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# NAVIGATING FORCE MAJEURE CLAUSES AND RELATED DOCTRINES IN LIGHT OF THE COVID-19 PANDEMIC

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The outbreak of the novel coronavirus COVID-19 has had and continues to have a devastating impact on human health and life around the globe, with significant repercussions for businesses worldwide. This article addresses some of the contractual issues that companies are facing in deciding whether force majeure or other clauses in their contracts – or other related doctrines under the governing law – may excuse them or their counterparties from the performance of contractual obligations in light of the impact of the pandemic.

The contracting parties' rights, obligations, and remedies in this regard are a function of the language of the force majeure clause, the governing law clause, and the dispute resolution procedures agreed in the contract. These contractual issues are likely to lead to a growing number of disputes between parties, including many that will likely be resolved through international arbitration over the coming months and years.

Even those companies not affected yet by COVID-19 may benefit from a careful analysis of the interplay of these contractual provisions and the governing law in their existing and contemplated future contracts to assess their rights, obligations, and remedies if future unexpected events affect the parties' ability to perform their contractual obligations.

## I. The Impact of COVID-19 on Contractual Relations

Since the first reported infections in Wuhan, China in December 2019, COVID-19 has had a significant toll on human health and life. Over a million people globally have been infected, and many thousands have died. Billions have been affected by government efforts around the world to slow the spread of the virus through stay-at-home/lockdowns orders, quarantines, travel restrictions, heightened border scrutiny, and other measures, which have been far-ranging and change almost daily.

The pandemic and government measures taken in response have had a significant impact, both direct and indirect, on businesses and commercial relations, as worker shortages have occurred; supply chains have been disrupted; facilities and production have been suspended and shut down; and demand for and supply of certain goods and services has dramatically fallen. The impact was originally particularly pronounced in business sectors that rely on global supply chains and other cross-border industries, including manufacturing, construction, mining, commodity markets, shipping, tourism, aviation, and oil and gas, but the impact has by now affected virtually all industries, with few exceptions. And the consequences have spared few, if any, countries.

The impact on parties' contractual relationships has been extensive and depends significantly on the industry in which the particular company operates and the types of contracts that the company has. But, even more importantly the impact depends on the specific language of the contract that the parties have negotiated and on the governing law that applies to their contractual relations. The governing law determines how the language of the contract – and by extension the parties' rights and obligations – will be interpreted. The governing law also determines what statutory or code provisions or court developed doctrines and legal principles may apply and affect the parties' rights and obligations beyond those that they have expressly set forth in their contract.

As companies cope with the impact of the outbreak of COVID-19 on their businesses, many are undertaking an extensive review of their contract portfolios to assess what rights and obligations may be affected by the spread of COVID-19 and government measures taken in response. This contract portfolio review is important in order to identify and assess risks they may face regarding rights and obligations that may be affected by impediments stemming from COVID-19 and government measures taken in response, including risks that the company or its counterparty may be unable to perform certain contractual obligations. Companies must also assess what alternative options they may have, including alternative sources of supply, staffing, means of transportation, and buyers, or diversification of sources, as well as other fallback options. This contract portfolio review is also important in order to identify and assess any provisions in the contract or doctrines applicable under the governing law that may excuse performance in light of such unexpected events.

Parties enter into contracts on the assumption that they and their counterparty are able to perform their obligations, but what happens if an unexpected event, such as the COVID-19 pandemic or government measures taken in response, prevents a party from performing or hinders or delays a party's performance? Indeed, what happens if a party alleges that it is unable to perform as contractually required?

A number of contract clauses may be relevant in this analysis including specific clauses negotiated by the parties to allocate risks for certain events, clauses regarding delay or termination rights, change in circumstances or change in law clauses, price adjustment clauses, hardship or modification clauses, and perhaps

the common provision relevant to this issue: force majeure clauses. This article focuses in particular on force majeure clauses and related doctrines that may excuse a party's performance of an obligation in light of unexpected events, such as the COVID-19 pandemic and government measures in response.

