

Force Majeure in real estate contracts and leases

A comparative analysis:

Civil Law v Common Law

with a focus on Covid-19



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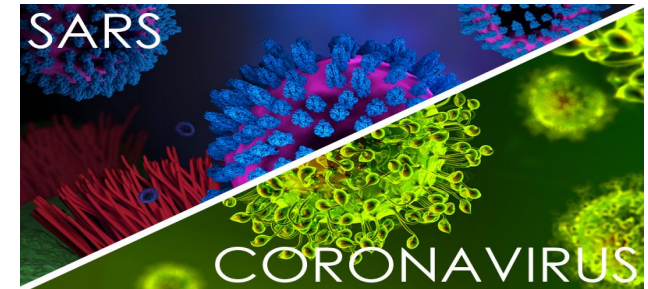
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“Force Majeure” as a general legal principle if the contract is silent?

	CIVIL LAW	COMMON LAW
Origin:	Originated from the French Civil Law and many Civil Code jurisdictions (including the UAE, Brazil and the Netherlands) have adopted similar/identical principles.	“Force Majeure” is not an established principle of common law outside contract. Rather, concepts such as “Frustration of Purpose” or “Impossibility of Performance” have similar effect.
3 Key Questions of Fact:	3 key factors to be present: <ol style="list-style-type: none">1) The event must have been <u>unforeseeable</u> at the time of the entering into the contract;2) The event must be <u>unavoidable</u>; and3) The event must render performance <u>impossible</u>.	3 key factors to be present: <ol style="list-style-type: none">1) the event must have been <u>unforeseen</u> and <u>beyond the control</u> of the defaulting party;2) the defaulting party must have <u>taken all reasonable steps to avoid</u> the event; and3) the event must <u>prevent performance or render it radically different</u>.
Effect:	Termination or suspension if impossibility is temporary.	Varies depending on jurisdiction from deferment of obligations to termination.

1st Question of Fact - Was COVID-19 Unforeseen?

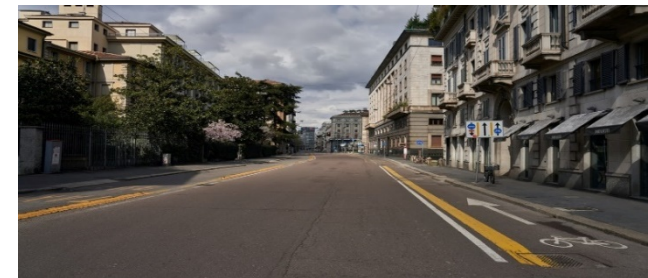
- We have previously experienced SARS, MERS, and the Spanish Flu. Is this Pandemic any different?
- Was it predictable and does its timing and duration count?
- Do the consequences count? i.e. Removal of civil liberties - forced lockdowns and closures, curfews, borders closed, travel halted, cruise ships stranded.



Germany



Dubai Mall, UAE



Milano, Italy

2nd Question of Fact - Is COVID-19 Unavoidable?

- Once the genie is out of the bottle, is eradication possible?
- What can be done to mitigate? Lobbying, movement permits, essential services, redefining how we do things such as social distancing etc.?
- Does the length of time count? What we say today may change tomorrow.
- This is where the consequences really do count. Is there any greater authority than the Government?



3rd Question of Fact - Is performance Impossible/prevented?

- A key question of fact depending on the obligation and the facts applicable.
- Are increased administration requirements or increased difficulty performing enough?
- Is performance merely delayed or absolutely impossible?
- What if your main obligation is solely to pay and banks are still open?



Force Majeure as a principle of Contract?

Contracts often redefine, expand or limit the effects of force majeure type events and may also reallocate risks.

A common two tiered test is often applicable:

(1) THE DEFINITION TEST

- Does your FM clause expressly cover pandemic, quarantine, travel restrictions, border closures, government action or other circumstance that affects performance?
- If not, then is it within any more general wording in the clause, such as “outside reasonable control”?

(2) THE CAUSATION TEST

- Do you automatically get relief if you meet the Definition Test?
- Are both direct effects and indirect general effects covered?
- Does the clause require absolute impossibility or just hindrance or negative effect?



What happens if COVID-19 is not contemplated by the contract?

- Is the freedom of contract recognised and will the contract override the force majeure position at general law?
- Are the general positions at law still available to you if your contract does not capture a COVID-19 type pandemic/epidemic?
- What about express versus implied exclusions of general legal principles?



