COVID-19 and Force Majeure

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Force Majeure

A *force majeure* is generally defined as "an act of God or man that is unforeseen and unforeseeable and out of the reasonable control of one or both of the parties to a contract, and which makes it objectively impossible for one or both of the parties to perform their obligations under the contract."

Force majeure – or vis major (Latin) – meaning "superior force", also known as cas fortuit (French) or casus fortuitus (Latin) "chance occurrence, unavoidable accident", is a common clause in contracts that essentially frees both parties from liability or obligation when an extraordinary event or circumstance beyond the control of the parties, such as a war, strike, riot, crime, epidemic or an event described by the legal term act of God (hurricane, flood, earthquake, volcanic eruption, etc.), prevents one or both parties from fulfilling their obligations under the contract. In practice, most *force majeure* clauses do not excuse a party's non-performance entirely, but only suspend it for the duration of the *force majeure*.

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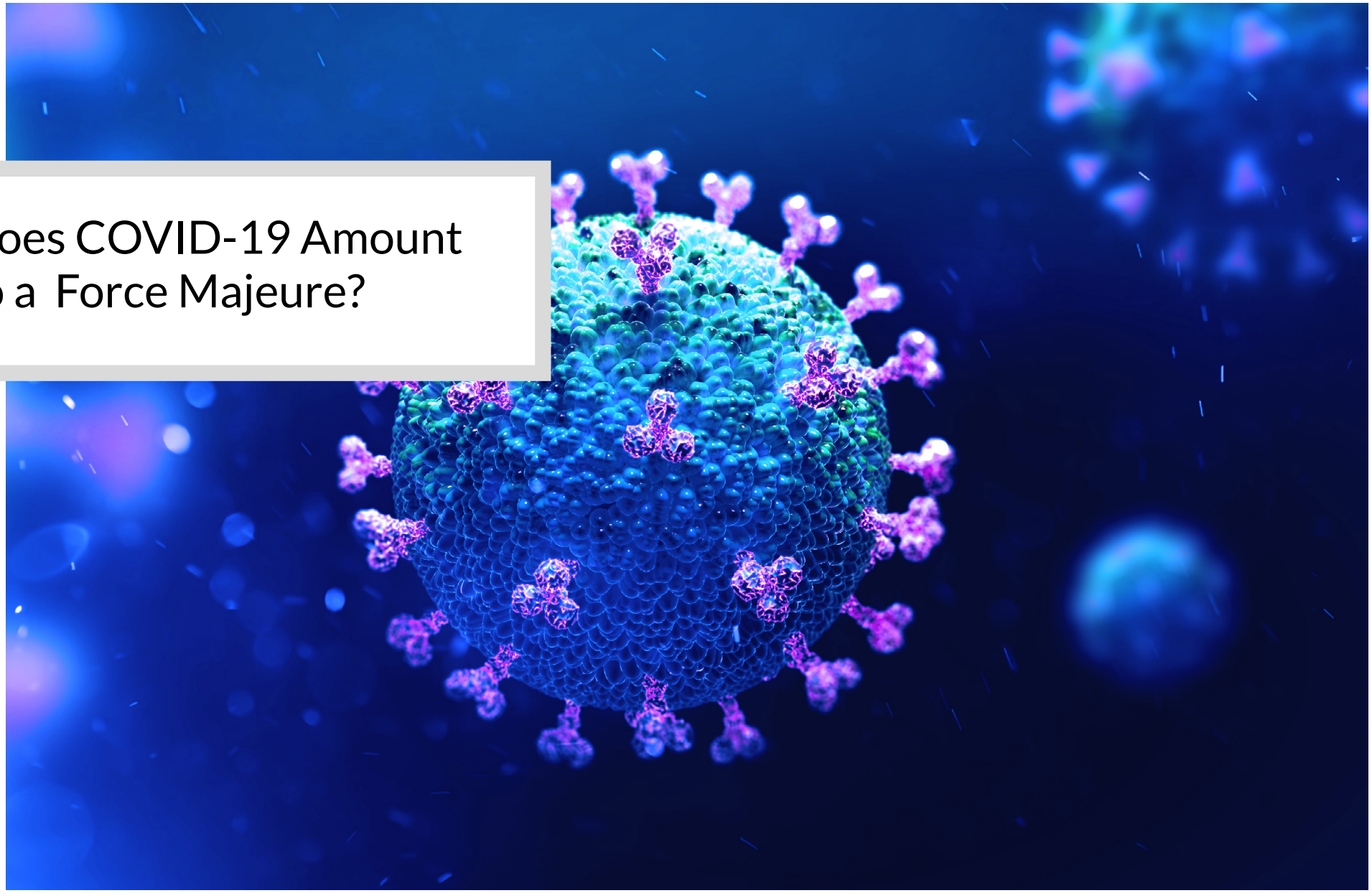
Does COVID-19 Amount to a Force Majeure?



Views

What follows below are a number of views expressed since the outbreak of COVID-19.

In an article by Georg Kahle and Yasmine Wilson published in ***Financial Institutions Legal Snapshot*** *(dated March 23, 2020 and entitled "COVID-19 and force majeure" the authors write (mostly in the context of South African law):*

"Will the coronavirus (COVID-19) constitute a *force majeure* event under South African law? The answer to that is it depends. The virus has been declared as a pandemic by the World Health Organisation and is causing economic chaos on an international scale never seen before, due to the closure of businesses and consequent disruption of global supply chains. On a local level it is disrupting retailers, restaurants, service providers, such as taxi services and local businesses.

These disruptions may make it difficult for people and businesses to meet their obligations under contracts.

There are specific circumstances and criteria that need to be met for '*force majeure*' to be relied on to suspend obligations under a contract. Businesses should be careful to not simply rely on '*force majeure*' to escape their contractual obligations. Doing so could result in specific performance or damages claims being brought against that party.

Businesses should seek legal advice before not honouring contractual obligations because of issues related to the COVID-19 outbreak."

Force majeure (vis maior) in South Africa's common law.

If an agreement does not contain a *force majeure* clause, or if a *force majeure* clause in a contract does not name the unforeseen event that the parties wish to rely on, then the parties may be able to rely on the common law principle of 'supervening impossibility of performance' to suspend their obligations under the contract, provided that it has become objectively impossible for them to perform under the contract as a result of an unforeseeable and unavoidable event.

South African doctrine of impossibility.

- The impossibility must occur after the conclusion of the contract.
- These events must be unavoidable and make proper performance of the contract impossible and must not merely make performance more burdensome or economically onerous.
- If performance becomes objectively or absolutely impossible, the contractual obligation is extinguished and the duty to perform and the corresponding right to claim performance falls away.
- Objective impossibility includes instances of actual physical impossibility and also where performance remains physically possible but cannot reasonably be expected to be performed.
- Both parties' obligation to perform the contract will be extinguished.
- If the event causing the impossibility was foreseen or foreseeable and could have been avoided, then the parties cannot rely on this doctrine to not perform their obligations.
- Once the *force majeure* event has come to an end and performance has become possible again, the contract will continue.
- The creditor will have the option to terminate the contract if the interruption is likely to endure for an unreasonably long time. The question of what is an unreasonably long period of time is one of fact. In the event of the contract being terminated due to the *force majeure* clause, certain financial obligations can still be applicable and could be paid at a reduced price.

Force majeure clauses in contracts.

The principal objective of a force majeure clause in a contract is to relax obligations and to set a limit to the strict liability imposed on a party to perform in terms of a contract in the event of certain circumstances arising, which prevent or have an effect on the party's ability to perform.

It provides protection to a party from being liable for damages for a breach of contract provided that it can be classified within the ambit of the definition of *force majeure*; and it halts the parties' contractual obligations to one another for a period of time.

Parties often include time periods during which the contract will be suspended if a *force majeure* event occurs. This gives any party the right to elect to terminate the agreement unilaterally by way of notice to the other party should the *force majeure* event continue for longer than the set period. This period will depend on the agreement between the parties and the nature of the obligation, the contractual performance and the practicality of allowing for such a suspension.

Both parties will be excused from performing, because the impossibility of performance, due to an event beyond the control and foreseeable expectation of the parties, causes their intention of performing an agreement to be extinguished, and frustrates the purpose of their agreement. This is based on the *impossibilium nulla obligatio est maxim* (nobody has an obligation to do the impossible).

Wording of *force majeure* clauses.

If your existing contracts have force majeure clauses in them, then you may be able to rely on these clauses, instead of the common law principle of 'supervening impossibility of performance' to suspend your obligations under a particular contract if performance of that contract becomes impossible as a result of an uncontrollable event.

