In re IBP, Inc S'holders Litig*, 789 A 2d 14, 68 (Del Ch 2001) (finding no MAE with a sharply reduced earnings estimate for target because the drop was not aberrational for what was typically a cyclical business and did not seem to presage a long-term drop in value).

12 See, eg, *Frontier Oil Corp v Holly Corp*, No Civ A 20502, 2005 WL 1039027, at *36 (Del Ch, 29 April 2005) (finding no MAE where a merger target faced the prospect of substantial litigation costs – even though the costs could be 'catastrophic' – because the buyer had not established that its target would be unable to bear the costs over the long term). Cf *Pan Am Corp v Delta Air Lines, Inc*, 175 BR 438, 481 (SDNY 1994) (applying New York law, upholding buyer's termination of contract on basis of MAE where seller Pan Am suffered 'rapid deterioration' of revenue and bookings between August and October 1991).

13 See, eg, Benjamin Horney, 'Alphatec Cites Material Adverse Effects in Ending $122M Deal', Law360, www.law360.com/articles/1267548/alphatec-cites-material-adverse-effects-in-ending-122m-deal accessed 27 April 2020; Alison Frankel, 'Sycamore Partners invoke MAE clause in bid to escape Victoria's Secret deal', Reuters, www.reuters.com/article/us-otc-mae/sycamore-partners-invokes-mae-clause-in-bid-to-escape-victorias-secret-deal-idUSKCN2243CK accessed 22 April 2020).

literally able to perform but, as a result of unforeseeable events, performance by one party would no longer give the other the benefit that induced that party to make the bargain in the first place.[14] Courts analysing frustration claims typically consider the foreseeability of the allegedly frustrating event's occurrence, the fault of the non-performing party in causing or not providing protection against the event's occurrence, the severity of the harm and other circumstances affecting the just allocation of the risk.[15] The doctrine of frustration may be governed by common law or by statute.[16]

Frustration of contract is 'very difficult to invoke, as courts have been extremely reluctant to allow parties to disavow obligations that they have [previously] agreed to',[17] and it applies only when the frustrated purpose is 'so completely the basis of the contract that, as both parties understood, without it, the transaction would have made little sense'.[18] In practice, this means that application of the doctrine is 'limited to instances where a virtually cataclysmic, wholly unforeseeable event renders the contract valueless to one party'.[19]

Market shifts or financial hardships on their own do not typically establish contract frustration.[20] A party seeking to be excused from performance should consider whether the underlying reason the contract was entered into has been categorically undermined by circumstances related to the outbreak.

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14 *United States v Gen Douglas MacArthur Senior Vill, Inc*, 508 F 2d 377, 381 (2d Cir 1974); *D & A Structural Contractors Inc v Unger*, No 001112-08, 2009 WL 3206596, at *5 (NY Sup Ct, 20 August 2009) (citing *Crown IT Servs, Inc v Olsen*, 11 AD 3d 263, 265 (NY App Div 2004)); cf *PPF Safeguard, LLC v BCR Safeguard Holding, LLC*, 85 AD 3d 506, 508–09 (NY App Div 2011) (holding that Hurricane Katrina did not frustrate purpose of an indemnity agreement, as it had no effect on the value of performance under the contract); see *Rockland Dev v Richlou Auto Body, Inc*, 173 AD 2d 690, 691 (NY App Div 1991) (finding frustration of purpose claim not sustainable in an action to recover damages for non-payment of rent because the defendant 'merely allege[d] that he ha[d] sustained a loss', which was insufficiently substantial). See also Restatement (Second) of Contracts s 265 (Am Law Inst 2019).

15 *D & A*, 2009 WL 3206596, at *5 (finding that the purpose of a contract for construction on a home was frustrated when payment was to be made upon settlement of an insurance claim and a court issued a restraining order barring transfer of relevant assets).

16 See, eg, Del Code tit 6, s 2-615; *J & G Assocs v Ritz Camera Ctrs, Inc*, Civ A No 9811, 1989 WL 115216, at *3 (Del Ch, 3 October 1989).

