International Lawyers Network

Force Majeure

The following paper aims to succinctly address the question "Does the current corona crisis constitute a (global) force majeure from a legal point of view?"

This guide offers an overview of legal aspects of force majeure in the requisite jurisdictions. It is meant as an overview in these marketplaces and does not offer specific legal advice. This information is not intended to create, and receipt of it does not constitute, an attorney-client relationship, or its equivalent in the requisite jurisdiction.

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The information in this guide may be considered legal advertising.

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LEGAL DIMENSIONS OF FORCE MAJEURE EVENTS UNDER CURRENT GLOBAL CORONAVIRUS SCENARIO

Due to the current state of affairs regarding the coronavirus expansion worldwide, an unprecedented number of abnormal situations are affecting business, along with the relevant questions about the legal implications in connection therewith.

In particular, a sensitive question arose in the contractual field: does this situation constitute a force majeure event?

A first natural answer to that question would be for the affirmative, to the extent such situation is effectively unforeseeable, or is unavoidable even while being foreseeable. The breaching party must be able to demonstrate the cause-effect relation existing between the situation and the effective breach of the obligation.

Though, as to bring further light to this answer, it is essential to carefully review the executed contracts on a case-by-case basis, identifying the termination, breach and force majeure related provisions set forth thereunder. Such provisions may contain a specific definition of the force majeure event, require certain actions on the affected party's side, list exceptions to the general principle referred to above, or even provide that a party has contractually assumed the consequences of force majeure events.

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Canada - Ontario

COVID-19 AND PERFORMANCE OF CONTRACTUAL OBLIGATIONS

As the global community works to respond to the challenges presented by the spread of COVID-19, many Canadian businesses have been impacted by market and supply chain disruptions, as well as government mandated travel and business restrictions. This article considers the utility of force majeure clauses in commercial contracts, and whether COVID-19 may be invoked as an excuse to non-perform, or delay the performance of, contractual obligations.

Force Majeure

A force majeure clause operates to excuse a party from a delay, or non-performance of, its obligations under a contract upon the occurrence of certain serious events which are unforeseen, or beyond an affected party's control. These serious events make contractual performance impossible or impracticable.

What constitutes an "event of force majeure" varies from contract to contract and is entirely fact specific and dependent on the specific contractual wording contained in the contract.

Where an event of force majeure is more narrowly defined, the clause will only be triggered upon the occurrence of specific delineated events which are claimed to have prevented performance. In the context of the current global health crisis, reference in the contract to "public health emergency", "pandemic", "communicable disease outbreak" or other similar terms may mean that the clause can be successfully invoked.

On the broader end of the spectrum, it is typical to see a force majeure event defined to encompass any unforeseeable circumstance outside the reasonable control of the affected party. Such clauses may contain certain qualifications, such as:

- the event cannot have been foreseen, prevented, remedied or removed by the affected party;
- the event has had a material adverse effect on the ability of such party to perform its obligations under the agreement; and/or
- such party has taken all reasonable precautions to mitigate the consequences thereof.

Once a force majeure event has occurred in accordance with the specific terms of the contract, the party looking to be excused from performance or delay must also prove that such event directly impacted its ability to perform its contractual obligations. Again, this will depend upon the language of the force majeure provision, which will likely specify different degrees of causation from "cause" or "prevent" to "hinder" or "delay".

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Canada – Ontario (cont'd)

It is important to note that, however broad the language of the force majeure clause, historically, these provisions have been narrowly interpreted by Canadian courts. For example, where a contract is silent on the requisite standard of causation between the force majeure event and a party's performance, courts have imposed a high threshold, only invoking force majeure where performance is rendered an impossibility. Courts have consistently concluded that financial hardship (versus impossibility) is not sufficient grounds to successfully invoke force majeure. Mere delay in the ability to perform or changes in circumstances that make the performance of a contract less profitable will not generally suffice to relieve a party's obligation to perform.

Where an event of force majeure has occurred, it is important to review the specific language of the force majeure clause to determine the mechanics of relying on the clause and the obligations of each party. For example, there may be notice requirements where the affected party is required to notify the other party within a certain time after the commencement of the event of force majeure. Failure to provide such notice may nullify the ability to rely on the clause.

There may also be a requirement for the affected party to mitigate damages by using diligent efforts to ensure the effects of the force majeure event are minimized to the fullest extent possible, and for the affected party to resume the performance of its obligations as soon as possible.

Additionally, any or all of the parties may be entitled to permanently terminate or temporarily suspend the operation of the agreement if the force majeure event continues for a specified period of time and obligations under the agreement have not been performed. The ability to terminate may depend on the specific wording of the agreement overall, and the force majeure clause in particular.

Frustration

It should be noted that courts will not read in (or add) force majeure clauses into contracts where they are absent – regardless of world circumstances.

In the absence of a force majeure clause, or where the language of such a clause does not extend to a pandemic like COVID-19, there may be an excuse available at common law for non-performance. This excuse is known as the doctrine of frustration. Frustration applies where, due to an unforeseen event, performance of a contract is "radically different" from what the parties originally bargained for. However, the threshold to successfully claim frustration is high, given that its effect is to extinguish the contract and completely relieve all parties of their obligations thereunder. A close factual analysis would be required to assess whether the impact of COVID-19 significantly alters the nature of the parties' contractual obligations.

Business Considerations

In addition to the legal factors noted above, there are other business realities to consider when determining whether relief from contractual obligations is available, or even appropriate:

- The need for relief: In the face of closures and extended periods of quarantine and self-isolation, businesses are experiencing a steep reduction in revenues, harming their cash flow and their ability to satisfy outstanding obligations. It is uncertain how long this will last. Short-term relief from current obligations may make room for businesses to fulfill long-term obligations.

Canada – Ontario (cont'd)

- Industry trends: Reflect on what competitors are doing and how that impacts the parties with whom your business contracts. For example, Canada's big six banks have announced mortgage payment deferrals - other lenders may be required to enact similar measures to maintain client relationships.
- Dispute resolution mechanisms: Review the dispute resolution mechanisms in agreements containing force majeure clauses. It may be more productive to negotiate with parties seeking or granting relief, instead of proceeding directly to dispute resolution for breach of contract.

Bottom line - is it better to bankrupt a business and forgo performance of all obligations under the contract; or to work with the business during this crisis and ultimately increase the probability of receiving full performance?

Notwithstanding the fact that force majeure clauses have been narrowly interpreted in the past, it remains to be seen how courts will react in light of current circumstances, and in the face of what can be expected to be a flood of new force majeure cases.

Please feel free to contact the authors, or your Foglers lawyer, for advice during these difficult times. We would be pleased to review your individual agreements, force majeure clauses and to advise on any of your other legal or business needs during this unprecedented time.

Canada - Quebec

On March 11th, COVID-19 was declared a pandemic by the World Health Organization. But is COVID-19 "force majeure", that often under-considered element of most contracts, under Quebec law?

The Civil Code of Quebec defines force majeure (or in English, "superior force") as an event allowing an actor to avoid liability for harm caused, or from a debt owed, to another. For the actor to demonstrate that the event was in fact force majeure, they must meet three criteria:

- First, that the event was unforeseeable, and therefore could not have been predicted or anticipated;
- Second, that it was irresistible, meaning there was nothing the actor could have done to mitigate, avoid, or control it; and
- Third, that the unforeseeable and irresistible event made those obligations impossible to fulfill.

A global pandemic may very well be an unforeseeable and irresistible event, but this does not mean that every obligation impacted by it will be impossible to meet. For example, a commercial tenant that can no longer operate because of the Quebec Government's mandatory shutdown of non-essential businesses might still technically be able to pay its rent. However, there is case law in Quebec to the effect that government regulation following an unforeseeable and irresistible event, and not simply the event itself, can be considered force majeure.

Force majeure is not of public order in Quebec and contracting parties can specify which events will be treated as "force majeure" and which will not, agree to modify its effects (for example, it is often limited to non-monetary obligations) or waive it altogether. Where contracts include such clauses, the parties' agreement will prevail, whether or not the CCQ conditions have been met. Where contracts do not include these clauses, a case-by-case analysis of the facts, exploring the true impossibility of performance of the obligation, and possible liability, will be required.