If *force majeure* clauses are vague and incomprehensive, their interpretation could be problematic. South African law applies presumptions of interpretation to determine the meaning of words in contracts when the intention is not clear from the way a clause is drafted. To interpret the agreement, the court will presume that the words used are used precisely and exactly, that the parties chose their words carefully to express their intention, and that no superfluous words were included.

In the case of *Sucden Middle-East v Yagci Denizcilik ve Ticaret Ltd Sirketi (The 'Muammer Yagci') – [2020] 1 lloyd's rep. 107* the UK court noted that the phrase '*force majeure*' is simply a phrase to label a list that includes a mixture of matters. The list informs the meaning of the phrase, and not the other way around.

The South African courts would likely follow the same approach. The parties cannot simply rely on a clause that is labelled as a '*force majeure*' clause or contains those words, but does not list or elaborate on what the parties agree a *force majeure* to be. *Force majeure* clauses must be detailed and specifically list the *force majeure* events that the parties agree will suspend their performance of the contract (such as an epidemic). In this regard, parties should specifically list broad catch-all wording to contracts such as 'act of God' or 'acts of authorities' that they can rely on to encompass events they may not reasonably have foreseen.

An agreement should also specifically state that the *force majeure* events include a pandemic and acts by government. This will ensure that there will be no doubt that the consequences of the coronavirus will be covered by that *force majeure* clause. Given that South Africa recently announced a State of Disaster, certain effects flowing from this determination may be caught as 'an act of authority'. We can assist you with either adding a *force majeure* clause or amending the *force majeure* clauses in your existing agreements to provide for a situation where it may be impossible for you to perform as a result of the consequences of an infectious disease outbreak such as the COVID-19 outbreak."

André Visser, Sibusile Khusi and Kelly Mzobe of the firm Adams & Adams wrote on 23 March 2020 (also mostly from a South African perspective):

***CLICK HERE** FOR MORE INFO ON ADAMS & ADAMS COVID-19 FORCE MAJEUR BREACH OF CONTRACT*

"On the 5th of March 2020, the National Institute for Communicable Diseases confirmed that South Africa's first suspected case of COVID-19 had tested positive. The impact of this highly contagious virus has forced the world to find a new normal as we navigate our lives around containing its spread as much as possible. How does this affect existing agreements and performance under these agreements?

In the context of South African common law any occurrence beyond the control of parties, to an agreement, which makes the performance of contractual obligations impossible after the conclusion of a contract (that does not have a so-called *force majeure* clause) is dealt with in accordance with the principle of supervening impossibility. As a general rule, if a situation arises, without any act or fault of either of the parties to the agreement, which renders the performance of a contractual obligation by one of the parties impossible, the party is excused from the failure to perform. However, a party seeking to rely on this principle must show that the performance is objectively impossible and not just difficult, burdensome or economically onerous.

Due to the limiting nature of the common law position, many agreements today include a "*force majeure*" clause which is included in an effort to protect against the potential risk of an occurrence, through no fault or act of either of the parties, which may render the performance of contractual obligations impossible.

This type of clause usually sets out the following:

- **what would constitute a *force majeure* by providing a list of such events;**
- **a catch all phrase on what would constitute a *force majeure* (discussed below);**
- **a requirement that a party seeking to rely on the *force majeure* clause must provide the other party to the agreement with a notice before invoking the *force majeure* clause for purposes of not fulfilling their contractual obligations; and**
- **a period after which the agreement may be terminated by either of the parties without liability to the other for any loss suffered if the *force majeure* continues beyond that period.**

If an agreement includes such a *force majeure* clause, the parties will have to rely on the specific provisions of the agreement and, if an agreement does not include such a clause, the parties will have to rely on the common law principle of supervening impossibility.

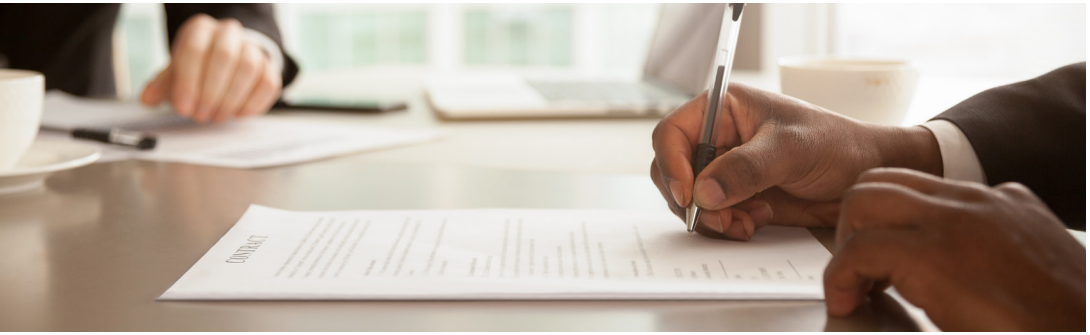
Due to the recent outbreak and spread of COVID-19 world-wide and the precautions put in place by relevant stakeholders in an effort to minimise the spread of the virus, parties to agreements in South Africa are finding themselves in a position where the performance of their contractual obligations are now either arguably impossible or onerous to fulfill.

Whether you are a party that is seeking to rely on the *force majeure* clause or the party that anticipates that a *force majeure* clause will be relied upon, your first starting point is to carefully review the provisions of your agreement. A party seeking to rely on a *force majeure* clause that is included in an agreement, must first examine whether the clause caters for the occurrence of a circumstance such as the results flowing from the spread of COVID-19. This is important as many *force majeure* provisions are either drafted narrowly or widely. An example of a narrowly drafted *force majeure* clause is when the provision specifically lists the events which may occur, such as an act of God, a strike, fire or war like operation without making provision for any other event outside of the listed events, which a party may rely on to invoke this clause. Whilst a widely drafted *force majeure* clause will normally include, in addition to a list of *force majeure* events, what is known as "a catch all phrase" such as "any event arising beyond the control of the parties, rendering the performance impossible". Therefore, a party seeking to rely on a *force majeure* clause due to COVID-19 must ensure that the provisions of the agreement governing the relationship between the parties are wide enough to include this pandemic.

The impossibility of performance must be objectively impossible and not merely cause an inconvenience in the performance of a party's obligations. An example of an occurrence which may render an obligation in a contract impossible, is one where the law changes and the performance becomes illegal. For example, the impact of sudden import restrictions which may make the importing of goods illegal and thus rendering the supply of goods by a party impossible. Therefore, even if an agreement caters for an occurrence such as COVID-19, a party must prove that the result flowing from the existence of the pandemic renders the performance of their obligations impossible, in order to be excused of any liability arising from non-performance. It is the result of the pandemic that may render the performance impossible and not just the mere occurrence of the pandemic.

Parties must also be mindful of those agreements they have entered into which are subject to the fulfillment of suspensive conditions (terms in an agreement that must be met after the signing of the agreement in order for the whole agreement to come into effect). Some of these suspensive conditions include a "material or adverse change" clause. The purpose of a material or adverse

change clause is to provide parties with the option to terminate their agreement if there arises a material or adverse change, through no fault or act of their own, during the period provided for the fulfillment of the suspensive conditions. However, if what constitutes a material or adverse change is not clearly defined in the agreement, the interpretation of a material or adverse change may have limited application depending on the provisions of each agreement. We recommend that any party with such a clause incorporated in their agreement, who is either seeking to rely on the clause to terminate an agreement or is on the receiving end of such a clause, seeks legal advice before taking further steps.



It is worth noting that the principles discussed above are not only applicable to commercial contracts involving multi-national corporations but are also applicable to contracts involving small medium enterprises, especially considering that the current restrictions issued by the South African government have had an impact on all businesses across the country. For example, the prohibition of gatherings of more than 100 people has resulted in the cancellation or postponement of wedding venue bookings, concerts and conferences, etc. Therefore, it is important that parties revisit the terms and conditions of their agreements in this regard, and seek legal advice in order to ascertain, the relief available in such circumstances, if any.

In the event that South Africa experiences a total shutdown, retailers and wholesalers may wish to ascertain whether the terms and conditions of their lease agreements provide for a review of the terms, a rent reduction or the termination of the lease agreements due to the impact of the virus. Unless an agreement specifically caters for a review of the terms of a lease agreement, reduction in rent amount payable or the termination of the lease agreement in the circumstances of a pandemic, there is no automatic right to review the terms, reduce the rent amount payable or terminate the lease agreement. Therefore, it is important that contract parties first establish their legal position before taking any steps in respect of their agreements.