17 *Wal-Mart Stores, Inc v AIG Life Ins Co*, No 19875, 2005 WL 5757652, at *6 (Del Ch, 1 April 2005); *Crown IT*, 11 AD 3d at 265 (calling the doctrine 'narrow').

18 *Ibid.*

19 *Sage Realty Corp v Jugobanka, DD*, No 95 CIV 0323 RJW, 1997 WL 370786, at *2 (SDNY, 2 July 1997) (applying New York law) (quoting *Gen Douglas MacArthur Senior Vill*, 508 F 2d at 381).

20 *Freidco of Wilmington, Ltd v Farmers Bank*, 529 F Supp 822, 825 (D Del 1981).

Jurisdiction two: United Arab Emirates

The United Arab Emirates (UAE) is a multifaceted jurisdiction combining a civil law system that applies onshore throughout the seven emirates and distinct common law systems (in civil and commercial matters) that apply in the so-called offshore jurisdictions, namely the Dubai International Financial Centre (DIFC) and the Abu Dhabi Global Market (ADGM). The UAE Civil Code, which applies onshore, is largely based on the Egyptian Civil Code, which, in turn, draws heavily from the French Napoleonic Civil Code. The laws of the DIFC are modelled on the common law of England and Wales, while the ADGM directly applies English law. These differing legal regimes translate into distinct approaches to the concept of force majeure.

Onshore UAE

Parties are free to include force majeure provisions in their contracts, which will be interpreted and applied in the same way as any other contractual provision and ought to be enforced in accordance with their terms. That said, as in most civil law jurisdictions in the Middle East, the concept of force majeure (and the legal consequences of a force majeure event) are provided for in the UAE Civil Code. Therefore, while primacy is given to any contractual force majeure provisions, the statutory force majeure regime applies irrespective of any contractual arrangements.

The three key provisions of the UAE Civil Code on force majeure are as follows:

1. Article 273, which provides that: 'In contracts binding on both parties, if force majeure supervenes which makes the performance of the contract impossible, the corresponding obligation shall cease, and the contract shall be automatically cancelled.'
2. Article 287, which provides that: 'If a person proves that the harm arose out of an extraneous cause in which he played no part such as a natural disaster, sudden incident, force majeure, act of a third party, or act of the person suffering harm, he shall not be bound to make it good in the absence of a legal provision or agreement to the contrary.'
3. Article 472, which confirms, more generally, that an obligation to perform is excused: 'if the obligor proves that the performance of it has become impossible for him for an extraneous cause in which he played no part.'

The combined effect of these provisions is that, for an event to qualify as force majeure under UAE law, that event must: (1) be extraneous to the

parties, unforeseeable and unavoidable; and (2) render the performance of a contractual obligation impossible (and not merely more onerous).

In practice, parties may agree contractually that the occurrence of specific types of events (such as, for example, a pandemic) amount to force majeure and, as a matter of principle, such provisions are enforceable. In the absence of contractual force majeure provisions, a party is excused from performance (and the contract may be terminated) if it can show that the above criteria under the UAE Civil Code are met. The assessment of whether a specific set of facts amounts to force majeure is case specific. While past judgments may provide guidance, there is no doctrine of binding precedent in the UAE, so UAE courts retain discretion to qualify a certain set of facts as force majeure on a case-by-case basis. This means that the Covid-19 outbreak is unlikely to qualify, in itself, as an event of force majeure for the performance of any contractual obligations and parties will have to show how the outbreak rendered performance impossible in specific cases.

It remains to be seen how the UAE courts will approach this issue against the background of government declarations of force majeure in the context of the Covid-19 outbreak. These have been a significant issue in the Middle East with, for example, the Iraqi Government declaring that the ongoing Covid-19 crisis constitutes an event of force majeure for 'all projects and contracts' with retroactive effect from 20 February 2020. While no similar declarations have been reported in the UAE, their legal effects are potentially significant as they suggest that performance of all contracts was rendered impossible.