Whether COVID-19 and its impacts on businesses will fall under the Civil Code of Quebec's definition of force majeure has yet to be established by the Quebec courts. If a court finds that COVID-19 does in fact constitute force majeure, this will inevitably have a major impact on obligations of every nature in the province.

Lawyers will likely give greater thought to the careful drafting of force majeure and related contractual clauses going forward. Previously included in contracts as a "miscellaneous" or "boilerplate" provision (if at all), this pandemic has shown us that the application and impact of force majeure is anything but standard-form.

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Czech Republic

Force Majeure and Substantial Change in Circumstances under Czech Law

Due to the current situation, the majority of businesses are faced predominantly with supply disruptions and liability for damages caused by such disruptions. The first recommendation is to review all major client contracts and contracts with suppliers, in particular as far as it concerns the existence and applicability of a force-majeure clause (if any), the possibility of termination or renegotiation of certain contracts if necessary, etc. Despite the above, businesses remain generally liable for their commitments and should take into account that the possibility of their termination or renegotiation is only exceptional.

There is no specific definition of "force majeure" in Czech law. Its definition is based only on legal theory and a few court resolutions. The generally acceptable definition of force majeure is "a legal event objectively unpredictable and objectively unavoidable and independent of the will of the respective party". The current "state of emergency" in the Czech Republic and related governmental measures due to the spread of the COVID-19 disease could be considered force majeure within the generally acceptable interpretation of this term, but we may not exclude that local courts might have a different opinion.

However, force majeure may influence the contractual obligations of parties only to the following limited extent:

(i) force majeure might be a liberating ground against claims for damages for breach of contractual obligation (such as damages for late delivery) and

(ii) force majeure might be a substantial change in circumstances giving right to a contract change or termination.

We stress that the definition of force majeure and its possible consequences on the obligations of the contractual parties stipulated in the contract prevails over general legal regulation.

If the consequences of force majeure:

- are stipulated in the contract, the contract regulations apply;
- are not stipulated specifically by the parties, the affected party can be liberated from payment of damages for breach of its contractual obligations and terminate the contract or agree on its change due to substantial change in circumstances. Nevertheless, the other contractual party is entitled to terminate the contract due to breach of the contractual obligations by the party affected by force majeure.

Czech law contains a concept of what is known as "substantial change in circumstances", which could help businesses deal with the current situation. If there is such a substantial change in circumstances creating gross disproportion in the rights and duties of the parties by disadvantaging one of them either by disproportionately increasing the cost of the performance or disproportionately reducing the value of the subject of performance, the affected party has the right to claim the renegotiation of the contract with the other party if the conditions stipulated by law are fulfilled. However, asserting this right does not entitle the affected party to suspend the performance.

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England

There is no specific concept of "force majeure" in English common law. Whether or not a contract party will be able to invoke a force majeure event, depends on whether the relevant agreement makes provision for it. If it does, then its application in the circumstances at hand depends on the specific wording of the relevant clause.

If there is no force majeure clause in the contract, then a party may be able to rely on the common law doctrine of frustration, but it is rare that courts will deem a contract to be frustrated. Mere financial hardship (e.g. performance under a contract becoming expensive) will in most cases not be considered sufficient. But other factors may be a frustrating event, e.g. the fact that a country has made it illegal for foreigners to enter might qualify.

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Finland

Finnish government has on 16 March 2020 declared a state of emergency in Finland over the coronavirus outbreak. Also, several other restrictions regarding the free movement of people and operations of businesses have been imposed and e.g. schools and restaurants are ordered to be closed. The current restrictions will remain in force until 13 May 2020.

The application of force majeure in the Finnish legal system is quite strict and the coronavirus may not be automatically considered a force majeure event. However, in the present situation in which the authorities have imposed restrictions and prohibit certain activities it is quite easy to argue that force majeure situation applies in the areas which are affected by such governmental restrictions. It is obvious that certain businesses suffer more from coronavirus than others and the applicability of a force majeure should be considered in each individual case separately based on interpretation of the contract in question and the causality between the corona crisis and the impediment. In order to help such interpretation, certain institutions like local Chamber of Commerce, may issue "Force Majeure Certificates".

In a force majeure situation a contractual party is temporarily freed from its contractual obligations without repercussions due to an unexpected and unforeseeable impediment. Force majeure may be constituted based on a contract clause, when the clause itself often specifies the conditions and circumstances in which the clause is applicable, i.e. a pandemic could be included. However, it is important to note that according to principles of Finnish contract law, a party may refer to the force majeure even without a specific contractual clause, as force majeure is considered a general contractual restriction of liability.

Force majeure clauses typically require that the event or circumstances could not have been prevented or the effects minimized by exercising precaution. This underlines the idea that parties may invoke the clause only when the force majeure circumstances prevent the fulfilling of a contractual obligation, not only because the coronavirus makes the fulfilling of obligations harder or less profitable; therefore a rise in costs or delays due to a pandemic do not typically constitute a force majeure event.

Even if the force majeure clause may seem to be applicable, it is important to consider whether it is beneficial for the parties to invoke the clause. The affected party has cumulative burden of proof of showing circumstances which impede the fulfilling of an obligation, the foreseeability of the impediment and the non-existence of any means to overcome it. The evoking of the clause may also cause the other contract party to react in a way that has significant financial effects. Therefore, the parties should openly communicate and negotiate about the situation and examine alternative measures such as time extensions and other remedies.

If the force majeure clause is invoked, the affected party needs to immediately inform the contract party and open a dialog about the situation, provide necessary documents and otherwise carefully fulfill all the terms of the force majeure clause and also other parts of the mutual contract based on the principle of fidelity in contract law.

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Greece

As a matter of legal principle, the term "force majeure" refers to excessive situations which either cannot be reversed by human capacities or may possibly be redressed but with more difficulty than other unforeseeable situations (Supreme Court 513/2016).

Although there is no ad hoc case law in Greece regarding an epidemic as a force majeure event indications can be found in older legal literature (a "plague of cholera" as an example of force majeure in K. Simantiras 'General Principles of Civil Law) or as dicta in court decisions (see CA of Larisa 185/2018 where an "epidemic disease" is included among other facts/events that may constitute a force majeure). Moreover, the idea of an epidemic disease to be considered as a force majeure incident is not something unknown to the Greek legal system as Article 1 of law 2079/1952 incorporated into the Greek legal system, the Forced Labour Convention of Geneva 1930 (No. 29) which in its article 2 par. 2 subpar. (d) includes among the "force majeure" incidents a "violent epidemic".

In any case, COVID-19 crisis seems to have the characteristics of "excessive" and of something beyond the "human capacities" and depending on each case, "unforeseeable" too.

The pandemic of COVID-19 may be deemed to constitute a force majeure situation either directly or indirectly. More specifically the infection by the virus itself may constitute directly a force majeure situation for an individual, given the various aspects of the ease of contagion, the number of days that somebody may be hospitalized and the quarantine which may be imposed on him. In Greek case-law one of the common grounds of force majeure is the "unexpected illness" of a person or of its sole attorney (see indicatively SC 1119/2017), which has as a result the non-performance of his obligations under a contract or his inability to be represented in a court hearing. It will therefore have to be examined on a case per case basis whether the infection by COVID-19 was "unexpected".

Furthermore, the pandemic may constitute a force majeure situation indirectly i.e. by the adoption of several measures by the State such as travel prohibitions, quarantine, temporary closure by ministerial decisions of many businesses, such as hotels, restaurants, retail shops etc. (e.g. in art. 1 par. 1 of the ministerial decision 12998/232/28.03.2020 it is expressly mentioned that the temporary closure of the some businesses by a State decision constitutes force majeure regarding the employment contracts). Such measures may affect the performance of a wide range of contractual relations and in some cases, it is highly likely that the COVID-19 crisis will be considered as a force majeure situation.

Characterizing COVID-19 crisis as a force majeure event may have various legal consequences such as e.g. to release a debtor from his liability for damages due to negligence according to art. 330 of the Civil Code or to allow a litigant to avoid the negative impacts of failing with a procedural deadline or time-limit (see art. 152 et seq of the Code of Civil Procedure) or to give the right to a party not to perform or to ask the modification of a contract according to art. 388 of the Civil Code.

Having said the above, it is important to note that, at least in Greece, many aspects related to the consequences of the coronavirus have been directly dealt by the legislator at the same time the legislative measures regulating this period were enacted. In such cases such as for example

(i) the employer/employee relation,
(ii) procedural deadlines and
(iii) the time-bar of claims that are directly regulated by the Law there is no need to examine whether the crisis constitutes "force majeure" or not as the provisions of the recent Laws will apply directly.