The law of contract allows parties the freedom to agree and bind themselves to any form of arrangement provided that such arrangement is legal and they are at liberty to re-negotiate the provisions of their agreement. COVID-19 is currently affecting every aspect of the global economy and has placed countries in difficult positions. South African President, Cyril Ramaphosa, made it clear that all citizens must work together, in solidarity and in partnership. Therefore, despite the agreed upon provisions of an agreement, which may strictly dictate the contractual relationship amongst parties to an agreement, parties are at liberty and may consider re-negotiating in good faith the existing provisions in light of the effects of the pandemic, in an effort to mitigate each party's respective loss."

07 April 2020 Lydia le Roux , Legal Advisor for LexisNexis South Africa wrote an article called "*Force majeure* – an analysis of what *force majeure* is, mitigating its risks, remedies available to parties in the event of a *force majeure*, and whether COVID-19 is an event of *force majeure*" and stated the following:

***CLICK HERE** FOR AN ANALYSIS OF WHAT FORCE MAJEURE IS*

What does *force majeure* mean?

Force majeure is a common clause in contracts that essentially frees both parties from liability or obligation when an extraordinary event or circumstance beyond the control of the parties, such as a war, strike, riot, crime, plague, or an event described by the legal term act of God (hurricane, flood, earthquake, volcanic eruption, etc.), prevents one or both parties from fulfilling their obligations under the contract. In practice, most *force majeure* clauses do not excuse a party's non-performance entirely, but only suspend it for the duration of the *force majeure*.

Where a contract is silent on *force majeure* or no written contract is in place, we need to follow the principles of the common law. South African law is, however, quite strict in the sense that it does not excuse the performance of a contract in all cases of *force majeure*.

There are certain conditions that must be fulfilled in order for a *force majeure* to trigger impossibility to perform. These are:

- **the impossibility must be objectively impossible;**
- **it must be absolute as opposed to probable;**
- **it must be absolute as opposed to relative, in other words if it relates to something that can in general be done, but the one party seeking to escape liability cannot personally perform, such party remains liable in contract;**
- **the impossibility must be unavoidable by a reasonable person;**
- **it must not be the fault of either party; and**
- **the mere fact that a disaster or event was foreseeable, does not necessarily mean that it ought to have been foreseeable or that it is avoidable by a reasonable person.**

You may wonder whether you are protected during this period by appropriate contractual rights, particularly in relation to *force majeure*, as businesses will start to receive notices in terms of *force majeure* and might also require such notices to be sent out.

A company must prove that the *force majeure* event was not within its reasonable control. There must usually be a link between the *force majeure* event and the failure to perform. The important question remains: is it actually impossible for a party to fulfill its obligations under the contract?

While a party may be excused from its obligations under the contract while the *force majeure* continues, there is usually an obligation to use all commercially reasonable efforts to alleviate and mitigate the cause and effect of the *force majeure* event and resume performance of its obligations once it is able to do so.

Remedies available to parties in the event of a *force majeure*.

The general effect of a *force majeure* is that parties are excused from their obligations. This means that a party who validly fails to perform as a result of a *force majeure* cannot be sued for any damages suffered by the other party as a result of the non-performance of the other.

Steps to take to mitigate risks.

It is important for companies to take proactive steps to ensure that they can fulfill their contractual obligations and that the parties they are contracting with are doing the same in order to prevent the need for invoking a *force majeure* clause. It is also recommended that you review your insurance policies potentially covering an event such as COVID-19.

Is COVID-19 an event of *force majeure*?

In the event where a complete lockdown has been communicated and, as a result, contractual performance is rendered impossible, contracting parties would then be able to rely on a *force majeure* clause or rely on the principles of the common law.

As an introduction to and an aid to legal practitioners in understanding the legal nature, scope and implications of *force majeure* in practice, LexisNexis asked Advocate Chris Rodel of the KwaZulu-Natal Bar for a compilation of relevant citations and extracts from the Lexis Library using the **Advanced Search** and **Legal Citator**.

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Conclusion

Parties to commercial agreements need to carefully consider what constitutes *force majeure* in order to determine if the COVID-19 outbreak could be interpreted as *force majeure*.

Procedures which may be provided in commercial agreements in respect of the sending out of a force majeure notice to the other party would need to be adhered to fully. Further, companies should take reasonable steps to mitigate force majeure events, where permissible. Failing which, companies may not be successful in relying on force majeure as a mechanism to be excused from their obligations.

1. Amazon.com: International Business Law and Its Environment, Eighth Edition (South-Western Legal Studies in Business Academic Series) (9780538473613): Richard Schaffer, Filiberto Agusti, Lucien J. Dhooge, Beverley Earle: Books. amazon.com.
2. Glencore Grain Africa (Pty) Ltd v Du Plessis NO & others [2007] JOL 21043 (O).
3. The convergence of COVID-19 and *force majeure*, Thato Mashishi.

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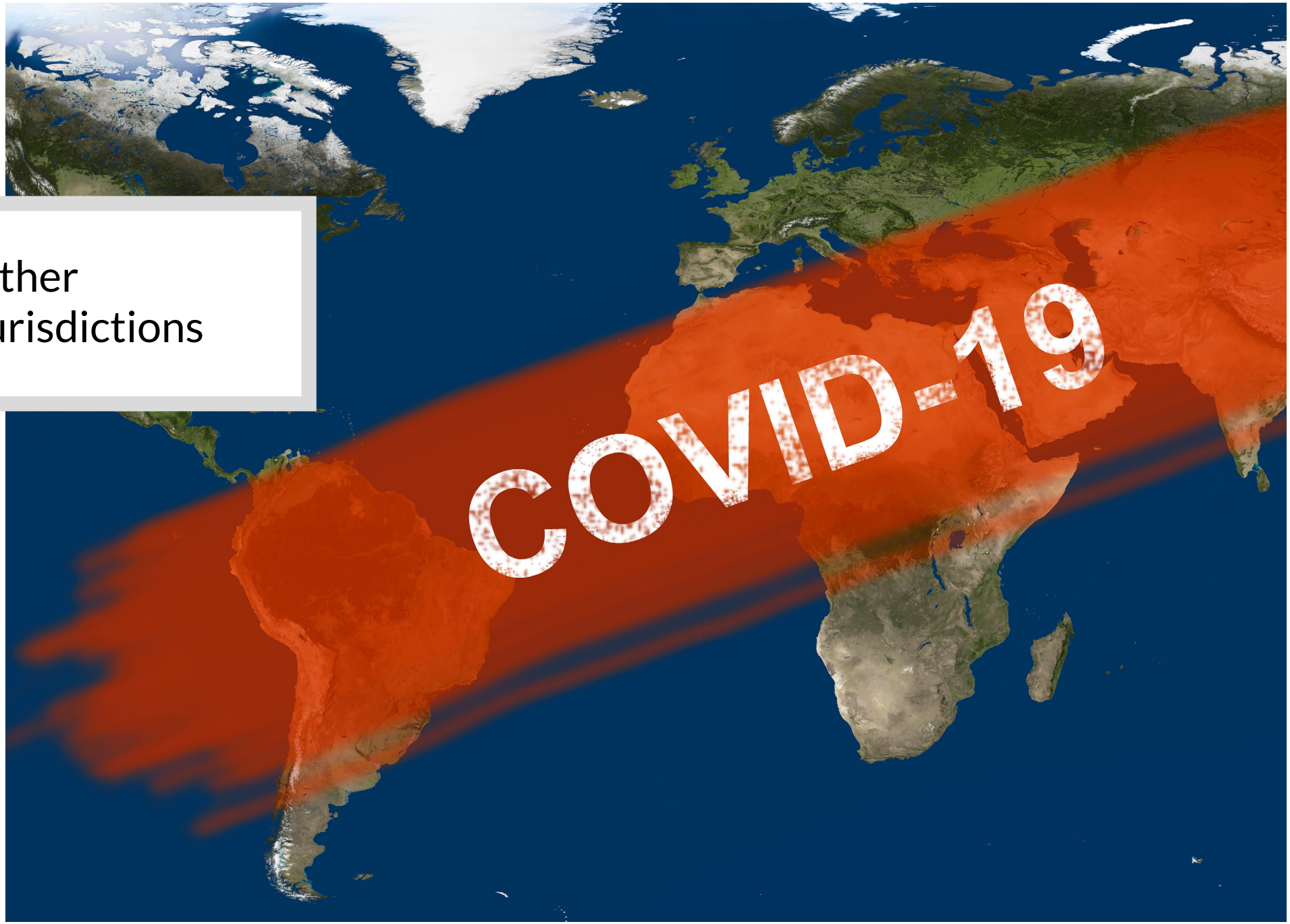
Other Jurisdictions



The UK

Messrs Crockford, Roberts and Milner of Clyde & Co wrote the following in an article called "COVID-19 UK: *Force majeure*... or simple frustration? Knowing where you stand in uncertain times" published on their website on 1 April 2020 :

"The COVID-19 pandemic and the unprecedented social lock downs in both the UK and internationally have seen a rapid increase in queries relating to *force majeure*. This article gives you the main legal principles and practical considerations in a nutshell.