Where the test for force majeure is made out under UAE law, the party whose performance was rendered impossible is exempt from contractual liability in respect of such performance and the contract may be terminated in full or in part.[21] Notably, where the event in question merely renders performance more onerous, as opposed to impossible, the UAE Civil Code empowers courts to reduce the claiming party's contractual obligations. Accordingly, even if an event does not fall within the force majeure provisions per se, the non-performing party may still have some scope to reduce its liability.

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21 If the force majeure event renders performance of the entire contract impossible, the effect is that the contract will be considered terminated. Where the force majeure event renders only part of an obligation impossible to perform, Art 273(2) of the UAE Civil Code allows only that part of the contract to be extinguished. The remainder of the contract remains enforceable. For contracts with successive (or continuous) obligations, termination due to force majeure only produces effects *ex nunc* meaning that obligations already performed remain unaffected.

DIFC and ADGM

In the DIFC, DIFC Law No 6/2004 on contracts (the 'DIFC Contract Law') contains express provisions dealing with force majeure, which apply subject to the terms of any specific force majeure contractual provisions. Article 82(1) of the DIFC Contract Law provides:

> 'Except with respect to a mere obligation to pay, non-performance by a party is excused if that party proves that the non-performance was due to an impediment beyond its control and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.'

Article 82(2) of the DIFC Contract Law provides that non-performance is excused 'for such period as is reasonable, having regard to the effect of the impediment on performance of the contract'. Article 82(3) requires a party to give notice to the other party of the impediment and its effect on the party's ability to perform. Failure to give notice 'within a reasonable time after the party who fails to perform knew or ought to have known of the impediment' renders the non-performing party liable for damages.

In the ADGM, English law is directly applicable. Therefore, a party's ability to claim force majeure is subject to the particular terms of the parties' contract and will be interpreted in accordance with usual principles of contractual interpretation. In the absence of a force majeure clause, the main alternative is for a party to rely on the English law doctrine of frustration to relieve it from the consequences of its non-performance.

Conclusion

Owing to the distinct approaches taken towards force majeure clauses in the different jurisdictions in the UAE, the outcome for a party seeking to invoke force majeure as a result of the Covid-19 outbreak may differ depending on the governing law of the contract. The approach that the courts (and arbitral tribunals) will take to such a requirement remains to be seen, particularly where governments have declared the outbreak as a force majeure event.

Jurisdiction three: Brazil

When it comes to Brazilian law, it is important to consider that it is a civil law codified legislation system.[22] The relatively recently enacted Brazilian Civil Code (BCC) provides the primary framework that deals with contractual relations and, thus, is the focus of study when considering contractual cases.

The BCC has already undergone some reforms, the most relevant being the reform introduced by the Economic Freedom Act (Lei da Liberdade Econômica).[23] Essentially, it reinforced Brazil's tendency to private autonomy, limiting the state's role as a normative and regulatory agent in business relations.[24]

In this context, disputes regarding contractual relations are primarily to be resolved by resorting to the terms agreed between the parties – before or even after the execution of the contract. If there is no consensus, then we should look for answers within the provisions of the law applicable to the case.

In the absence of a contractual provision, the best practice requires different provisions of law to be read and interpreted together, such as the general rules applicable to contractual relations and the specific provisions applicable to the type of contract that is the object of the dispute. The same applies to general contractual rules and the provisions that deal with force majeure.

The provisions set forth in the BCC that could potentially deal with the Covid-19 pandemic and its effects may be many,[25] but the main ones are undoubtedly force majeure and hardship.

According to Brazilian law, force majeure is a necessary fact, whose effects could not be avoided or prevented.[26] The elements that characterise it are unpredictability (lack of means to avoid or prevent the consequences of

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22 It is important to note, however, the recent approximation [of the civil law system adopted in Brazil] to the common law system, marked mainly by the enactment in 2014 of new provisions in the Brazilian constitution that allow the edition of binding precedents by the Brazilian Superior Courts. This approximation also gained strength in 2015 with the enactment of the New Brazilian Code of Civil Procedure, which started to provide for a complete chapter dedicated to the standardisation and consistency of case law (Book III, Title I, Chapter I: Arts 926 to 928).