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Hungary

In Hungary, the statutory provisions do not define the exact meaning of force majeure, therefore the meaning of the term is heavily relying on the judicial practice. The general meaning of force majeure is an irresistible force that cannot be avoided by human power. However, in the courts' practice, such force cannot be deemed as force majeure on its own, as there is an additional requirement that the force must directly hinder the affected party to perform its obligations.

It is one of the principles of civil law that contractual obligations must be performed. Therefore, the parties are only exempt from performing their contractual obligations if they can prove that there is an exceptional, external and unavoidable circumstance that was preventing them from doing so. According to the judicial practice, if such circumstance is generally preventing every participant of the respective market, i.e. there is an economic recession, then such circumstance cannot be deemed as exceptional. Following this logic, the coronavirus pandemic cannot be deemed as a force majeure on its own, but any event that is the direct result of the pandemic, can be, i.e. an official closure. It must be also taken into consideration whether the referred cause was foreseeable at the time of the conclusion of the agreement and to what extent did it prevent the performance of the affected obligation.

We understand that it is rather difficult to consider such questions, therefore we have summarised the most important legal considerations that cannot be ignored.

1. **What obligations can you (and can't you) fulfil?**
   Consider which obligations of yours cannot be fulfilled at all, or that can only be fulfilled with a delay? This consideration provide clarity in legal and business terms and is an essential tool that help you to comply with the contractual commitments.

2. **Take a look at your force majeure clauses!**
   Force majeure clauses typically determine what the parties regard as force majeure, and what is to be done if they arise. If you do not follow the procedure set out in the contract, you may well lose the right to apply the force majeure cause. We recommend that you look at your key contracts from this perspective as soon as possible.

3. **Communicate!**
   Make sure that you immediately notify the other party in writing if a circumstance that will (or is likely to) prevent you from fulfilling the contract arises. If you're late in providing such notification, this can in itself result in liability for damages, even if you're not actually responsible for causing the problem that prevented performance.

4. **Doing nothing is not an option!**
   The virus, and the circumstances caused by the preventive measures against it, may prove to mitigate your responsibility for a breach of contract. Nonetheless, even in this situation the law still requires the parties to take the necessary measures to minimise any damage that can be minimised. Whatever may be reasonably expected of you in the interests of fulfilling the contract and mitigating the consequences, you still need to do.

5. **Adapt!**
   Information that's available on the virus is changing from day to day. Let's not forget that the situation will improve, and as it does, contractual obligations will gradually start to apply again, and may become fulfillable on the next day. Ensuring compliance with your obligations under the law requires that you keep up-to-date, and that you constantly adapt to the latest situation by taking appropriate action.

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India

The term Force Majeure translates as superior force in the French language. Typically, force majeure events include an Act of God or natural disasters, war or war-like situations, labour unrest or strikes, epidemics, pandemics, etc. The intention of a force majeure clause is to save the performing party from consequences of something over which it has no control.

According to the World Health Organization, COVID-19 is an infectious disease caused by the most recently discovered coronavirus. The Coronavirus, COVID-19, which originated in Wuhan, China, is widespread around the world with such speed that the World Health Organization (WHO) has declared the outbreak a pandemic. In terms of the precautions to be taken care by the Indian residents, Ministry of Health and Family Welfare has issued an advisory on social distancing, with respect to mass gathering and has put numerous travel restrictions to prevent the spread of COVID-19.

On 19th February, 2020, vide an office memorandum No. 18/4/2020-PPD, the Government of India has clarified that the disruption of the supply chains due to spread of coronavirus in China or any other country should be considered as a case of natural calamity and "Force Majeure Clause" may be invoked, wherever considered appropriate, following the due procedure.

Further, the Central Government and several State Governments, in India, have imposed travel restrictions, mandatory self-quarantine, closure of borders and business operations, with the sole intention to restrict any further spread of the COVID-19. Through our evaluation of various Indian judgments, the key ingredients for invoking a 'force majeure' provision, include:

i. Happening of an event which is beyond the reasonable control of either party to contract;

ii. Occurrence of an event which affects a party's ability to perform its obligations in a contract, either in entirety or in a timely manner; and

iii. Events which render an act to be impracticable and useless, for the time being, in terms of the object and purpose of the contract.

A force majeure clause is included in the contract to lay down the obligations of the parties in case of the occurrence of a force majeure event and the effect of such an event on the contract. However, there is no mandatory requirement to include a force majeure clause in a contract. In the absence of a specific clause relating to force majeure in a contract, the consequences of a force majeure event on a contract and the obligations under it will have to be examined to understand whether the contract has been 'frustrated' or rendered 'impossible' in terms of Section 56 of the Indian Contract Act, 1872 governing the contract in India.

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India (cont'd)

ILLUSTRATIONS:

i. Oyo Homes & Hotels has exercised 'force majeure' clauses as per their agreements amidst the Covid-19 pandemic, as the same has severely impacted the business of their hotels. As a result of nationwide lockdown, hotel revenues have decreased and are unlikely to improve in the next few months and thus Oyo has been constrained to exercise its 'force majeure' rights in suspending payments of the monthly benchmark revenue or any other amounts payable to the hotel owners.

ii. Hero Moto Corp, which is India's largest two-wheeler manufacturer, has stated that since the sales have drastically fallen due to the coronavirus shut down, the company will suspend full payments to its vendors as no other alternative amid the current crisis situation is available.

iii. In the light of the recent announcement dated 24th March, 2020 by the Hon'ble Prime Minister of India declaring 21 (twenty-one) days nationwide lockdown starting midnight of 24th March, 2020 and the subsequent order dated 24th March, 2020 vide No.40-3/2020-Dm-I(A) passed by the Government of India, Ministry of Home Affairs, this outbreak of COVID-19 has been considered as a force majeure situation that must be treated under the head of natural calamity/ Act of God.

iv. However, whether a party can be excused from a contract on account of COVID-19 being declared a pandemic is a fact-specific determination that will depend on the nature of the party's obligations and the specific terms of the contract.

Ireland

As the global effect of Covid-19 increases day by day, parties' abilities to perform contractual obligations have been impacted and will inevitably be further interfered with as this pandemic continues.

WIDESPREAD NON-PERFORMANCE OF CONTRACTS

Coronavirus has impacted the wider world to an extent that no-one could ever have envisaged, and the impact it has had on the economy seems likely to continue for the foreseeable future. It is inevitable that substantial business and operational disruptions, including interference to supply chains and business arrangements, is set to continue and increase in line with the restrictions being justifiably imposed in an attempt to counteract the current pandemic. However, one significant question which arises as a result is whether the global pandemic will be viewed by the courts as constituting a force majeure event and will essentially provide parties with an excuse in respect of delay/non-performance of their contractual obligations or whether a party will continue to be liable for breach of contract.

WHAT IS "FORCE MAJEURE"?

A force majeure clause can provide relief to a party who is unable to fulfil their contractual duties due to an unforeseeable event or situation i.e a "superior force". A force majeure event can either excuse a person from the contractual duties entirely, allowing both parties to walk away and consider alternative options, or alternatively, suspend their contractual obligations temporarily for the duration of the force majeure event.

Some legal systems have codified the concept force majeure into legislation and therefore the inclusion/non-inclusion of an express force majeure clause in the contract is not all that important. Codifying the concept of force majeure into legislation permits a government to deem a specific circumstance/event as constituting a force majeure event. This can be seen in China whereby on the 30th January of this year, the quasi-governmental China Council for the Promotion of International Trade (CCPIT) announced that it would issue "force majeure certificates" with a view to protecting companies in situations where disputes have arisen with foreign trading partners due to their inability to perform their contractual obligation as a result of the measures implemented by the Chinese Government in response to the Coronavirus pandemic. To date, it has been reported that thousands of certificates have been provided to companies in an effort to protect them against liabilities for non-performance of contractual obligations.