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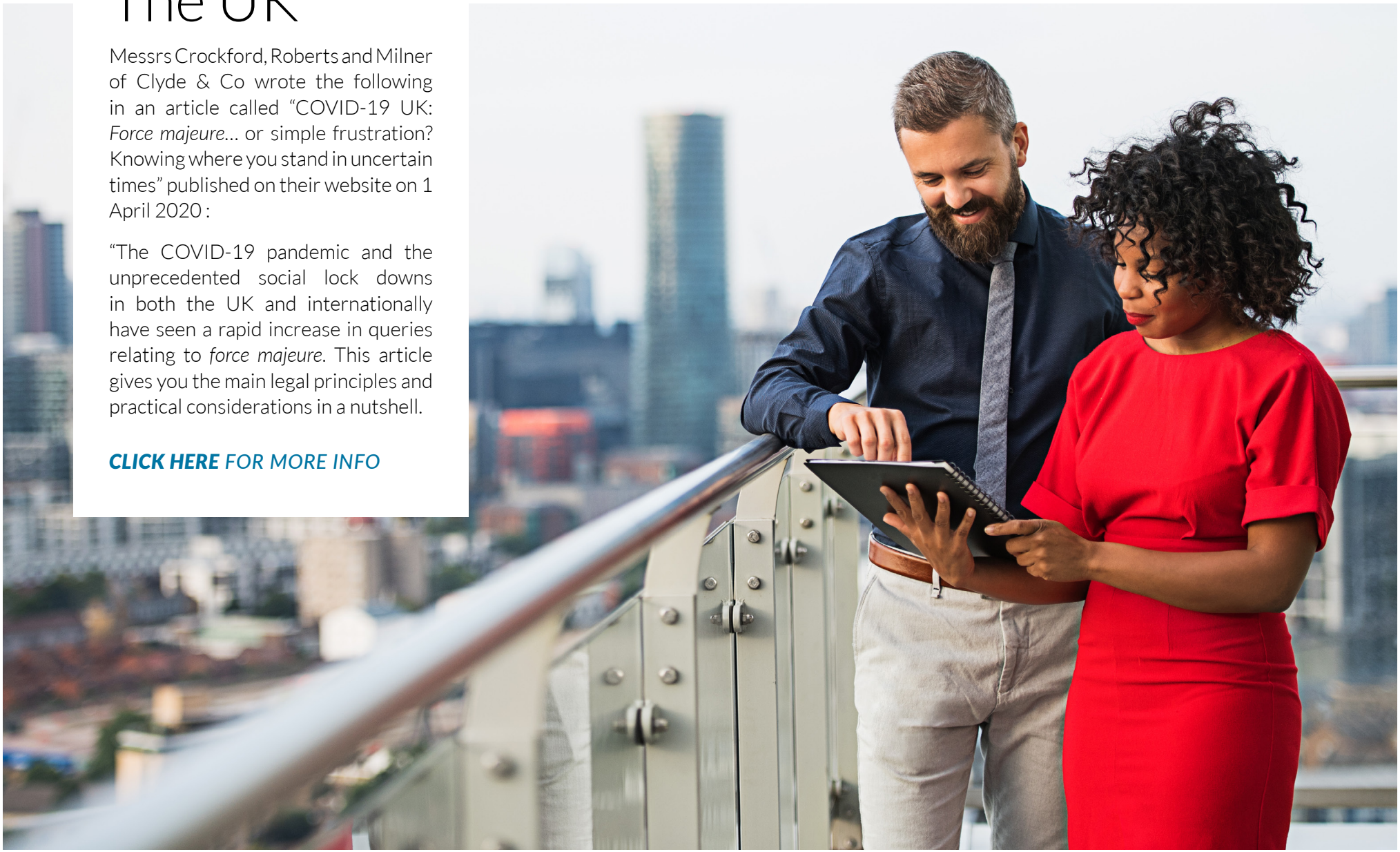

The Law

Force majeure clauses are fairly common in commercial contracts but there is no standalone concept of *'force majeure'* under the laws of England & Wales. Accordingly, such clauses are creatures of the contracts in which they appear, and their scope and effect will depend on the wording in question.

That said, typically a *force majeure* clause excuses or delays the performance of contractual obligations upon the occurrence of an event outside the reasonable control of the party alleging the *force majeure* event.

When *force majeure* is asserted there are a number of considerations for both parties.

Is there actually a force majeure event?

The event in question must fall within the contractual definition of circumstances or occurrences capable of triggering the *force majeure* clause. The list of events in the contract is exhaustive and the court will look at the natural meaning of the words used and whether the present circumstances were intended to fall within them. The courts will assume that the parties only intended to grant relief where the event was outside of their control, as anything else may lead to an unjust result.

Typical *force majeure* events are war, revolution, drastic government interventions and 'acts of God', among others. 'Acts of God' typically connote natural events which cannot be prevented against, such as earthquakes, tsunamis, floods, etc. Whether a virus pandemic amounts to an 'act of God' will depend on a number of factors, such as whether the phrase is defined under the contract, whether the clause defining *'force majeure'* otherwise includes specific references to pandemics or epidemics that would support a *noscitur a sociis* all approach to construction, and the governing law of the contract (in contrast to England and Wales, 'Act of God' is a recognised legal concept in some jurisdictions).

However, general 'sweep up' provisions in *force majeure* clauses that attempt to cover off any deficiencies in the drafting will be interpreted narrowly. Consequently, they will not assist a party who seeks to rely on such provisions where the event in question has no connection with those which are expressly listed.

Has the party's ability to perform its contractual obligations been prevented, impeded or hindered by the event?

The exact requirements will depend on the contractual wording but all clauses require the party alleging *force majeure* to show a causal link between the event and its inability to perform the contract. In more lenient contracts the event may only need to have hindered a party rather than prevented it altogether.

Either way, the event must be the only cause of the failure/under-performance in question.

Has the party alleging force majeure taken all reasonable steps to try to avoid or mitigate the event or its consequences?

Even if there is a *force majeure* event, the alleging party cannot rely on it if in fact performance under the contract would have been possible via another reasonable course of action. It is no good to invoke *force majeure* and then 'sit on your hands'.

Effect of a *Force Majeure* event

Typically, a valid *force majeure* event will have one of two outcomes depending on the drafting of the contract:

- Mutually suspend all obligations under the contract – obligations resume when the specified event ends; or
- Be an event of termination – typically a notice must be served on the other party and thereafter liability for non-performance (other than for prior breaches) will ordinarily be extinguished because there is no longer a valid contract.

Practical considerations - getting it right

Check your contract carefully! Those wishing to invoke a *force majeure* clause must assess carefully whether the requirements are met. Where one party wrongfully seeks to terminate on the basis of a *force majeure* event, the other party may in turn rely upon such a wrongful termination as a repudiatory breach entitling it to terminate. Both parties may be better served by opening a dialogue in order to find consensus on whether there has indeed been a *force majeure* event.

It is important, as ever, to follow the notification provisions of the contract, including requirements for written notice and specified time periods.

Parties notified of a counterpart's intention to invoke *force majeure* should consider checking their insurance arrangements and assessing any impacts that the *force majeure* event will have on fulfilling their own obligations under onward contracts. It may be worth checking the *force majeure* provisions of those agreements in case of any misalignment between the definitions of '*force majeure*'.

As far as possible, we recommend obtaining legal advice specific to both the circumstances in question and the wording of the particular *force majeure* clause.

Frustrating times?

Although '*force majeure*' is not a recognised legal concept under the laws of England and Wales, the doctrine of frustration is a not-so-distant relative. Frustration applies where a significant change of circumstances renders performance of a contract radically different from the obligations that were originally undertaken. Such a change must result from an outside event or change of situation occurring independently from the party seeking to rely on it.