23 Law no 13.874/2019.

24 Law no 13.874/2019, Art 7 (altering the language of Art 421 of the BCC):

> Article 421: Contractual freedom will be exercised within the limits of the social function of the contract.
>
> Sole paragraph: In private contractual relations, the principle of minimum State intervention will prevail, by any of its powers, and the contractual interference determined externally to the parties will be exceptional.

25 The term 'force majeure' appears in 15 different provisions in the Brazilian Civil Code: Arts 246, 393, 399, 583, 607, 625, 636, 642, 696, 702, 719, 734, 737, 753 and 936.

26 BCC, Art 393.

the event) and necessity or inevitability (the event makes it impossible to fulfil the obligation).[27]

If a cause of force majeure is verified, it exempts the debtor from the damages and losses resulting from the fact or event. If the force majeure event prevents the fulfilment of the contractual obligation, the contract shall be terminated.

The exclusion of liability arising from an event of force majeure is a cogent rule, therefore, it is applicable even if not provided for in the contract. But it can be restricted or expanded by express contractual terms.

Brazilian law does not provide for a list of events that can be considered force majeure, but only a few exceptions to the general rule.[28] Therefore, the main source of examples comes from scholars' opinions and case law. Classic examples are unprovoked fires, hurricanes, etc.

As mentioned above, in order to claim an exclusion of liability arising from a force majeure event before the Brazilian courts, one must demonstrate that the obligation could not be performed owing to an unpredictable and inevitable event.

The unpredictability test is assessed by the courts within reasonable criteria of what could be expected at the time of the execution of the contract. For example, even though some may say science has predicted the proximity of a new epidemic, or even a pandemic, it is unreasonable to demand that such a possibility – especially with the effects that Covid-19 has generated – be predicted, calculated and addressed in any relationship commercial.

With regard to the inevitability requirement, the courts assess whether the force majeure event was in fact the cause of the default. In other words, no conduct of the defaulting party must have caused or aggravated the situation. There must be no causality between the debtor's conduct and the default itself.

Therefore, the analysis of the debtor's due diligence at the time of the conclusion of the agreement and at the time of the occurrence of the event is of the utmost importance to the exclusion of his liability. If (1) at the time of the execution the event could have been reasonably expected or (2) if at the time of the default the event could have been controlled, then the exclusion shall not apply.

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27 Brazilian Superior Court of Justice, Special Appeal no 1.567.705/PE, Justice Ricardo Villas Bôas Cueva, 3rd Chamber, 9 September 2016.

28 For example: BCC, Art 399: the defaulting party is liable for the impossibility of performance, irrespective of whether it results from unforeseeable circumstances or force majeure, if the unforeseeable circumstances or the force majeure event occurred during the default; unless it proves exemption from guilt, or that the damage would still survive when the obligation had been performed in a timely manner.

Another concept that has been broadly discussed in the scope of Covid-19 is hardship (excessive burden). In Brazilian law, this concept has some peculiarities. It is provided for in Articles 478 to 480 of the BCC and it covers circumstances where because of (1) an extraordinary and unpredictable event, (2) the obligation has become excessively onerous to one party and (3) extremely advantageous for the other.

In general, items (1) and (2) are relatively easy to prove. However, item (3) ends up hampering the practical use of a legal doctrine that, in theory, could be applied to review or terminate business contracts; thus, it may be relativised or analysed within the macro context under discussion.

Undoubtedly, Covid-19 can be understood as an extraordinary and unpredictable event, but the excessive burden caused to one party and the generation of excessive advantage to the other parties are requirements that must be assessed on a case-by-case basis.