In Ireland, no legal presumption in favour of force majeure provisions exists and in fact, due to the serious impact that force majeure clauses can have, a strict interpretation has always been adopted by the Irish courts. In order for a party to rely on the concept of force majeure to relieve or delay their contractual obligations, it is necessary for there to be an express clause included in the contract which provides for the discharge of a person's obligations in pre-defined circumstances. In essence, it is not sufficient that a general force majeure clause merely be included in the contract but rather the parties to the contract must have contemplated and determined the relevant circumstances/events which would constitute a force majeure event and set them out expressly in the

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Ireland (cont'd)

contract. As a result, generally a force majeure clause may provide a non-exhaustive lists of events/circumstances which would trigger the force majeure provision. Obviously, it will prove easier to rely on the force majeure provision if the event/circumstance in question is expressly contained in the provision. Therefore, it would appear that unless terms such as 'medical emergency', 'pandemic', 'outbreak' etc. are expressly specified in the force majeure clause in the contract, it may be more difficult to rely on the relief afforded by the force majeure clause, but nevertheless not impossible.

In order to successfully rely on a force majeure clause in relation to the current pandemic, it is necessary that the party claiming inability to perform their contractual obligations is able to show that this inability is a direct result of the Coronavirus. Certainly, it appears that the concept of force majeure does not provide assistance whereby a party seeks to rely on it for non-performance of contractual obligations relating to payment. One aspect that is not clear under Irish law is whether force majeure provisions will have effect if performing the contract merely becomes uneconomical or more difficult, rather than actual impossibility of performance.

An additional requirement is that the party must be seen to take all reasonable measures to mitigate the event or the consequences which follow same. Force majeure clauses also may contain notice requirements which vary depending on the contract. Some contracts may require immediate notice to be provided or notice within a specified timeframe of the force majeure event occurring, whereas others may simply require notice within a reasonable timeframe. One consideration in this regard is when the force majeure event is deemed to have occurred – was it when Covid-19 was declared to be a global pandemic or was it when restrictions were imposed on travel and movement which ultimately rendered performance of the contract impossible. Determining this will be important in terms of when notice was required and if this was adhered to by the party seeking to rely on the force majeure provision.

CONCLUSION

The question of whether the current global pandemic and the inability of some parties to perform their contractual obligations as a result of same will be deemed to constitute a force majeure event under Irish law is not certain at this stage. It is made all the more unclear due the narrow interpretation that the Irish courts have adopted in respect of force majeure provisions in the past. Essentially, even if the contract contains an express force majeure clause, it appears that a general catch all provision may be declared void by Irish courts due to it being too vague. Therefore, it may be necessary for the parties to the contract to have considered and expressly set out in the contract specific circumstances in which a force majeure provision will be deemed to operate. It follows from this that unless Covid-19 can be deemed to fall within the scope of these pre-defined circumstances, the relief of the force majeure provision may not be afforded to an affected party and they may still be deemed liable for breach of contract.

While force majeure provisions appear to be construed strictly in Ireland, it is important to note that the current global pandemic is unprecedented. It is therefore impossible to tell how public policy decisions and government directives will impact the judicial consideration of force majeure clauses in the future. Nevertheless, disputes arising in relation to force majeure provisions and the Coronavirus pandemic appear to be inevitable.

Italy

Overview

The Covid-19 epidemic crisis is undoubtedly having a strong impact on commercial (and contractual) relations between companies and the question is whether, in practice, it may constitute a *force majeure - Act of God* situation from a legal point of view, with the consequence to justify a possible breach of the contract.

The first consideration is whether the contract expressly contains a *force majeure* clause. Indeed, especially in international trade the use of the ***force majeure*** and ***hardship*** clauses in commercial contracts and agreements is very usual.

As also underlined by the **International Chamber of Commerce, *force majeure* literally means "greater force"**: an event (i) beyond affected party's reasonable control, (ii) that it could not reasonably have been foreseen at the time of the conclusion of the contract and (iii) and the effects of which could not reasonably have been avoided or overcome by the affected party. Force majeure clauses excuse a party from liability if the unforeseen event prevents it from performing its obligations under the contract[1].

A **hardship clause**, on the other hand, requests re-negotiation of the contract if the continued performance of one party's contractual duties has become excessively onerous due to an unforeseen event beyond the control of that party.

Force majeure and Act of God in the Italian legal system

Having said that, and if the contract does not contain a *force majeure* clause, **with reference to the Italian legal system it must be noted that there is no specific law defining and regulating *force majeure*** (and also the ***Act of God***[2]**,** unlike what happens in other legal systems such as the French, Bulgarian or some common law systems.

The only articles, in the Italian civil code, which somehow refer to force majeure (and Act of God) are articles 1256 (in the section of the code "On the impossibility of performance for events not attributable to the debtor") **and 1467** (in the section relating to the of termination of contracts for consideration for the so-called "supervening impossibility of performance"). Force majeure is expressly mentioned only in the Italian penal code by article 45, which excludes the punishment of the person for lack of fault if the offence is committed by force majeure or unforeseeable circumstances.

[1] Common force majeure events are: war (whether declared or not), hostilities, invasion, act of foreign enemies, extensive military mobilization; civil war, riot, rebellion and revolution, military or usurped power, insurrection, act of terrorism, sabotage or piracy; currency and trade restriction, embargo, sanction; act of authority whether lawful or unlawful, compliance with any law or governmental order, expropriation, seizure of works, requisition, nationalization; plague, epidemic, natural disaster or extreme natural event; explosion, fire, destruction of equipment, prolonged break-down of transport, telecommunication, information system or energy; etc.

[2] In Italian legal systems also "*factum principis*".

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Italy (cont'd)

The above-mentioned articles of the Italian civil code both refer to the concept of "**impossibility**" of performance which, as explained in more detail below, can be a consequence of both *force majeure* and *Act of God*.

The Italian jurisprudence about force majeure and Act of God and Covid-19 epidemic

Before going over the aforementioned articles, it must be immediately clear that **the Italian jurisprudence has repeatedly analyzed the legal forms of *force majeure* and *factum principis* / *Act of God***, providing a precise definition and indicating the objective and subjective legal requirements.

From an objective point of view, according to the Italian *Corte di Cassazione* (Supreme Court of Justice), ***force majeure***[3] (as well as ***Act of God***) **is an extraordinary event or circumstance beyond the affected party control that cannot be foreseen and changes in a remarkable way the contractual relationship as to justify the breach of contract or makes the performance extremely onerous or expensive.**

As far as commercial relations between companies are concerned, there seem to be no doubts in confirming that the extraordinary and unpredictable nature of the spread of Covid-19 epidemic can be qualified as an hypothesis of *force majeure* as well as subsequent emergency legislation (issued by public authorities to limit the contagion) can be qualified as *Act of God* according to the aforementioned Italian jurisprudence[4].

As for the *factum principis* - *Act of God*, however, it should be noted that according to Italian jurisprudence the mere occurrence of the *Act of God* is not enough to excuse the non-fulfilling party from liability due to unforeseeable circumstances (pursuant to article 1256 of the Italian Civil Code). **The subjective requirement of the "absence of fault" on the affected party will also be necessary.** Therefore, it will not be possible to rely on the "impossibility" in the event that the *Act of God* was reasonably and easily foreseeable, according to the reasonable care, at the time of undertaking the obligation; or in the event that the debtor has not experienced all the possibilities that were offered to him to overcome or remove the obstacles coming from the Act of *God*[5].

Conclusion

Now, it is therefore possible to identify different consequences depending on the application of the aforementioned articles of Italian civil code.

In the case of application of article 1256, the obligation is extinguished if, for an event or circumstance beyond non-fulfilling party control, the performance becomes totally impossible (also due to force majeure or Act of God). If, on the other hand, the "impossibility" is only temporary, the non-fulfilling party, as long as the impossibility persists, will not be liable for the delay in performance.

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[3] Also equivalent to *cas fortuit* (French).
[4] See Italian Supreme Court of Justice, decision no. 16315 of 2007.
[5] See Italian Supreme Court of Justice, decision no. 14915 of 2018 and also Italian Supreme Court of Justice, order no. 8766 of 2019.

Italy (cont'd)

An event qualifiable as force majeure (such as the Covid-19 epidemic) if it does not make the performance "impossible", however, could make it excessively onerous or expensive. It is here, therefore, that the second mentioned article 1467 of the Italian Civil Code will apply.