Where frustration applies, the parties are excused from all further performance and are not liable for damages for non-performance. The contract is permanently set aside.

Relying on frustration is only possible in circumstances where the contract does not already include an express provision catering to the particular *force majeure* situations. Moreover, it is a rare beast because of the courts' general reluctance to hold that a contract has been frustrated. It is very much a place of last resort (much like self-isolation).

Final word of warning!

The English approach to *force majeure* is much more restrictive than the approach to *force majeure* taken under Civil law systems. Therefore you should be alert to the fact that if you have force majeure issues being negotiated with Civil law counterparts or determined by Civil law arbitrators, even if the contract is governed by English law, they are likely to start from the position that if a *force majeure* event has been established, performance has been prevented under the entirety of the contract. In other words, in those circumstances, there is a higher likelihood that *force majeure* will be relied upon as a defence to a claim for performance."

A Global View

The firm Mayer Brown, got a host of their people together and cobbled together an insightful article entitled "COVID-19 Contractual performance – *Force Majeure* clauses and other options: a global perspective" that saw the light of day on 20 March 2020 and stated the following:

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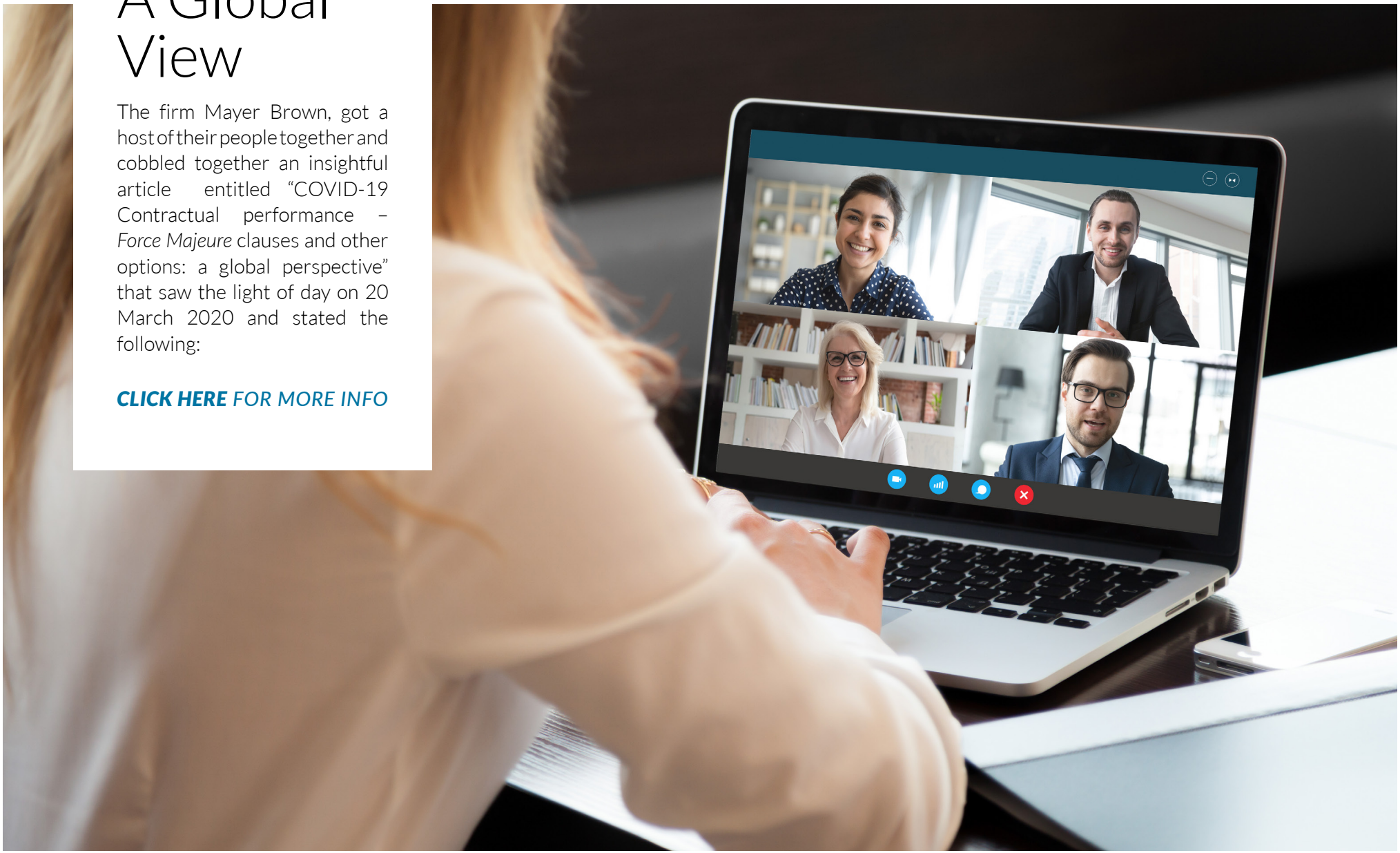

This legal update describes options that may be available to parties to contracts affected by COVID-19. In particular, we focus on the concept of Force Majeure, which translates from French roughly as "a major force", and which may excuse a party from the performance of its contractual obligations.

The analysis must be undertaken on a contract-by-contract basis. Each party has a different set of objectives, each contract has different obligations that may be affected in different ways, and each jurisdiction has different applicable laws.

While the concept of an excuse from performance of contractual obligations due to unexpected events is common in many jurisdictions, there are differences in its scope and operation. Businesses may need to be alert to these differences in laws in addition to carefully considering the specific wording of force majeure clauses when they appear in a contract.

Practical Steps: Each situation is different, but in general, businesses should:

- Identify contracts that are likely to be affected by COVID-19.
- Review high-priority contracts to assess impact and potential relief available. Priorities might be set both on the importance of the relationship and the potential harm from COVID-19.
- Consider whether (in addition to *force majeure*) other legal avenues are available, such as

  MATERIAL ADVERSE CHANGE (MAC)/MATERIAL ADVERSE EFFECT (MAE) CLAUSES,

  price adjustment clauses or the concept of "frustration" of contract.
- Comply with contractual notice requirements where beneficial, whether in *Force Majeure* or other relevant clauses. The giving of notice might begin the period of relief of performance obligations or the beginning of insurance coverage.
- Identify and consider utilising governance provisions to make plans and work on joint solutions. Today, it is difficult to even get the attention of counterparties, and a contractual right to attention through a governance provision may help.
- Consider communicating with counterparties regarding potential difficulties with performance and possible solutions, for example, sending letters to potentially affected counterparties indicating your view that the *force majeure* clause does not apply and that they thus remain fully obligated to perform. This may convince them to fully perform or, at minimum, be good evidence in later litigation.
- Consider what steps could be taken to mitigate the impact of COVID-19 on performance, and how such steps fit with contractual and legal obligations. Many laws and contracts impose upon both parties an obligation to mitigate damages.
- Work closely with other parts of your COVID-19 response team so that steps taken (such as imposing a travel ban) to prioritise health and welfare are put in effect without violating contractual obligations. For example, be cautious about instructing individuals (or giving individuals the option) to work from home if you are contractually obligated to have those individuals working at a specific facility.

Guidance on a wide variety of relevant issues is available at the MAYER BROWN COVID-19 PORTAL. In particular, please refer to recent legal updates.

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FORCE MAJEURE- COVID-19: CONSTRUCTION, FRUSTRATION, FORCE MAJEURE- WHAT DOES CONTRACT LAW SAY?

CONTRACTS/FORCE MAJEURE- THE LASTING IMPACT OF COVID-19 ON THE GLOBAL PROJECT DEVELOPMENT & FINANCE MARKET

Reviewing a *Force Majeure* clause

The review of an express *force majeure* provision might include considering the following questions:

- Are we the affected party or the unaffected party?
- Is COVID-19 a type of event that triggers the relevant clause? Obvious possibilities include a 'disease', an 'epidemic' or a 'pandemic'. Some clauses include sweeping language such as "any event or circumstance beyond the reasonable control of the affected party" while others are limited to major events such as earthquake, war, explosion, fire and flood. Governmental action is another particularly helpful category for affected providers.
- Is the waiver of obligations limited to failures due to a *force majeure* , or only those that could not have been prevented through reasonable means (such as workaround plans)?
- Must performance be "prevented" (essentially impossible) or is it sufficient for performance to be "delayed" or "hindered" for the clause to excuse contractual obligations?
- What is the impact of the party's own actions in contributing to its inability to perform? For instance, if it has imposed a travel ban that has meant it is unable to perform, does that limit its ability to rely on the *force majeure* clause?
- When should notice be given? Should it be when there is an actual impact, or a possible impact? Does giving notice have adverse contractual effects, such as beginning a period for correction and restoration of full performance?
- Is there an obligation to take steps to mitigate the consequences of the event? If so, which party has (or which parties have) that obligation? Are they described in the contract (such as a specific disaster recovery or business continuity plan)?
- Is there an obligation to report to the other party on a continuing basis as to the steps being taken and/or the expected impact of the event?
- Does either party have the right to terminate or delay performance of the contract if the clause has been invoked? If so, after how long?