At the time this article was produced, the São Paulo Court of Appeals had already granted an injunction based on hardship in the context of Covid-19. The court allowed the deferral of instalments of a contract for the acquisition of a commercial store on the following basis:

> 'In times of war, which is, mutatis mutandis, the one we live in the face of the coronavirus pandemic, this is how it should be.
>
> ... the theory of unpredictability [hardship] shall only be applied (1st) to long-term execution agreements, with successive installments, according to existing and predictable conditions; (2nd) the new circumstances go far beyond what could reasonably have been predicted at the time of the mutual consensus of the contracting parties, whether they have come on suddenly, or very quickly, or whether they have resulted from a gradual and gradual change in economic or social conditions, reaching, not a certain contractor, but all contracts of the same nature, entered into with similar clauses; (3rd) the contracts are not of a random nature, such as those of the Stock Exchange (ob. Cit., Pages 757/758).'[29]

The fact is that there are numerous rules that must be evaluated within the specific cases that will arise from the pandemic. As stated above, the BCC must be interpreted in an integrative manner, taking into account its general rules.

In that sense, as the BCC's general rules tend to prioritise good faith, probity, the social and economic function in business dealings, opportunistic actions or claims may constitute litigation in bad faith and/or unlawful act subject to indemnification.

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29 São Paulo's Court of Appeals; Interlocutory Appeal no 20619005-74.2020.8.26.000, 3rd Chamber of Commercial Law, Justice Cesar Ciampolini, 5 April 2020. Free translation.

Jurisdiction four: Singapore

A force majeure clause is defined to mean 'a provision in a contract that excuses a party from not performing its contractual obligations that becomes impossible or impracticable, due to an event or effect that the parties could not have anticipated or controlled'. Arguably, the Covid-19 pandemic outbreak may be regarded to constitute an unforeseeable event that arises outside a party's reasonable control. Interpreted as a force majeure event, parties unable to fulfil their contracts may want to rely on force majeure clauses in their contracts for relief.

Can a party rely on a force majeure clause in light of the Covid-19 pandemic outbreak? In the context of Singapore, a careful consideration of the following tests will be necessary:

1. There is a need to examine the contract to identify whether a force majeure clause exists.
2. In the context where a force majeure clause is expressly stated, and regulates the parties' agreement, a careful examination of the precise wording of the express language of the force majeure clause in the contract to determine whether parties to the contract had intended for an event such as the outbreak (or similar terms such as 'pandemic', 'change of law', 'disease' and the like) would apply. Whether a party can rely on a force majeure clause depends on several factors, including:
   (i) what constitutes a force majeure event in the sense of the threshold required, such as the event continuing to occur or such similar determination of impact and length of time;
   (ii) what procedures and timeline for determination apply, including any mitigation factors that a party needs to undertake prior to such determination (the 'reasonable steps' test) or if delay is not reasonably foreseen by the level of disruption caused by the pandemic;
   (iii) what mitigation efforts are required, whether a cure period is provided (extension for relief), or whether it automatically renders the contract impossible to perform, including notification and renegotiation requirements expected; and
   (iv) what exclusions may apply as wrongful declaration may lead to repudiatory breach of the contract.
3. If precise wording or express event language is not stated in the force majeure clause, parties seeking to rely on the clause will carry the burden of proving that the outbreak falls within the ambit of the force majeure clause regardless of whether it is defined. A factual inquiry and/or the reasonable steps test may need to be applied during such determination.

4. Alternatively, if there is *no* force majeure clause in the contract whatsoever or if a party is unable to bring itself within the ambit of the force majeure clause, the party may need to look at the doctrine of frustration. It is important to note, however, that the doctrine of frustration may only be relied on under exceptional circumstances where the parties' obligations are fundamentally altered such that the contract can no longer be performed in the same terms that the parties originally intended to.
5. On 7 April 2020 in Singapore, as a response for relief for parties unable to perform their contractual obligations due to the Covid-19 pandemic, the Covid-19 (Temporary Measures) Act 2020 (the 'Covid Act') was passed. However, the contractual relief under the Covid Act is temporary and will only be in place for a period of six months (with possible extensions) – and it does not grant blanket relief for all non-performable contractual obligations.

In order for a party to benefit from the temporary relief measures under the Covid Act:

1. the contract must be entered into or renewed before 25 March 2020;
2. the contract must be of the type specified in the Covid Act;
3. the party to the contract is unable to fulfil its obligation that is to be performed on or after 1 February 2020;
4. the inability to perform is to a material extent caused by a Covid-19 event; and
5. the party has served the required notification in accordance with the Covid Act.