Article 1467 of the Italian Civil Code, devoted to contracts for consideration or with deferred execution (i.e. purchase/sales agreements, lease, etc.), **states that one party can early terminate a contract in case its obligations become excessively onerous due to the occurrence of extraordinary and unforeseen events. The party cannot early terminate the contract if the supervening unconscionability falls within the normal risk (*alea*) of the contract**. The other party can avoid the termination by offering to "fairly renegotiate" the contract conditions.

Furthermore, it should be stressed that the emergency Italian regulations of the last few weeks, in addition to specifying provisions in relevant sectors (e.g. in travel, sport, etc.), generally established through **article 91 of Decree Law no. 18/2020**, paragraph 1, that: "*Compliance with the management measures referred to in this decree is always evaluated for the purposes of exclusion [...] of the debtor's liability, including in relation to the application of any [contractual] deadlines or penalty clauses related to non-performances or delayed performances*".

In the essence, the legislator intended to underline, wherever it had been put in doubt, that compliance with the Covid-19 epidemic management measures constitute a possible cause of exclusion of the non-fulfilling party liability.

However, this is a very general provision which will then be applied and interpreted by the courts on a case-by-case basis.

In conclusion, it can be said that an event such as the spread of an epidemic (and the subsequent emergency legislation issued by public authorities to limit the contagion) may constitute a (global) *force majeure - Act of God* situation from a legal point of view.

There can be many consequences in the Italian legal system (total or partial impossibility of the performance or *hardship*) depending on the type of undertaken obligation and the contract entered into between the parties.

The Netherlands

Under Dutch law a general principle is that a party being unable to meet his obligations is liable, pursuant to the Dutch Civil Code, for the damage suffered by the opposing party as a result of this non-performance. Force majeure is an important exception to this starting point. Contrary to some Anglo-Saxon oriented legal systems the Netherlands has statutory force majeure provisions which can be relied upon if nothing has been arranged for in the event of force majeure.

Under Dutch law parties are free to deviate from the statutory force majeure provisions in their agreement. In practice therefore the concept force majeure is frequently defined in more detail in an agreement or in the applicable general conditions. For this reason, it is advisable to give a good look at the contract first. By means of a force majeure stipulation, quite often found in the international contract practice, parties may be able to classify certain events under force majeure or to exclude them from it, in deviation of the statutory regulation. When answering the question whether a pandemic (in the given circumstances) constitutes force majeure, it comes down to the interpretation of the stipulation if the pandemic has not specifically been mentioned. Not only the used terms play a role in the way in which a stipulation must be interpreted, but also the (reasonably knowable) intention of the parties. The question then is whether it can be derived objectively from the contract or from the contract negotiations whether the parties intended to have this extraordinary event be classified under force majeure.

If the parties do not make any arrangements with regard to force majeure and Dutch law is applicable, then the statutory regulation in the Dutch Civil Code under article 6:75 applies. The law, in short, provides that a non-performance cannot be attributed to the debtor if he is not to blame for it nor accountable for it. This will not often be the case.

The legal consequences of a successful reliance upon force majeure have been described in the law. If force majeure has been relied upon successfully, the opposing party to the party on whose side a force majeure situation has arisen, cannot demand fulfilment of the performance. Neither is the party being in force majeure obliged to pay a compensation because he fails to perform. However, the opposing party to the party who came into a situation of force majeure does have the possibility to terminate the agreement.

Which extraordinary event in the given circumstances is considered to be force majeure and whether a party can rely upon the statutory regulation must be determined by the court on a case-by-case basis. Whether a reliance upon force majeure succeeds is for this reason quite often uncertain. Generally, it applies that a reliance upon force majeure is only honoured by the court in exceptional cases.

Relevant circumstances are, amongst other things: the time of conclusion of the contract, the extent to which the inability to perform could have been foreseeable, the exact nature and scope of the non-performance in relation to the contract and the nature and scope of government measures that may possibly have been announced.

The Dutch court has not yet reflected on the question whether an extraordinary event (comparable to a pandemic) such as Covid-19 justifies a reliance upon force majeure. In the Dutch legal practice, one seems to agree that a party who cannot in all reasonableness meet his obligations as a result of government measures taken because of Covid-19 can successfully rely upon force majeure. This will be different if that party has reasonable alternatives for compliance with his/her obligations.

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Portugal

The pandemic situation related to the NCovid-19 virus spread, as it has been declared by the World Health Organization, and the effects of the measures introduced, both at a national and international level, are raising serious challenges to companies and families, which could jeopardize the stability of business and, consequently, of the worldwide economy.

From a legal standpoint, it is necessary to assess if the above-mentioned outbreak constitutes, or not, a force majeure situation, especially regarding its effects on the fulfilment of contracts.

With origins dated back to the Roman Law, a generally accepted concept of force majeure is that of an event, direct or indirectly, beyond the human will, determining the material impossibility of executing the scope of an obligation. It is the case, for example, of any natural causes (namely, natural disasters, such as: floods, earthquakes or landslides), any legal act that removes the matter of the contract from trade, or any human action by any third parties that, within a certain contractual framework, and with irresistible strength and manner, make it impossible to fulfil the obligations.

And, if no particular difficulties are found when parties have specifically foreseen in the relevant agreements the effects (such as the suspension or even the termination of the contract without no indemnity) of the impossibility to fulfil an obligation under force majeure clauses (often including the case of epidemics), for the situations/relationships where a force majeure event was not expressly established, then the issue must be approached with caution.

As far as Portuguese law is concerned, the main command regarding the impossibility to fulfil/perform an obligation due to objective reasons is foreseen in article 790.º of the Portuguese Civil Code, under which the obligation ceases when its fulfilment becomes impossible, for reasons not attributable to the debtor. It must be clarified that such a rule has been interpreted by Portuguese higher courts in a sense that it comprehends the cases of absolute impossibility, where there is an "objective, insurmountable barrier for the debtor and for anyone who may replace him" and where the obligation cannot be "performed by anyone".

Considering the above, the existence of a force majeure event shall depend on the simultaneous verification of the following requirements: i) a true impossibility in fulfilling the obligation (an increase to the difficulties or an excessive burden are not sufficient, for this purpose) and ii) that such impossibility derives, in fact, from an event completely beyond the will or the control of the party invoking it.

Thus, while it is clear that the pandemic situation related to NCovid-19 is beyond the control and the will of the contractual parties, it is necessary to determine, on a case-by-case basis, if it really resulted in a true impossibility to fulfil/perform the obligation and only then can we state, on absolute terms, that we are before a force majeure event.

On a final note, and given the importance and relevance of the matter, we believe that this legal mechanism will experience new approaches, definitions and resolutions by the courts where the relevant disputes will soon be brought.

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Romania

Under the Romanian Civil Code, "force majeure" is defined as an external, unpredictable, absolutely invincible and inevitable event, and, unless the law stipulates or the parties agree otherwise, civil liability is waived when the damage is caused by force majeure.

- **Agreements with force majeure clauses**

Where an agreement contains a force majeure clause, generally, such clause may become applicable between the parties. The contractual parties will typically define the scope of the force majeure clause and prescribe the steps to be taken to trigger the clause, for instance, obligations to notify and mitigate.

Generally, a party which is unable or has failed to fulfil its obligations (undertaken under an agreement with force majeure clauses), due to a force majeure event, may request a certificate from the Chamber of Commerce and Industry of Romania "**CCIR**"). The CCIR issues a certificate on the existence of force majeure cases and their effects on the execution of international commercial obligations, based on relevant documentation. Nonetheless, such a certificate does not represent undeniable evidence of the force majeure event.

- **Agreements without force majeure clauses**

The fact that there is no force majeure clause in the agreement does not mean that force majeure cannot be invoked. In this case, the general principles of force majeure apply.

- **Rules protecting small and middle-sized enterprises ("SMEs") debtors against force majeure**

The Romanian government recently adopted, with the aim of protecting the economy, specific rules on force majeure applicable to SMEs[1]:

- in the case of ongoing contracts (other than those for utilities), force majeure can be invoked against SMEs only after an attempt to renegotiate the contracts aimed to adjust their clauses by taking into account the exceptional conditions generated by the state of emergency. If the parties fail to achieve a result (after both negotiating in good faith), force majeure may be invoked by the party unable to execute.
- the unpredictable, absolutely invincible and inevitable circumstances (defining the force majeure), resulting from an action of the authorities taken for the application of the measures imposed by COVID-19, which affected the activities of the SMEs, and whose impact is attested by the emergency situation certificate, should be assumed as representing a force majeure event.