## II. The Operation of a Force Majeure Clause

Force majeure clauses appear in a large percentage of commercial contracts. The language is often taken off the shelf from a prior contract and, in many contracts, has not been adapted to the specific circumstances of the parties or their contractual relationship. The language is also not always drafted in light of the governing law applicable to the contract.

The concept of "force majeure" has its roots in Roman law, and the term – translated literally from French – means "superior force." Although some (typically civil law) jurisdictions may imply a right to declare force majeure into contracts that are otherwise silent, force majeure is largely a contractual concept that depends on the precise language drafted by the contracting parties. Generally speaking, a force majeure clause excuses a party from a contractual obligation in light of an unexpected event beyond its control in specified circumstances.

The language of these clauses varies significantly from contract to contract. Moreover, the governing law applicable to the contract has a significant impact on the interpretation of the clause, and therefore on its scope and operation. Industry or trade practice can also be relevant to the interpretation of the force majeure clause. Numerous other considerations factor into whether a particular clause may excuse performance, including the specific circumstances surrounding the parties' contractual relationship, the impact of the unexpected event on the defined contractual obligations, and the parties' actions in light of the unexpected event. As explained below, the governing law of the contract will also determine the extent to which parties can be excused from their contractual obligations even in the absence of an express force majeure clause or other contractual provision.

Although the language of force majeure clauses varies, force majeure clauses typically have several common elements.

First, clauses set forth a *definition* of what covered events constitute force majeure. The unexpected event must fall within the scope of that definition to excuse performance. The definition may refer to specified requirements that must be established by the party invoking the clause, such as demonstrating that the event was not within the reasonable control of the parties, the event was not reasonably foreseeable, and/or the effects cannot be avoided through reasonable efforts or due diligence.

In addition to or instead of defining a force majeure event by reference to general requirements, many force majeure clauses provide a list of examples of force majeure events. Depending on the language of the clause, the list may be exhaustive or non-exhaustive. Lists often include certain natural events, such as "acts of God," floods, fires, earthquakes, hurricanes, etc. The term "acts of God" is typically undefined in the contract, but the term

typically refers to an act of *nature* – that is, a natural event – that is the cause of the event, without human contribution to or control over the event. Events that constitute “acts of God” may include weather-related events and natural disasters, although the term may be interpreted to include other events in some circumstances. Sometimes, a list may refer specifically to epidemics, pandemics, or diseases, but this is arguably less common, outside certain industries or more recent, carefully drafted clauses.

The list of covered events in other clauses may include certain political or human events, such as acts of war, civil strife, invasion, riots, labor strikes, government orders or other government measures, etc. Depending on the circumstances, the parties to a contract might intentionally omit reference to government measures if a party had a concern about a government taking steps that might affect contractual performance to the benefit of the counterparty. In other circumstances, parties may include reference to government measures precisely to excuse performance if a government takes steps beyond the parties’ control that impact performance.

Some clauses also include a generic, “catch-all” phrase like “any other events or circumstances beyond the reasonable control of the party affected” following the list of force majeure events, although the interpretation of this catch-all may vary depending on the language of the clause, including any list of covered events explicitly mentioned, and the governing law. Other force majeure clauses may even include a list of certain *excluded* events that do *not* constitute force majeure, such as financial hardship, although that might be excluded under the governing law in any event.

Whether the spread of COVID-19 or any specific measures taken by governments in response – such as lockdowns, quarantines, travel restrictions, shutdowns, or other orders – fall within the scope of the definition of a force majeure event in any particular contract is something that must be assessed on a case-by-case basis in light of the language of the contract, the governing law, and the surrounding circumstances. Force majeure clauses that expressly mention epidemics, pandemics, infectious diseases, and in particular government measures are more likely to encompass circumstances affecting companies in light of the COVID-19 pandemic, but the precise wording still matters. The cause of the precise impediment to contractual performance will also be central to the analysis.