Force Majeure: Key jurisdiction Q&A

In the following section, we answer some key questions about the options available to parties affected by COVID-19 in different jurisdictions, focusing particularly on the scope of *force majeure*.

England & Wales

1. *Does this jurisdiction imply a concept of force majeure into commercial contracts, or do the parties need to negotiate the provision?*

   English law does not imply the concept of *force majeure* into commercial contracts. It is entirely up to the parties to negotiate whether or not there should be a *force majeure* clause in the contract, and if so, its scope and the circumstances in which it can be exercised.

2. *If implied, what is the legal basis for this and what is the scope of the implied provision?*

   Not applicable.

3. *For a contract without a force majeure provision, what options does a party have where its ability to perform its obligations has been affected by COVID-19? Is that different for contracts for services and contracts for the provision of goods?*

   There is no particular difference between contracts for services and contracts for the provision of goods. There may be contractual provisions that allow a party affected by COVID-19 to amend or delay its contractual obligations.

   In addition, the affected party may rely on the doctrine of "frustration" to argue that it no longer needs to perform its future obligations because the purpose of the contract has been frustrated. However, for this doctrine to apply under English law, it must be impossible (not merely more difficult or uneconomic) to perform the contract, so there are likely to be relatively limited circumstances where it will apply in the current situation.

   If these options do not assist, the affected party is likely to be in breach of contract unless it can renegotiate or vary its terms, or assert that other contractual provisions (for example, MAC or MAE clauses) apply, which may excuse future performance under the contract.

England & Wales

4. *How are the courts likely to assess whether COVID-19 qualifies as a force majeure event?*

The court will consider the specific wording of the clause, and whether the current situation entitled the party seeking to rely on the clause to do so. In order to interpret what the parties intended when entering into the agreement, the court will also consider the context of the clause.

Where a clause contains a non-exclusive list of events, followed by general language such as "any other cause beyond the party's control", a court has found that for an event to fit within this general wording, it must be of a similar nature to the specific events listed *(Tandrin Aviation Holdings Ltd and Aero Toy Store LLC and others [2010] EWHC 40)*.

A court will also want to consider whether the event relied upon is the sole cause of a party's inability to perform its obligations; if not, and there are other causes, case law suggests that the clause cannot be relied upon.

It is for the party seeking to rely on the clause to prove, on the balance of probabilities, that it was entitled to do so.

5. *What are the potential effects of exercising force majeure rights?*

This will depend on the specific wording of the clause, but generally it will entitle a party to suspend performance of its obligations without a penalty. The contract will determine whether this is for a particular period of time or indefinitely, and what the options are for the parties; this can include the right for one or both parties to terminate the contract if the *force majeure* event has continued for a specified period of time.

The clause may also require a party that has exercised a *force majeure* clause to take particular steps to mitigate the impact of the event or find a workaround.

6. *If a party cannot rely on a force majeure clause or other legal option, what is the contractual position?*

Unless the party is able to renegotiate or vary the terms of the contract, it is likely to be in breach of contract. This may allow the counterparty to terminate the contract and/or seek damages or other contractual remedies.

France

1. *Does this jurisdiction imply a concept of force majeure into commercial contracts, or do the parties need to negotiate the provision?*

   French contract law recognises a legal concept of force majeure, which courts apply irrespective of whether the parties have expressly provided for it in their contracts.

2. *If implied, what is the legal basis for this and what is the scope of the implied provision?*

   The legal basis for implying the concept of *force majeure* into commercial contracts is set out in Article 1218 of the French Civil Code ***(FCC)***.

   In order for an event to fall within the legal definition of force majeure, the following characteristics must cumulatively be present:

   - it is beyond a party's control;
   - it can be considered as reasonably unpredictable at the time the contract was entered into;
   - its effects cannot be avoided by appropriate measures; and
   - it prevents a party from performing its contractual obligations.

   The parties are free to expressly agree the contractual definition of *force majeure*, for example, by expressly listing the types of events which fall within the definition of *force majeure*.

   The concept of *force majeure* assumes the occurrence of an event which prevents a party from performing its contractual obligations. This should not be confused with that of 'unforeseeable circumstances'. This refers to the occurrence of a change of circumstances, unforeseeable at the time the contract was entered into, and which would make contractual performance 'only' excessively onerous for one of the parties (and for which article 1195 of the FCC provides for the termination or revision of the contract by the court, in the absence of any express agreement between the parties).

France

3. For a contract without a force majeure provision, what options does a party have where its ability to perform its obligations has been affected by COVID-19? Is that different for contracts for services and contracts for the provision of goods?

In the absence of any express *force majeure* provisions, the liability of a party may be affected by COVID-19, if COVID-19 is considered to fall within the legal definition of *force majeure*.

There is no particular difference between contracts for services and contracts for the provisions of goods.

4. How are the courts likely to assess whether COVID-19 qualifies as a force majeure event?

When considering whether a specific event is a *force majeure* event, the court will have regard for the circumstances in which the relevant event occurs and will check whether the requirements of Article 1218 of the FCC are met.

As regards COVID-19 specifically, it is quite likely that the courts will consider it to be a *force majeure* event, in the event it is established that it prevents a party from performing its contractual obligations.

It is likely that the present COVID-19 outbreak falls within the characteristics (set out above) of *force majeure*, on the basis of: (i) the unpredictability of the event (save for those contracts concluded relatively recently); (ii) its irresistibility; and (iii) the imperative and binding measures taken by the public authorities, provided the effect is to prevent a party from fulfilling its contractual obligations.

5. What are the potential effects of exercising force majeure rights?

Force majeure releases a party from any civil liability it may have. French law does not require a party to mitigate its damages in the event of contractual non-performance due to *force majeure*.

6. If a party cannot rely on a force majeure clause or other legal option, what is the contractual position?

A party which is unable to rely on *force majeure* shall be deemed to be in breach of contract. Consequently, pursuant Article 1231-1 of the FCC, a party's civil liability may be engaged, the result of which being that it may be obliged to compensate the damage caused to the counterparty arising out of the non-performance. This may include a payment of damages plus interest.

In addition to a party's civil liability, the counterparty may avail itself of the other sanctions for non-performance of the contract, pursuant to Article 1217 of the FCC (such as forced performance in kind, revision of the price, termination of the contract).

Moreover, the party's non-performance would enable the counterparty to invoke the benefit of a plea of non-performance under Article 1219 of the FCC, and thus suspend performance of its own contractual obligations.

Germany

1. *Does this jurisdiction imply a concept of force majeure into commercial contracts, or do the parties need to negotiate the provision?*

   German law does not imply the concept of *force majeure* into commercial contracts. It is entirely up to the parties to negotiate whether or not there should be a *Force majeure* clause in the contract, and if so, its scope and the circumstances in which it can be exercised.

2. *If implied, what is the legal basis for this and what is the scope of the implied provision?*

   Not applicable.

3. *For a contract without a force majeure provision, what options does a party have where its ability to perform its obligations has been affected by COVID-19? Is that different for contracts for services and contracts for the provision of goods?*

   In general, the following applies in general for the delivery of goods or workmanship/service contracts (other than employment contracts):

   - If the contract is objectively impossible to perform, then the contractual obligation (e.g. the delivery of services or goods) is extinguished, pursuant to section 275 of the German Civil Code (BGB).
   - Where it is not impossible to perform a contractual obligation, but to do so would now be significantly more difficult or uneconomical, section 275 BGB provides for a right to refuse performance. If the relevant contractual party is not responsible for the issue causing the disproportionality, the bar to refuse performance is lower.
   - The party relying on section 275 BGB may, however, be exposed to a claim for damages if it (as the non-performing party) is responsible for the circumstances which have resulted in the contract being impossible or uneconomical to perform.