To conclude, the coronavirus crisis *per se* cannot be generally or automatically considered a force majeure event, and thus giving the affected parties the right to invoke the impossibility to fulfil their contractual obligations. The analysis of each agreement is essential to determine whether or not a measure ordered by the competent authorities is excluded from the application of force majeure rules. In addition, affected parties should be able to evidence that all conditions required for an event to be qualified as force majeure are met.

[1] SMEs are companies which have an average annual number of employees fewer than 250 and a net annual turnover of up to EUR 50 million (equivalent in Lei) or total assets of up to EUR 43 million (equivalent in Lei), according to their last approved financial statements.

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Russia

Under the Russian Law the force majeure - act of god situation means emergency, unforeseen and unavoidable situations, which cannot be reasonably predicted, avoided or overcome in time of contracts' execution and are not under the control of parties.

The standard list of the force majeure - act of god situations includes, among others, mass diseases (epidemies)[1].

How to constitute the pandemic 2019-nCoV (COVID-19) as a force majeure - act of god situation?

In connection with the fast spread of the 2019-nCoV (COVID-19) in the territory of the Russian Federation, the state authorities approve legislative acts, which stipulate that 2019-nCoV (COVID-19) is an emergency and unavoidable situation[2].

However, the pandemic 2019-nCoV (COVID-19) cannot be constituted as a force majeure only on the basis of the abovementioned facts. In accordance with civil legislation, the impact of the force majeure circumstances on the parties' relationships should be estimated individually in each particular case. The party, which refers to the force majeure, should prove that the breach of a contract was due to the pandemic 2019-nCoV (COVID-19).

That is why, it is not enough to refer only to the legislative acts, which stipulate that 2019-nCoV (COVID-19) is an emergency and unavoidable situation.

It is necessary to prepare documentary support of force majeure impact on contracts' relationships, as well as to apply for certification of the force majeure:

(1) In international contracts – to the Chamber of Commerce and Industry of the Russian Federation;

(2) In internal contracts – to the Chamber of Commerce and Industry of the relevant region[3];

The consequences of the confirmation of the pandemic 2019-nCoV (COVID-19) as a force majeure - act of god situation

To determine the legal consequences of the confirmation of the pandemic 2019-nCoV (COVID-19) as a force majeure the following questions should be clarified:

(1) Is a performance of the parties' obligations under the contract impossible due to the force majeure?

Or, if the performance is possible, is such a performance sill actual and relevant for the parties?

The impossibility of the obligation performance can be due to (1) the pandemic 2019-nCoV (COVID-19) itself as well as (2) the state authority legislative act, which is approved in connection to the pandemic 2019-nCoV (COVID-19) and provides

[1] Cl. 1.3. Procedure on the certification of the act of god situations (force-major) by Chamber of Commerce and Industry of the Russian Federation (appr. Decision of the Board of the Chamber of Commerce No.173-14 dd 23.12.2015).
[2] For example, the Moscow Mayor Decree No. 12-UM dd 05.03.2020.
[3] The letter of the to the Chamber of Commerce and Industry of the Russian Federation No. PR/0315 dd 26.03.2020.

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Russia (cont'd)

additional basis for the impossibility of the obligation performance. In the first case, the obligations terminate due to the impossibility of their discharge under cl. 1 art. 416 of the Civil Code of Russia. In the second case, the obligations terminate on the grounds of an act, issued by the state authority under cl. 1 art. 417 of the Civil Code of Russia.

Another situation – when the obligation performance is possible – raises the following questions: (1) is the performance possible even along with the pandemic 2019-nCoV (COVID-19); or (2) can the performance be continued only after the end of the force majeure?

In the first variant, one of the parties can face the fact that pandemic 2019-nCoV (COVID-19) situation leads to the great disadvantages. To prevent or minimize this negative effect, this party is entitled to apply to the court for amending or termination of the contract due to the essential change of circumstances (art. 451 of the Civil Code).

In the second variant, the party should notify its counterparty immediately, when the 2019-nCoV (COVID-19) situation starts to raise obstacles for duly performance of the obligations. According to cl. 3 art. 401 of the Civil Code in this case there is no liability for parties for non-performance or improper performance of their obligations. At the same time the parties should be ready to start the performance immediately once the force majeure will be ended (or in agreed terms).

Also, it should be noted that the creditor is entitled to withdraw from an agreement in case he loses his interest in the deal because of the delay in fulfilling obligations (cl. 9 Resolution of the Plenum of Supreme Court of the Russian Federation No. 7 dd 24.03.2016).

Slovakia

Closed borders, restrictions on transport, closed stores, business operations and schools, a ban of public events ordered by Slovak Government and the associated lack of large numbers of employees, followed by a decline in orders and massive layoffs, have made many entrepreneurs unable to meet their obligations, and they face liability for damages.

The inability to fulfil contractual obligations can have serious consequences in the long run, in the worst case leading to insolvency or indebtedness. Therefore, entrepreneurs that cannot meet their obligations should communicate with their business partners as soon as possible and review their mutual contracts, in particular the existence and applicability of a force majeure clause or change-in-law clause (if any), renegotiate contractual terms if necessary or, as the case may be, the possibility of termination of the contract.

Force majeure in general may be interpreted as an extraordinary unforeseeable event or circumstance, out of the reach and control of the parties, that results in the impossibility of performance or impracticable performance of contractual obligations. Since **Slovak law does not have a legal definition of force majeure, its definition in a contract (if any) is important and binding for contractual parties**. Lack of legal definition also means that it cannot be undoubtedly declared that the actual COVID-19 protection measures ordered by Slovak Government are force majeure despite the fact that such opinion may be reasonable and generally accepted.

Therefore, if a contract includes a force majeure clause, attention needs to be paid to what it implies under the contract, which obligations are affected by the force majeure and what steps in view of the force majeure provisions should be taken (e.g., notification of the other party about the occurrence of the force majeure event and its consequences for impossibility of performance of the contract).

If a business contract does not have a force majeure clause, liability for damages caused by the breach of contractual duty (not the contractual duty itself) may be avoided by claiming circumstances excluding liability under the liberalization provisions of the Slovak Commercial Code; such provisions are applicable if the breach of contractual duty was caused by an obstacle that occurred independently of the intent of the obliged party and that prevents the party from fulfilling its obligation, if it may not be reasonably assumed that the obliged party could have averted or overcome this obstacle or its consequences, or that it could have foreseen this obstacle at the time when the obligation was established.

In addition to the above, depending on the nature of the contract, performances resulting therefrom and other circumstances, a permanent, unpredictable obstacle to the performance of a contract may cause the expiry of an unfulfilled obligation by law (e.g., due to the frustrating of the purpose of a contract or subsequent impossibility of fulfilment of a contract provided that fulfilment cannot be carried out under more difficult conditions, at a higher cost or after the agreed time). Each contract and the related circumstances need to be considered on a case-by-case basis.

The concept of circumstances excluding liability under Slovak law is narrower than the concept of "force majeure" in other countries. Circumstances excluding liability under Slovak law relieve a party of liability for a breach of duty arising from such circumstance but do not relieve it of the obligation to continue to fulfill its contractual obligations, accept performance from the other party, pay contractual penalties and default interest, and do not deprive the other party of the right of withdrawal from the contract in the event of a breach.

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Spain

As a consequence of the declaration of the state of alert by the Spanish Government due to the "Covid 19" pandemic, a series of restrictive measures have been implemented, which have had a substantial impact on the commercial sphere. Therefore, we face an undoubtedly Force majeure event in respect of contract compliance, which is contemplated by Spanish Law.

Art. 1105 of the civil code: "Unless otherwise stated by law or agreed in a contract, nobody shall be liable for those events that could not have been foreseen or that, even foreseen, could not have been avoided."

The occurrence or non-occurrence of a force majeure event as a relief of liability arising from a breach of contract may have various effects:

1. Total inability to perform the contractual obligations, the defaulting party being relieved of liability. Nevertheless, there are some exceptions where force majeure would not apply such as on generic obligations since the generic thing can be replaced by another of the same kind. Nor would force majeure as a relief of liability apply in the event the contract or a legal provision expressly contemplated its non-application.
2. Partial inability to perform the contractual obligations, the defaulting party being relieved from performing those aspects of the contract it is unable to accomplish, but still being bound to perform the remaining obligations of the contract.
3. Temporary inability to comply with contractual obligations, the defaulting party being relieved of liability for delay.