Second, force majeure clauses typically set forth a *standard* regarding the degree of impact that a covered event must cause to a party’s performance to excuse an obligation. For example, some clauses excuse an obligation only when a covered event actually *prevents* performance. Under such a clause, a covered event generally must do more than simply render performance more burdensome; it must typically be the cause that prevents the party invoking force majeure from performing an obligation. Therefore, a mere increase in the price of supplies or labor, by itself, would generally not be sufficient for invoking force majeure under such a clause. Sometimes clauses extend coverage to excuse an obligation when a covered event *prevents, hinders, impairs, or delays* performance. Other clauses might use different language that requires that a covered event renders performance impossible

or in some contracts impracticable. The language used will greatly affect the scope of coverage of the clause.

Third, most force majeure clauses set forth *additional requirements* that the party invoking force majeure must satisfy, such as a duty to avoid or mitigate damages arising from the event, or an obligation to provide certain notice to its counterparty often within a period of time defined in the contract. For instance, the clause may require notice as soon as possible following the occurrence of the force majeure event and may set forth an obligation to keep the other party informed until it is able to resume its contractual obligations. Some clauses may also require the party to undertake reasonable endeavors to resume performance of the party’s obligations as soon as practicable. Whether or not the contract specifies these requirements, sometimes the governing law will impose them.

Finally, force majeure clauses typically address the *consequences* of declaring force majeure. If a force majeure event has occurred within the meaning of the contractual definition, preventing/impairing/delaying a party’s performance of an obligation, a typical force majeure clause *excuses* that party’s performance of the specified obligation. Some clauses are more concrete than others on the consequences of a force majeure event and the duration of any excused performance. Some clauses may allow a party to *suspend* or *terminate* the contract in certain circumstances. Indeed, in some contracts, if a party declares force majeure, the counterparty may terminate the contract after a defined period of non-performance. Some clauses carve out certain obligations from those that can be excused – such as payment obligations, which a party would therefore generally be required to make even if a covered event has occurred.

In sum, the precise language of the clause and the governing law applicable to interpreting the clause are critical to understanding the operation of the force majeure clause in any particular contract. Each jurisdiction interprets force majeure clauses somewhat differently, as discussed in more detail below.

Although clauses may differ considerably and careful attention should be given to the precise language used when drafting a contract, one example of a force majeure clause proposed by the ICC for consideration is the following:

1. “Force Majeure” means the occurrence of an event or circumstance that prevents or impedes a party from performing one or more of its contractual obligations under the contract, if and to the extent that that party proves: [a] that such impediment is beyond its reasonable control; and [b] that it could not reasonably have been foreseen at the time of the conclusion of the contract; and [c] that the effects of the impediment could not reasonably have been avoided or overcome by the affected party.

2. In the absence of proof to the contrary, the following events affecting a party shall be presumed to fulfil conditions (a) and (b) under paragraph 1 of this Clause: (i) war (whether declared or not), hostilities, invasion, act of foreign enemies, extensive military mobilisation; (ii) civil war, riot, rebellion and revolution, military or usurped power, insurrection, act of

terrorism, sabotage or piracy; (iii) currency and trade restriction, embargo, sanction; (iv) act of authority whether lawful or unlawful, compliance with any law or governmental order, expropriation, seizure of works, requisition, nationalisation; (v) plague, epidemic, natural disaster or extreme natural event; (vi) explosion, fire, destruction of equipment, prolonged break-down of transport, telecommunication, information system or energy; (vii) general labour disturbance such as boycott, strike and lock-out, go-slow, occupation of factories and premises.