Germany

- However, if the obstacle to performance merely disturbs the equivalence of contractual obligations (e.g. excessive increase in procurement prices), section 313 BCB can lead to an adjustment of the contractual provisions, e.g. the price. Only if an adjustment of the contract is not possible or not reasonable, can the contract be terminated.
- In the context of an international sale of goods contract, Article 79 of the United Nations Convention on Contracts for the International Sale of Goods (CISG) may assist a seller to avoid liability, providing CISG applies (based on the facts) and has not been explicitly excluded in the contract (which is often the case). While epidemics and state interventions are, in principle, covered by Article 79 CISG, its applicability will depend on the specific circumstances of the contract.

4. *How are the courts likely to assess whether COVID-19 qualifies as a force majeure event?*

The question of whether or not the current situation would qualify as a *force majeure* event is determined by:

- the specific nature of the agreement;
- the wording of the clause; and
- whether the incident giving rise to the *force majeure* claim is addressed in the *force majeure* clause.

German travel law, for example, acknowledges 'epidemics' and 'diseases' as *force majeure*. When assessing the individual case, the statements of the Federal Foreign Office (Auswärtiges Amt) and the recommendations of the World Health Organisation are likely to have an indicative effect. Official measures (e.g. production restrictions or embargos) can also be classified as *force majeure*.

5. *What are the potential effects of exercising force majeure rights?*

The potential effects of a *force majeure* clause are determined by the wording of the clause itself.

Generally speaking, the affected party is entitled to suspend its performance for a period of time, provided it follows the contractually prescribed notification provisions. After a certain period of time either party may be entitled to terminate the contract; no additional damages claims will apply.

Although German law does recognise the concept of *force majeure*, it does not provide a statutory framework for it. Consequently, the effect of each *force majeure* clause will be determined by the explicit wording of the clause.

6. *If a party cannot rely on a force majeure clause or other legal option, what is the contractual position?*

See section 3 above.

Hong Kong

1. *Does this jurisdiction imply a concept of force majeure into commercial contracts, or do the parties need to negotiate the provision?*

   Hong Kong law does not imply the concept of *force majeure* into commercial contracts. It is entirely up to the parties to negotiate whether or not there should be a *force majeure* clause in the contract, and if so, its scope and the circumstances in which it can be exercised.

2. *If implied, what is the legal basis for this and what is the scope of the implied provision?*

   Not applicable.

3. *For a contract without a force majeure provision, what options does a party have where its ability to perform its obligations has been affected by COVID-19? Is that different for contracts for services and contracts for the provision of goods?*

   If the contract does not contain a *force majeure* clause, the affected party may seek to discharge the contract on the ground of 'frustration' which, in practice, is far more difficult to establish. Frustration is a common law doctrine which applies when an outside event occurs without the fault of the party relying on it (such as the COVID-19 outbreak) rendering the affected party physically or commercially unable to fulfill the contract, or transforms the obligation to perform into a fundamentally different obligation from that undertaken at the point at which the contract was entered into. A contract will not be frustrated simply because it becomes more difficult or more expensive to perform, or that there is an economic downturn or a break in the supply chain.

   The legal test for frustration is the same for all contracts, whether contracts for services or contracts for the provision of goods.

Hong Kong

4. *How are the courts likely to assess whether COVID-19 qualifies as a force majeure event?*

Courts in Hong Kong are generally reluctant to intervene in commercial arrangements and tend to interpret *force majeure* clauses narrowly. There must be express wording in the *force majeure* clause wide enough to cover the COVID-19 outbreak as a possible *force majeure* event (such as 'epidemic', 'pandemic' 'disease', 'acts of god' or 'events beyond a party's reasonable control'). It must also be shown that the 'triggers', if any, set out in the *Force Majeure* clause are satisfied. For instance, *force majeure* events are typically qualified as those which 'prevent' the affected party from performing the contract. In such cases, the affected party must prove to the court that the COVID-19 outbreak has rendered performance legally or physically impossible. An economic downturn (by itself) may not be sufficient.

5. *What are the potential effects of exercising force majeure rights?*

The effects of exercising *force majeure* rights depend entirely on the precise wording of the *force majeure* clause and the specific impact of the COVID-19 outbreak (if being a recognised *force majeure* event under the contract) on the affected party. For instance, under the *force majeure* clause, there may be a duty to mitigate (and continued performance to the extent not affected by the pandemic is thus necessary) and/or a duty to promptly notify the other party of the extent of impact suffered. It is important that the affected party must strictly follow the mechanism set out in the clause when exercising *force majeure* rights. A failure to comply may result in certain consequences which may compromise the affected party's claim.

6. *If a party cannot rely on a force majeure clause or other legal option, what is the contractual position?*

If the affected party cannot rely on a *force majeure* clause or other legal option, it is bound by its contractual obligations. It may therefore be necessary to seek to obtain a release or variation of the contract from the counterparty.

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PRC

1. *Does this jurisdiction imply a concept of force majeure into commercial contracts, or do the parties need to negotiate the provision?*

   PRC implies a concept of *force majeure* into commercial contracts. The PRC Contract Law also respects the principle of freedom of contract and it is very common for contracting parties to agree a contractual definition of *force majeure*.

2. *If implied, what is the legal basis for this and what is the scope of the implied provision?*

   Force majeure is codified in Article 180 of the General Rules of the Civil Law of the PRC and Article 117 of the PRC Contract Law, which define *force majeure* as "the objective circumstances that are unforeseeable, unavoidable and insurmountable".

3. *For a contract without a force majeure provision, what options does a party have where its ability to perform its obligations has been affected by COVID-19? Is that different for contracts for services and contracts for the provision of goods?*

   A party may claim *force majeure* under the aforementioned statutory provisions.

4. *How are the courts likely to assess whether COVID-19 qualifies as a force majeure event?*

   Although government statements and local court notices are not binding to all cases, they may be persuasive. The following are some examples of recent statements and local court notices that could be considered:

PRC

- A spokesperson for the Legislative Affairs Commission of the National People's Congress Standing Committee is reported to have stated on 10 February 2020 that if parties are unable to perform their contractual obligations due to the government measures relating to COVID-19, they should be allowed to claim *force majeure* relief in accordance with the PRC Contract law.
- The First Civil Division of Higher People's Court of Zhejiang Province is also reported to have issued a notice stating that a *force majeure* could be established if: (i) the failure of performance is directly caused by administrative measures taken by the government to prevent the COVID-19 pandemic; or (ii) it is fundamentally impossible for a party to perform its obligation due to the COVID-19 pandemic.

In case *force majeure* cannot be established, the court may consider applying the principle of fairness and the principle of circumstance change if it is apparently unfair for a party to continue performing its obligations, or the contract purpose cannot be realised due to COVID-19.

5. *What are the potential effects of exercising force majeure rights?*

The contractual provision will prevail. Further, there are two possible remedies under PRC Contract Law. A party impacted by a *force majeure* event may be exempted from performance as result of such *Force Majeure* event, and either party may terminate the contract if the contract's purpose is impossible to perform due to the *force majeure* event.

6. *If a party cannot rely on a force majeure clause or other legal option, what is the contractual position?*

A party may have rights under the statutory *force majeure* provisions as discussed above, if there is no *force majeure* clause in the contract.

In case a party cannot rely on the contractual clause or the statutory provisions (i.e. a *force majeure* cannot be established), a party may seek to obtain a variation of the contract based on the principle of fairness and the principle of circumstance change (a principle under PRC law which is similar to *rebus sic stantibus*) where it is considered unfair for such party to continue performing its obligation, or the contract purpose cannot be realised due to the COVID-19 pandemic. However, courts are generally more reluctant to apply such principles as compared to *force majeure* relief.

Where *force majeure* cannot be established and the court decides that the principles of fairness and change of circumstance are applicable, then the failure of (or delay in) performing certain obligations under the contract will constitute a contractual breach, unless the contract provides otherwise.

United States

1. *Does this jurisdiction imply a concept of force majeure into commercial contracts, or do the parties need to negotiate the provision?*

   Under US law, a *force majeure* provision is not implied by law with respect to most contracts. Rather, it is up to the parties to negotiate any *force majeure* provision, the definition of a *force majeure* event, the notice obligations, and other relevant provisions.