In any case, the precise terms of the contract and its specific background context, which is the framework under which the agreement was entered into, must be necessarily considered.

In addition, it should be borne in mind that, at present, the situation of alert due to a coronavirus pandemic in Spain is not static but in progress and therefore it is likely to improve or worsen. For this reason, the way circumstances continue to unfold in each case and at each time should be taken into account in order to assess in an accurate manner the legal effects of the pandemic on contracts.

All things considered, and given that the "Covid 19" pandemic has had an impact on the stability of commercial relationships, as it is a clear impediment to regular performance of contracts, it would be advisable to make some variations in them so that they can continue to be performed, avoiding as far as possible their termination or suspension. Such variations should be agreed between the parties in order to avoid judicial claims and, from an economic standpoint, any damage and negative consequences such as unemployment, bankruptcy etc.

One legal tool that would allow for stability and continuity of contracts is the "Rebus sic stantibus" principle ("for as long as the relevant facts and circumstances remain basically the same"), and on its grounds modify or suspend the effects of a contract (either by means of an agreement or using it as an argument in court).

Although the "Rebus sic stantibus" principle is not provided for in any specific legal provision in Spain, it is contemplated by case law. According to Supreme Court case law we understand that this contractual tool would be of application in a case such as the "Covid 19" pandemic, since the following circumstances occur: 1.- Unforeseeable and extraordinary risk; 2.- Supervening and unanticipated event ; 3.- The pandemic causes a significant imbalance in the parties' rights and obligations; 4.- Risk which is not usually contemplated in contracts. 5.- The change of circumstances giving rise to the situation resulting from the Covid19 were not caused by the affected party. 6.- The affected party has acted under the principle of good faith and with no intent to cause or worsen the difficulty or inability to fulfil the contract.

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Sweden

1. CRITERIA

The extent of invoking force majeure under Swedish law due to Covid-19 is mainly determined by the wording of the contract/agreement at hand. There are no compulsory force majeure laws or "act of god" acts, however optional contract law may be applicable by analogy. Force majeure contract clauses may vary widely and may include either an enumeration of events which are considered as force majeure, or a more generally held writing covering events beyond the control of a party. It is also common to combine these writings. Enumerations can be either exemplary or exhaustive. It is also probable that force majeure clauses under review would have been interpreted restrictively as clauses of this type implies a limitation of liability. Typically, it needs to be an obstacle beyond the control of the breaching party, which could not be foreseen and whose effects could not reasonably have been avoided in order to constitute force majeure. In principle, it should be an insurmountable obstacle - or at least it should be unreasonably expensive for the obligor to exceed the obstacle.

Under Swedish (optional) law, force majeure has been formulated as follows for example in the Sale of Goods Act: *the buyer is entitled to damages for losses that he suffers because of the seller's delay in delivery, unless the seller proves that the delay was due to an impediment beyond his control which he could not reasonably be expected to have taken into account at the time of the conclusion of the contract and whose consequences he could not reasonably have avoided or overcome, (Section 27 of the Sale of Goods Act).* Whether rules of the Sale of Goods Act can be applied by analogy or not appears to be an open question under Swedish law. In multi-chain contractual relationships, it is often required to have what is sometimes referred to as a "double force majeure". What is meant by this expression are situations where, for example, incorrect delivery or non-delivery depends on one's sub-supplier or subcontractor. In order to claim force majeure it is required, in these cases, that the sub-supplier or subcontractor were affected by an obstacle out of their control, and that this in turn led to an obstacle beyond the control of the main supplier or the main contractor. This is not a necessary condition, but occurs in agreements and in optional law applicable in Sweden. In the Sale of goods Act Section 27.2 this is expressed as follows: *If the delay is due to a third person whom the seller has engaged to perform the whole or part of the contract, the seller is exempt from liability only if that third person would also be exempt from liability under paragraph (1). The same shall apply if the delay is due to a supplier of the seller or to someone else at a previous level in the chain of supply.*

2. CONSEQUENCES

The consequences of invoking force majeure depend on the circumstances of the individual situation/case and, above all, on the parties' agreement. However, it is not normally the case that force majeure automatically results in the termination of the agreement, especially not in long-term contractual relationships. More common is that the obligation of the party, to the extent that the obstacle exists, is postponed until after the obstacle has expired. It is common for the agreement to also include a possibility to terminate the agreement if the obstacle exists for a certain time, for example six months. The provision in Section 27 of the Sale of goods Act only regulates the question of the party's liability for damages. In practice, force majeure clauses tend to regulate the legal consequences in other ways. As stated above, it is more common for the delivery time to be delayed in the case of supply agreements. This also implies that it's not only the contracting party's liability for damages that is regulated, but also the counterparty's ability to, for example, terminate the agreement.

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A closely related legal implication to keep in mind is the possibility of an adjustment due to later occurred conditions under Swedish law namely Section 36 of the Contract Act (Sw. Avtalslagen 1915:218). Even if a particular event is not in itself affected by a certain force majeure clause, it can ultimately be affected by invoking this provision. Although it is possible to adjust an agreement in accordance with section 36, relatively qualified circumstances are required in the relationship between the parties, for an adjustment to take place, and predominately in consumer relations.

3. OTHER

Although it is not possible to express a general opinion about the effects of Covid-19 under Swedish law, some general advice can be given regarding approaches. Initially, it is important for the parties to identify and evaluate the circumstances in their own case. What are the risk areas, i.e. where can one identify probability that the Covid-19 effects will affect one's own business? What are the ways to avoid the effects of the virus? In most cases, force majeure will only excuse a breach of contract as long as the obstacle persists. For this reason, it is important to keep up to date on the circumstances and continue to evaluate the possibility of fulfilling one's part of the agreement. Documenting the effects of the obstacle is also an important issue. In the end, a claim of force majeure may need to be tried in a dispute by a court or arbitration. As stated above, it is up to the party that invokes force majeure to prove that obstacles existed. In this also lies to prove to what extent one has been prevented from fulfilling one's agreement. For example, if it is possible that partial delivery could have been done.

Thailand

The term "force majeure" as prescribed inter alia under the provision of Section 8* of the Thai Civil and Commercial Code ("the CCC") as referred to below covers the issue of legal protection to those effectively suffering critical situations in responding to or performing an act or to execute any undertaking as obliged under a contract and/or regulatory compliance. The Thai Government adopted and issued an Emergency Decree in mid-March 2020 aiming to halt the outbreaks of the Coronavirus COVID – 19 which commenced in the Kingdom in January 2020 through visitors/carriers who came from or visited the originating territories/countries and those returned Thai workers/persons from such places. Under this Emergency Decree and the notifications and/or orders executed by the Prime Minister and/or the competent officers appointed and empowered thereunder, all directions and any other measures adopted and executed by the said authorities constitute a force majeure or act of God situation under the above-referred provision.

We advise our clients and friends that the effectiveness of this provision towards the Pandemic Coronavirus whereby all debtors or obliged parties can refer to Section 8 of the CCC to defer or delay their dutiful performance under the regulation or the contract for a period of not less than 3 months according to the duration prescribed in the Emergency Decree. We have learned that banks, financial institutes, the Labour office, the Social Security Office, and the tax authority as well as other government enterprises including the power supply enterprise, the water supply enterprise, and the telecommunication enterprise, are all concentrating on adopting the extension of payments and/or reducing premiums or fees to their customers.

*Section 8 of the CCC

"Force majeure" means any event, either it will be happened or will cause a disaster, which could not be prevented even though a person who shall face or will nearly face such event may be able to prepare appropriated undertaking which could normally be expected form the person under such status and condition."

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United Arab Emirates

On 30 January 2020, the World Health Organization declared the COVID-19 outbreak a 'public health emergency of international concern' and on 11 March 2020 declared it a pandemic. The question many legal practitioners are being faced with is, whether COVID-19 could be considered a force majeure event.

While UAE law does not specifically define what exactly a force majeure event is, Article 273(1) of Federal Law No. 8 of 1985 ("Civil Code") does provide that if a force majeure event makes performance under an agreement impossible, the associated obligations under such agreement will cease and the agreement will automatically terminate. Article 273(2) further provides that where performance is partially or temporarily impossible, that portion of the agreement will be extinguished - the obligor may nevertheless elect to terminate the entire agreement, provided the obligee is given notice of such termination.