3. A party successfully invoking this Clause is relieved from its duty to perform its obligations under the contract and from any liability in damages or from any other contractual remedy for breach of contract, from the time at which the impediment causes inability to perform, provided that the notice thereof is given without delay. If notice thereof is not given without delay, the relief is effective from the time at which notice thereof reaches the other party. Where the effect of the impediment or event invoked is temporary, the above consequences shall apply only as long as the impediment invoked impedes performance by the affected party. Where the duration of the impediment invoked has the effect of substantially depriving the contracting parties of what they were reasonably entitled to expect under the contract, either party has the right to terminate the contract by notification within a reasonable period to the other party. Unless otherwise agreed, the parties expressly agree that the contract may be terminated by either party if the duration of the impediment exceeds 120 days.<sup>2</sup>

Whether the impact of COVID-19 or government measures taken in response falls within the scope of a particular force majeure clause requires a careful legal analysis of the contract language in light of the governing law and surrounding circumstances. The governing law may affect whether requirements outside those expressly enumerated may be taken into account in determining whether a force majeure event has occurred, and if a party has properly invoked force majeure as an excuse for performance. Other provisions in the contract also may have a bearing on how an unforeseen event affects contractual obligations and the applicability of a force majeure clause. Courts and tribunals often refer to the parties' allocation of risk elsewhere in the contract in assessing whether a party is excused from a contractual obligation under a force majeure clause or a related doctrine. Some contracts may have provisions regarding risk allocation relating to various issues, such as changes in law or regulations. Some contracts, such as charter party agreements, may contain specific clauses on infectious diseases and their consequences.

Some contracts include so-called "hardship" clauses that allow a party suffering hardship – a concept that may or may not be defined under the contract – to notify the counterparty and request negotiations to address the effects of the alleged hardship. Some hardship clauses specify the consequences of a failure to reach agreement on how to address alleged hardship, while others are silent.

The burden of establishing that the requirements of a force majeure clause have been satisfied will typically rest on the party invoking the clause. As each contract is unique, legal advice is important to navigate the nuances and issues raised.

### III. Other Related Doctrines to Excuse Performance

Importantly, even in contracts that do not include an express force majeure clause or where a force majeure clause is not applicable in the circumstances, the parties may have rights and obligations in the face of unexpected events that are implied under the governing law or applicable by code or statute.

For example, in some civil law jurisdictions, particularly those derived from the Napoleonic Code, a right of force majeure may be implied into contracts that are silent. In some civil law jurisdictions, code provisions or court developed law governing the doctrines of *clausula rebus sic stantibus*, changes in circumstances, hardship, *imprévision*, or others may also apply providing a right to modify or terminate a contract, or other relief, in certain circumstances.

In many common law jurisdictions, such as U.S. states, England, and certain Commonwealth countries, there are three potentially applicable doctrines that may excuse performance under a contract in light of a supervening event. Not all jurisdictions apply all three doctrines, and the scope varies significantly based on the governing law. The three common law doctrines are:

1. the doctrine of impossibility – which generally excuses performance when a supervening event that the parties assumed would not occur destroys the subject matter of the contract or the means of performance, effectively making performance objectively impossible;

2. the doctrine of impracticability – which generally excuses performance when a supervening event that the parties assumed would not occur renders performance impracticable; and

3. the doctrine of frustration of purpose – which generally excuses performance when a supervening event that the parties assumed would not occur substantially frustrates a party's principal purpose under the contract.

These three common law doctrines are closely related to each other and the concepts underlying force majeure clauses. The first two common law doctrines – impossibility and impracticability – are variants of the same principle that a party is excused from performing a contractual obligation if an unexpected supervening event renders performance impossible or commercially impracticable. These two doctrines notably both focus on the effect that the supervening event has on the *performance* of a contractual obligation. And, if applicable, these two doctrines generally excuse performance of the specific obligation.