Finally, it is important also to explore how Singapore courts and jurisprudence have tended to decide on force majeure clauses. Approaches such as that of a test of commercial practicability, or whether the event is beyond the control of the party relying on the force majeure clause, and the steps taken to avoid relying on the clause as first instance, are important considerations.

Jurisdiction five: France

Executive summary

Force majeure is a long-recognised principle under French law and is codified in the French Civil Code. However, French courts typically take a strict approach and do not find instances of force majeure lightly. In relation to Covid-19, parties have sought to rely on force majeure due not only to the virus itself, but also to the strict governmental measures that have been imposed in reaction to the same. However, traditionally it has been a challenge to argue that pandemics trigger force majeure clauses before French courts. As an alternative to force majeure, parties often also consider

whether they can rely on the principle of *imprévision* or 'hardship', which arguably carries a lower standard to meet.

Force majeure under French law

Force majeure applies as a matter of statute under Article 1218 of the French Civil Code and applies to all contracts governed by French law. An event constitutes force majeure if it:

1. prevents performance of an obligation by the debtor;
2. is beyond the debtor's control;
3. could not have been reasonably foreseen at the time of conclusion of the contract; and
4. has the effects that cannot be avoided by appropriate measures.

The burden of proof lies on the party seeking to invoke force majeure. Parties are also by and large free to modify the force majeure regime by contractual means.

There are as a rule two possible outcomes in a force majeure case: (1) if the obstacle is temporary, performance of the obligation is suspended, but (2) if the obstacle is permanent, the contract is terminated, and the parties are discharged from their obligations entirely. If a case falls under the first scenario, performance should resume as soon as it becomes possible again.

Force majeure applied by the French courts

In France, the courts have traditionally been reluctant in recognising epidemics or pandemics as force majeure. In cases that have concerned Ebola,[30] H1N1,[31] SARS[32] and Dengue fever[33] the court in each instance held that these were not unforeseeable and/or unavoidable circumstances and the necessary conditions were not met. (Notions of assumption of risk may also play a role in the courts' determination.)

In practice, the chances of successfully relying on a force majeure argument can be improved where the parties have explicitly provided for force majeure events in their contract and have defined what circumstances will trigger the clause. For instance, by including epidemics or pandemics in the definition, courts may be more inclined to find that the situations described above, or Covid-19, are capable of being considered an event of force majeure (defining force majeure, however, does not automatically

30 Paris, 29 March 2016, n° 15/05607.
31 Besançon, 8 January 2014, n° 12/02291.
32 Paris, 29 June 2006, n° 04/09052.
33 Nancy, 22 November 2010, n° 09/00003.

determine the case, as the court must still of course pay heed to all the requirements of a force majeure claim, and this in light of all the factual – and contractual – circumstances in which the claim is founded).

Force majeure and Covid-19

It has been suggested that Covid-19 may, given its severity, be looked at differently to previous epidemics. The governmental measures in response to Covid-19, which have resulted in abrupt, temporary closures of businesses, strict isolation measures and transport restrictions, are in many respects unprecedented. This is why recent experience has shown that in arguing force majeure, parties often seek to rely more on the seriousness and widespread application of these national lockdown measures than the (direct) effects of the virus itself.

And matters have shown themselves to be predictably complex. In February, the French Minister for the Economy, in the context of public procurement, indicated that the coronavirus amounted to force majeure.[34] The Colmar Court of Appeal also held that this pandemic constituted force majeure (although this case was somewhat nuanced and involved an immigration matter).[35]

Conversely, two more recent cases involving Renault and Amazon show the French courts concluding that the effects of Covid-19 do not mean that production in factories and warehouses needs to stop entirely. Rather, employers must ensure that the necessary health and safety measures have been adopted in the workplace.[36] Once these measures are in place, it seems that work can resume.

In May, a French major relied on force majeure to avoid buying nuclear power from another French industry player, as the impact of Covid-19 had reduced electricity prices in France. Having considered the conditions of force majeure in the contract, the Paris Commercial Court agreed that the purchase of nuclear electricity should be suspended during the crisis.[37] This is a lower court emergency decision and turns on the contractual force majeure provision in question, which contained broad wording covering economic difficulties.