   With respect to contracts for the sale of goods, in certain circumstances concepts similar to the *force majeure* concept may be implied. For example, in contracts for the sale of goods between countries that are parties to the UN Convention on Contracts for the International Sale of Goods (***CISG***) (and if the CISG has not been excluded in the agreement), section 79 of the CISG provides a remedy similar to a *force majeure* clause. Section 79 provides that a party is not liable for a failure to perform any of his obligations if it proves that the failure was due to an impediment beyond its control and that it could not be reasonably expected to have taken the impediment into account at the time of the contracting. Similarly, contracts for the sale of goods under the Uniform Commercial Code (***UCC***) are subject to section 2-615 of the UCC, which excuses performance under a contract if performance, as agreed, has been made impracticable by the occurrence of a contingency, the non-occurrence of which was a basic assumption upon which the contract was made.

2. *If implied, what is the legal basis for this and what is the scope of the implied provision?*

   As noted above, *force majeure* provisions are not implied into most contracts, but a similar concept is incorporated with respect to the sale of goods under the UCC and the CISG.

United States

3. For a contract without a force majeure provision, what options does a party have where its ability to perform its obligations has been affected by COVID-19? Is that different for contracts for services and contracts for the provision of goods?

Even in the absence of contractual *force majeure* provision, common law principles of impracticability, frustration of purpose, or prevention by government regulation are available in most states and are incorporated into the Restatement (2d) of Contracts, which is followed in most state jurisdictions. Under the doctrine of impracticability, a party's contractual obligations may be discharged if, after the contract is made, the party's performance becomes impracticable due to the occurrence of an event that is:

- outside of a party's control; and
- a basic assumption on which the contract was made. Restatement (2d) Contracts § 261.

Similarly, under the doctrine of "frustration" of contract, a party's contractual obligations may be discharged if, after the contract is made, the party's principal purpose is substantially frustrated:

- without the party's fault; and
- where the occurrence or non-occurrence of an event was a basic assumption on which the contract was made. Restatement (2d) Contracts § 265.

Parties may also be discharged from their obligations if the performance of a duty is made impracticable by having to comply with a governmental regulation or order, the non-occurrence of which was a basic assumption on which the contract was made. Restatement (2d) Contracts § 264.

Those defences are available to all contracts, including contracts governing the sale of services and those governing the sale of goods. In addition, as noted above, additional rights are available in the context of the sale of goods under the CISG (if not excluded by the terms of the contract) and the UCC.

4. How are the courts likely to assess whether COVID-19 qualifies as a force majeure event?

For an event to constitute a *force majeure* event, courts will typically require the event to be outside the control of the party exercising the right and not foreseeable by either party. Contractual *force majeure* provisions are strictly construed, and will turn on the specific definition of *force majeure* used in a contract. A change in economic conditions is almost never sufficient, standing alone, to constitute a *force majeure* event. Further, the party asserting the existence of the *force majeure* event will bear the burden of demonstrating the existence of such event. Depending on the language of the *force majeure* provision, the exercising party must demonstrate that the *force majeure* event 'prevented' the parties' performance, though some provisions may suggest a lower standard (e.g., 'materially interfere' or 'materially hinder' performance). Some courts will require such parties to demonstrate the steps they took in an attempt to complete performance.

Whether events related to COVID-19 will constitute a *force majeure* will turn on the language used in the agreement, the specific events that are being referenced, and the extent to which those events were foreseeable or under a party's control. For example, if an agreement defines a *force majeure* as an 'Act of God,' and the event triggering the *force majeure* is a voluntary directive to work from home, such directive may not sufficiently fall within the definition of *force majeure*. Similarly, in the event of a government-mandated business shut down, a party's right to discharge its contractual obligation may be more naturally adjudicated under the doctrine of impracticability due to government regulation, rather than under a *force majeure* clause. On the other hand, if a *force majeure* provision specifically includes a pandemic, parties may have a better argument for relying on such provisions to excuse their contractual obligations.

United States

5. What are the potential effects of exercising force majeure rights?

The effects on the parties' performance from exercising a *force majeure* provision will depend upon the language of the *force majeure* provision. Some agreements may 'excuse' performance or 'discharge' obligations as a result of the *force majeure* event, in which case the remaining obligations in the contract may otherwise continue to exist. In other cases, the non-existence of a *force majeure* event may serve as a condition to formation of a contract, in which case exercising the right will mean that no contract is formed. In other cases, parties may agree that the existence of a *force majeure* event relieves both parties of their obligations to continue to perform.

Parties considering exercising their *force majeure* rights should carefully review the contract's language to determine if a *force majeure* event (or non-occurrence thereof) is a condition to contracting, an excuse from performing certain obligations, or creates a mutual right for both parties to terminate their obligations. Further, parties should take care to note the procedural requirements to exercising the *force majeure* rights, as most courts will require rigid adherence to such procedural mechanisms.

6. If a party cannot rely on a force majeure clause or other legal option, what is the contractual position?

If a party cannot rely on a *force majeure* clause, and the other common law defences of frustration of purpose or impracticability are not applicable, parties then must consider whether non-performance can be justified based on any other contractual conditions in a contract. For instance, in the event of the emergencies triggered by COVID-19, it may be the case that contractual performance obligations for each party have become substantially more difficult, even if not amounting to a *force majeure*. Parties are well-advised to negotiate about potential revisions to their contract, or temporary amendments to their performance.

Brazil

1. *Does this jurisdiction imply a concept of force majeure into commercial contracts, or do the parties need to negotiate the provision?*

   According to Article 393 of the Law No. 10.406/2002 (Brazilian Civil Code), it is open to the parties to define the liability for *force majeure*. In summary, they are only liable for the risks expressly assumed in the contracts.

   An event may be classified as *force majeure* when the fact is inescapable and its effect cannot be either preventable or controlled. It can be caused by acts of nature (e.g., flood, earthquake, and hurricanes) or acts of people (e.g., riots, strikes, and wars).

   Under these circumstances, foreseeable or not, the parties are relieved from performing the contractual obligation affected by the *force majeure*, since the contracts do not refer to the said events.

2. *If implied, what is the legal basis for this and what is the scope of the implied provision?*

   As noted above, *force majeure* provisions are established in Article 393 of the Brazilian Civil Code and are implied into all types of contracts.

3. *For a contract without a force majeure provision, what options does a party have where its ability to perform its obligations has been affected by COVID-19? Is that different for contracts for services and contracts for the provision of goods?*

   Besides a *force majeure* clause, the parties may be discharged from their obligations, depending on the effects of the event, based on several arguments, such as (i) the theory of unpredictability (rebus sic stantibus clause) that allows for a contractual clause to become inapplicable because of a fundamental change of circumstances to re-establish the contractual balance, according to Articles 317, 478, and 479 of the Brazilian Civil Code, Article 81, VI, of the Law No. 13.303/2016 (State-Owned Companies Law),

Brazil

Article 65, II, "d", of the Law No. 8.666/1993 (Government Procurement Law and Policy), and Article 6, V, of the Law No. 8.078/1990 (Brazilian Consumer Defense Code); (ii) the principle of good faith, which is an open-textured rule that obliges the parties to act with honesty and loyalty during the contractual relationship, stated in Article 422 of the Civil Code; (iii) the impossibility of a debtor to be considered in default if no act or omission can be imputed to him/her, established in Article 396 of the Brazilian Civil Code, etc.

Under Brazilian law, there is no difference if a *force majeure* event affects contracts of service or contracts for provision of goods. In both contracts, clauses and deadlines may be declared unfair, due to COVID-19.

4. *How are the courts likely to assess whether COVID-19 qualifies as a force majeure event?*

The Brazilian courts will likely consider COVID-19 as a *force majeure* event, since this pandemic is inescapable and its effect remains unpreventable and uncontrolled.

However, the likelihood of a contractual obligation being considered by courts as affected by COVID-19, and consequently as a *force majeure* event, will also depend on the specific circumstances involved in every single case (e.g. it will probably not prevail if an obligation is part of Essential Businesses, as defined by the relevant legislation, for which multiple governmental restrictions, imposed due to COVID-19, are not applicable).

5. *What are the potential effects of exercising force majeure rights?*

If a *force majeure* event is recognised under the contract, its clauses will not prevail and the parties will be relieved from performing their contractual obligation.

Depending on the extension of the event and its specific impacts in a contract, the COVID-19 outbreak may also mitigate the performance of a contract, postpone deadlines, force a financial adjustment to re-establish the contractual balance, etc.

6. *If a party cannot rely on a force majeure clause or other legal option, what is the contractual position?*

If the affected parties cannot rely on a *force majeure*, they must consider whether (i) non-performance can be justified based on any other contractual conditions; (ii) other theories, exemplified in item (3), are applicable to obtain a variation of the contract; or (iii) it's possible to negotiate revisions and amendments to their contracts.

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