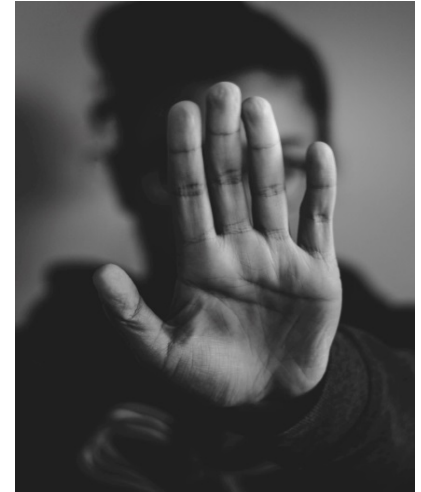
What consequences do Contracts usually provide?

- What are the consequences if you pass both the Definition Test and the Causation Test?
- This could include:
 - a) Deferral of certain performance obligations of one or both parties;
 - b) Termination;
 - c) Relief from liability to the other party.



Suspension of Contract

- Notice requirement.
- If you miss the deadline (i.e. within 30 days of the event starting) have you lost your protection?
- Does your relief backdate or only after notification is given?
- How much suspension is too much suspension, and can a party be allowed to exit the deal and look elsewhere?



Termination of Contract

- What are the pre-requisites for termination (applicable time periods can vary by jurisdiction)?
 - a) In short term supply contracts this might be 30 to 90 day's suspension;
 - b) long term supply or lease contracts these might be 6 months or more;
 - c) what happens if the performance is not suspended but cannot be performed at all – absolute impossibility?



What happens if Contract refers to liability release only?

- Some contracts avoid the suspension or termination wording all together.
- They simply say a party is not liable or that failure to timely perform an obligation is excused. What does that mean?



Other Contractual Considerations?

- Many contracts include other clauses relevant to reallocating risk such as:

(1) Warranties/Guarantees;

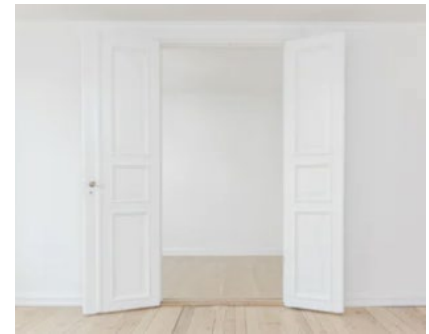
(2) Waivers;

(3) Releases; and/or

(4) Indemnities.

- Don't forget the insurance clauses.

Business Interruption and/or other Pandemic Risk Insurance may further reallocate risks associated with events such as COVID-19.



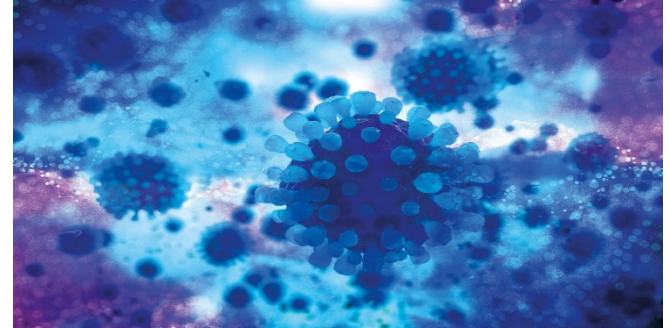
Payment relief carve-outs in Contracts

- Many contracts make it abundantly clear that a party seeking relief may not use force majeure event to claim relief for payment obligations.
- What is the net effect of such clauses under your law?
- Are there any other mandatory provisions of law that cannot be contracted out of that could be used to cut through such wording?



Other principles of law?

- Exceptional unforeseen circumstances of a public nature which render performance oppressive or threaten a party with grave loss?
- Specific landlord/tenant laws?
- Loss of use provisions of the Civil Code?
- Other equitable remedies?



Forms of security

- Many real estate contracts mandate one party to provide security for performance to the other party.
- This may be in the form of cheques, bank performance bonds, or upfront security payments.
- What is the effect of such security at law? Is it linked to the real estate contract or independently callable without reference to the real estate contract?
- How does that alter the balance of power between parties when COVID-19 type events strike?

Force Majeure Questions?



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THANK YOU!