However, such articles of the Civil Code do not provide for temporary reprieve where possible and/or practicable. Accordingly, it would likely be for the parties to agree to delay or postpone performance if they so wish.

Should a dispute arise, UAE Courts will likely look to the particular agreement in question as well as the facts of the matter, to ascertain whether the COVID-19 pandemic would constitute a force majeure event in those specific circumstances.

A party wishing to rely on the defence of force majeure should not only meet the high bar of impossibility of performance, but should also show (to the satisfaction of the court) that the event causing such impossibility fulfills the criteria for force majeure as generally established by UAE Courts in past jurisprudence. Namely, lack of: (a) foreseeability at the time the agreement was entered into; and (b) preventability.

Whether the UAE Courts will see the COVID-19 pandemic as a force majeure event remains to be seen. It will depend on the facts surrounding a given matter. The degree to which precautionary measures and rapidly deteriorating economic conditions make it impossible for parties to perform under their agreements will surely be an important factor for courts and arbitration tribunals to take into account. However, it should be noted that parties who have entered into agreements subsequent to the outbreak but who later wish to rely upon the pandemic as a force majeure defence for non-performance may have a harder time meeting the established criteria.

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United States - Delaware

The novel coronavirus making its way around the globe, and the associated government-mandated closure of innumerable businesses, has many parties to commercial agreements wondering whether the COVID-19 pandemic constitutes a "force majeure" excusing (at least temporarily) their performance under those contracts. For agreements governed by Delaware law, the answer is entirely dependent on the language of the force majeure provision in the contract.

Force majeure clauses typically include lists of unanticipated events beyond the control of the parties, the occurrence of which will excuse or delay a party's performance. Under Delaware law, the "[a]pplication of a force majeure provision, as with any other contractual provision, starts with the words chosen by the drafters." See Stroud v. Forest Gate Dev. Corp., No. Civ.A 20063-NC, slip op. at 13 (Del. Ch. May 5, 2004). A force majeure clause could cover the COVID-19 pandemic (as it was declared by the World Health Organization) if it includes specific public health-related language, such as "pandemics, epidemics or plagues". Unfortunately (or fortunately, depending on which side of the contract you stand), the vast majority of contracts do not contain such a specific epidemic or pandemic-based definition of force majeure.

A force majeure provision may also expressly cover "government action". Government mandated shut-downs would likely trigger such a force majeure provision. But again, a great many agreements will not include such a specific government action-based definition of force majeure.

Force majeure clauses frequently also contain catch-all language such as "or other similar causes beyond the control of such party". In Stroud, the Court indicated that a catch-all provision must be construed within the context of the causes that were specifically listed in the contract. In that case, the Court concluded that the phrase "or any other reason whatsoever beyond the control" of the party claiming a force majeure required that the reason be not only beyond the reasonable control of the claiming party but also that it not be reasonably foreseeable in the ordinary course. It would seem that a pandemic such as COVID-19 is both outside the control of the parties and not reasonably foreseeable in the ordinary course, and so stands a good chance of being held to constitute a force majeure under such a broad catch-all provision. Of course, if the catch-all provision were worded slightly differently, the result could also differ.

In short, as with so much in the world of contracts, it all comes down to the precise words chosen.

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Whether COVID-19 constitutes a force majeure event under a particular contract depends on the terms of that contract and the relevant facts. Events such as war, terrorist attacks, famine, earthquakes, floods, strikes, fire, epidemics, "acts of God," and government action are typically included as force majeure events excusing performance. Some force majeure clauses also include catch-all language broadly excusing performance based on similar or dissimilar events, and other significant events outside the parties' control.

Unless the relevant contract mandates a non-judicial dispute resolution, a court would ultimately decide whether COVID-19 constitutes a force majeure event under the contract where the parties disagree. Because state law governs the application and interpretation of force majeure clauses, the laws of the state whose laws govern the contract should be analyzed. Although most U.S. courts construe force majeure clauses according to their plain language, they do so narrowly, and courts may diverge from the plain language on the basis of foreseeability of the underlying event, particularly if the underlying event is covered by a catch-all provision in the force majeure clause (rather than being specifically listed). For example, a court might inquire into the foreseeability of an epidemic that is not specifically listed as a force majeure event, and if the court determines that such an event was foreseeable, it will likely hold that it is not force majeure.

A court may also analyze what the plain language used to list an event actually means. For example, a court faced with determining whether "quarantine," "quarantine restrictions," and the like include quarantine restrictions affecting a workforce, may decline to do so if, based on relevant industry practice, it finds the most reasonable interpretation is that the provision was intended to refer only to the quarantine of vessels. Similarly, not all courts interpret "acts of God" the same way, and courts may disagree on the extent to which a series of events (which may be both natural and political) should be treated as a single or combined force majeure event. Further, even if the parties explicitly allocate the risk of the specified event, courts still sometimes inquire into the foreseeability of the event.

The parties to a contract also need to determine whether an exclusion included in the force majeure clause applies to the underlying event which the impacted party seeks to declare a force majeure event. As part of the negotiated risk allocation, parties often specify that certain events are excluded as force majeure events, thus preventing an impacted party from being excused from performance on account of such event and otherwise availing itself of the benefits of the force majeure clause. Typical exclusions include changes in economic circumstances (including inability to pay), equipment failure, labor issues due to a party's lock out of its own employees, and other issues that are reasonably within a party's control. Commercial real estate leases in particular usually provide that the occurrence of a force majeure event is not an excuse to cease paying rent.

If a party to a contract anticipates that it will not be able to perform under that contract due to COVID-19, it should review the contract to assess whether the force majeure provision may apply and then carefully document support for a potential force majeure claim, including timing, size of the impact, and mitigation efforts.

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United States - Ohio

Many businesses are feeling a strain on operations due to the recent global coronavirus outbreak (COVID-19). As the virus continues to spread, the long-term ramifications it will have for businesses are unclear. However, businesses that may be affected should consider what steps are necessary to mitigate their risks should any interruption in their businesses occur. One of the questions companies should ask is, "Does the coronavirus outbreak fall within the operation of a force majeure clause?"

What is a force majeure clause?

A force majeure clause governs what happens in the event of specified events or events beyond the control of either party after entering into a contract. Events that qualify as a force majeure typically depend on the language provided in the specific contract, but generally include events such as natural disasters, acts of God, strikes, war or other radical and extreme events that are not due to the fault of either party.

Courts will generally recognize events expressly listed and, when qualifying events are not expressly stipulated, will presume that force majeure events are limited to supervening events which arise without fault of either party and for which neither party intended to undertake responsibility. If implicated, a force majeure clause may provide for different solutions including complete discharge from the contract or extension of time for performance. In any case, a force majeure clause usually holds all parties to the contract safe from liability for non-performance or delay in performance.

Steps to invoke the force majeure provisions of a contract

Businesses should review their contracts to determine if force majeure provisions apply and if so, in what instances or events those clauses are triggered. On January 30, the China Council for the Promotion of International Trade (CCPIT) announced it would offer "force majeure certificates" and since then has issued thousands of force majeure certificates. Another indication that the coronavirus may prompt the applicability of a force majeure clause is the recent World Health Organization announcement declaring a global health emergency in response to the outbreak. Additionally, the United States declared a state of emergency due to the rapidly spreading virus and implemented new health screening requirements for U.S. citizens returning from China's Hubei province.

There are several steps a business should take if it is looking to invoke the force majeure provisions of a contract:

1. Carefully review the force majeure provisions to determine in what situations and for which events the provision applies and what the provision allows if implicated.
2. Obtain as much information as possible regarding how the force majeure event has impacted the business – what areas of the business have been affected, how it will affect performance under the contract, how long is the delay in performance expected to last, and when is the force majeure event expected to conclude?
3. Ensure there are no other alternative means for the company to perform its obligations under the contract or that the company has taken all possible steps to avoid implication of the force majeure provision.
4. Review and confirm that all notice requirements under the contract have been satisfied, including time limitations on reporting.

Businesses seeking to invoke the force majeure provision should be aware that the other party's rights, if the provision is invoked, may include the right to immediately terminate, terminate after a specified period of time, or source an alternate supplier. Businesses should consult with an attorney before sending a notice to ensure contractual compliance.

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