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34 See https://minefi.hosting.augure.com/Augure_Minefi/r/ContenuEnLigne/Download?id=7428EB4B-E77B-40AA-8BB9-A5C0DA473BFB&filename=2046%20-%20Discours%20de%20Bruno%20LE%20MAIRE%20-%20R%C3%A9union%20avec%20Muriel%20PENICAUD%20et%20Oliver%20VERAN%20sur%20coronavirus.pdf.

35 Colmar, 23 March 2020, n° 20/01207.

36 See https://fr.motor1.com/news/422768/usine-renault-sandouville-arret and Versailles, 24 April 2020, n° 20/01993.

37 See www.lesechos.fr/industrie-services/energie-environnement/nucleaire-total-gagne-une-manche-judiciaire-face-a-edf-1204649.

We understand from press reports that the decision is being appealed – and those same press reports also suggest that France's energy market regulator in an earlier decision rejected these force majeure claims.[38]

There is no bright-line test for how force majeure should be interpreted and applied by French courts. Covid-19 has brought unprecedented and sudden changes to the way in which businesses operate and people interact. And so, while it is possible to argue that the governmental acts amount to force majeure, historically it has been difficult to argue that pandemics trigger this principle. It is also worth noting that where contracts have been signed in recent months, the situation will be very different since the argument of unforeseeability cannot, of course, be made.

Alternative method: imprévision

Under French law, parties could (and often do) instead or in addition rely on the principle of *imprévision*, or 'hardship', which has recently been codified under the Civil Code. The standard involves what appears to be a lower threshold to the 'usual' force majeure and seeks in (still somewhat) limited cases to restore contractual equilibrium although it is at the parties' discretion to exclude or modify the principle from their contract.

To invoke the *imprévision* doctrine, there must be a change of circumstances, unforeseeable at the time the contract is concluded, rendering performance excessively onerous for a party who had not accepted the risk of such change (in other words, a standard falling short of impossibility).

It should be noted, however, that the codified scope of *imprévision* applies only to contracts concluded after 1 October 2016, which may lessen its immediate impact.[39] For contracts concluded before 1 October 2016, a recent case demonstrates that parties may still seek to rely on the general obligation of good faith to require a renegotiation of the underlying contract.[40]

Jurisdiction six: English law

Introduction

In contrast to many civil law systems, English law does not recognise a doctrine of force majeure. Unless the very limited doctrine of frustration applies (which operates to discharge a contract where it has become

38 See https://uk.reuters.com/article/uk-edf-nuclearpower/total-among-companies-seeking-force-majeure-on-edf-contracts-sources-idUKKBN21O1BB.

39 Article 9 of Ordinance n° 2016-131 of 10 February 2016 reforming French contract law.

40 Paris, 17 January 2020, n° 18/01078.

impossible to perform), if the contract is silent on force majeure, English law will not intervene to assist an affected party.

Contracting parties rarely gave much consideration to the negotiation of force majeure clauses, relegating them to the province of 'boiler plate'. That all changed with the outbreak of Covid-19 and its impact on contractual non-performance. Those 'boiler plate' force majeure clauses are now being closely scrutinised, and disputes as to whether they cover the effects of Covid-19 are starting to emerge.

Force majeure events – is Covid-19 covered?

There are typically two approaches to the drafting of FM clauses.

They can be drafted in broad terms covering any circumstance beyond the reasonable control of the parties, and often include a non-exhaustive and illustrative list of circumstances intended to be covered. Parties that have adopted this approach may have little difficulty in accommodating Covid-19 and its consequences.

Alternatively, force majeure clauses adopt a 'laundry list' approach, listing specific 'force majeure events'. If, as is occasionally the case, that list includes 'Epidemic', 'Pandemic' or 'Plague', Covid-19 (which was officially declared a pandemic by the WHO on 11 March), should be covered as a force majeure event. On its dictionary definition and in case law, 'Plague' is not limited to the bubonic variety and may cover any highly infectious disease with a high mortality rate, thus probably encompassing Covid-19.

Where there is no such specific mention, the following commonly listed events could arguably cover Covid-19:

1. 'Act of God': this has been held to mean an event of exclusively natural causes, of an extraordinary nature that could not have been anticipated or provided against. It is therefore arguable that it covers Covid-19 itself but may not cover consequential governmental restrictions that involve human agency. Significantly, much case law dealing with 'Act of God' is somewhat ancient and of uncertain application to 21st century international trade. In addition, for those contracts entered into in early 2020, the requirement found in some decisions of unforeseeability is likely to lead to arguments as to when the effects of Covid-19 became foreseeable.
2. 'Act of state' (or of governmental instrumentality): restrictions imposed by governments around the world (travel bans, social distancing, etc) are measures that are likely to fall within the ambit of 'act of state', at least when they constitute 'hard law', rather than the 'mandatory guidance' that many governments (including the UK) relied upon before passing emergency legislation.

3. 'Embargo' or 'biological contamination': it is highly unlikely that these terms will cover Covid-19. 'Embargo' is of application to trade restrictions between sovereign states and contamination is properly applicable to a specific locality, rather than generally.

Causation and impact – how has Covid-19 affected contractual performance?

Once a party has established that a valid force majeure event has occurred it must then consider whether the manner in which performance is impacted comes within the force majeure regime of the contract. Proving causation may not be straightforward.

Under most commonly used formulations, force majeure will apply where performance is:

- 'Prevented' – this is the highest threshold and means that compliance with obligations must be physically or legally impossible. It is not enough for parties to show that performance was made more difficult or is rendered economically unviable;
- 'Hindered'– where performance would put the affected party in such a precarious position that it would endanger the business or prevent them from performing contracts with other parties;[41] or
- 'Affected' or 'delayed'– this lower bar is the most favourable for an affected party and any detrimental effect on performance is likely to suffice.

Notice – precondition to relief?

Force majeure clauses commonly require the force majeure claimant to give notice to the other party containing certain details. There may also be obligations to report periodically. Disputes often arise over whether the notice requirements constitute a condition precedent such that failure to give the requisite notice or to report will prevent a party from relying on the force majeure event. Ultimately, this is a matter of construction and clear words will be required for a court or tribunal to find a condition precedent. It is nevertheless highly inadvisable to ignore such requirements.[42]

Effect of force majeure – are parties permanently relieved of obligations?

Not all force majeure clauses are equal in the degree of relief they grant. Typically, a force majeure clause will suspend performance while the effect of the force majeure event continues, but certain obligations may continue

41 *Tennants (Lancashire) Ltd v GS Wilson & Co Ltd* [1917] AC 495.

42 *Scottish Power UK Plc v BP Exploration Operating Co Ltd and Others* [2015] EWHC 2658 (Comm).

(eg, to make payments, especially likely in the context of 'take or pay' commitments).

Some clauses may require the parties to mitigate against the impact of a force majeure event and take steps to demonstrate such mitigation. In the absence of express language, there is authority that an obligation to take reasonable steps to mitigate can be implied if the clause defines force majeure as events beyond the reasonable control of a party. This obligation imposes a heavy burden on the force majeure claimant to show, for example, that it could not have performed its obligations by seeking alternative supplies.[43]

Commonly, a time limit will apply to the suspension of performance and may give either or both parties the right to terminate the contract if the affected party remains unable to perform its obligations for a specified period. The presence of such a right may prove a 'sting in the tail' and its potential implications should be considered from the outset.

Conclusion

Save for the prescient few who expressly provided for 'pandemic' in their laundry list force majeure clauses, or those who incorporated the 19th century concept of 'act of God' – and, of course, those who eschewed the laundry list approach in favour of wider purposive drafting, the challenges of successfully invoking Covid-related force majeure clauses are great. They will test the ingenuity of litigators over the coming months and years; the writers of contract law books will be busy.

43 *Classic Maritime v Limbungan Makmur Sdn Bhd* [2018] EWHC 2389 (Comm).