Some jurisdictions, like New York, generally recognize the doctrine of impossibility but limit the applicability of the doctrine of impracticability to contracts for the sale of goods. Other jurisdictions have expanded the narrow doctrine of impossibility to extend to situations under contracts more generally in which performance is commercially impracticable, i.e., performance cannot be rendered without *extreme or unreasonable* difficulty, expense, injury, or loss.

The third common law doctrine – frustration of purpose – focuses on the *purpose* of the contract rather than on the performance of the parties’ obligations. Under the doctrine of frustration of purpose as recognized in most U.S. states, a party can still perform its contractual obligations, but the purpose underlying the contract for one of the parties has been fundamentally altered by the supervening event, effectively destroying the value of performance. If applicable, the doctrine of frustration of purpose in most U.S. states generally discharges the parties’ remaining duties under the contract, although temporary frustration is recognized in some jurisdictions. Under English law and in certain Commonwealth jurisdictions, the doctrine of frustration has been broadened to encompass the notions of impossibility, impracticability, and frustration.

Also note that Article 79 of the UN Convention on Contracts for the Sale of Goods may apply if the parties are from two contracting countries and the contract is for the sale of goods. Article 79(1) provides: “A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an *impediment* beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.” Article 79 sets forth additional requirements, including notice within a reasonable time.

Whether these various doctrines and principles in civil law and common law jurisdictions are applicable in the circumstances depends in part on the language of the contract and the extent to which certain risks have been allocated by the parties in any force majeure clause, any hardship clause, or other provisions. As with force majeure clauses, the burden typically rests on the party advancing a doctrine to demonstrate its applicability in the circumstances. And, as with force majeure clauses, these related doctrines are exceptions to the general rule that parties must perform their obligations. Generally speaking, excuses are rarely granted under force majeure clauses and these related doctrines.

The applicability of force majeure clauses and related doctrines often raises several common issues, including (1) the unforeseeability of the supervening event at the time of contracting (often if it was foreseeable, the parties might be assumed to have allocated the risk), (2) causation or exteriority (often requiring an external event beyond the party’s control as the cause preventing or hindering performance), (3) avoidability or irresistibility by the party invoking force majeure (often requiring that the party be without fault and exercise due diligence or reasonable efforts to avoid or mitigate the effects), (4) allocation of risk (generally speaking, these doctrines are gap fillers and are subject to the parties’ allocation of risk in the contract), and (5) notice (often requiring the party invoking the defense to promptly notify its counterparty).

#### **IV. Approaches to force majeure and related doctrines to excuse performance in different jurisdictions**

As discussed above, jurisdictions take different approaches to the interpretation of force majeure clauses and related doctrines

to excuse performance, or to modify or terminate contracts, in light of unexpected events or changes in circumstances. The sections below provide a brief overview of approaches under various U.S. state laws, English law and certain Commonwealth countries, as well as principles underlying many civil law jurisdictions.

##### **A. U.S. law**

Although the law regarding force majeure clauses differs among U.S. states, force majeure is not usually implied into contracts – the parties must have expressly provided for force majeure as an excuse for performance. Generally speaking, U.S. states construe force majeure clauses narrowly and typically require that the supervening event must have been unforeseeable and beyond the control of the parties.<sup>3</sup> The language of the contract is often of primary importance; even when an extreme and unforeseeable event happens, a party generally must establish that the event falls within the contractual definition of a force majeure event.<sup>4</sup> A party relying on a force majeure clause to excuse performance also typically bears the burden of proving that the event was beyond its control and without its fault or negligence.<sup>5</sup>

For example, under New York law, force majeure clauses are expressly construed narrowly; a list of covered events must generally include the specific event that allegedly prevented performance.<sup>6</sup> When a force majeure clause contains an expansive catch-all phrase in addition to specified events, New York courts typically recognize only events that are the same kind as those listed in the contract, rather than giving it the most expansive meaning possible.<sup>7</sup> Force majeure is usually limited to an unforeseeable event that makes performance objectively impossible – mere difficulties generally do not suffice.<sup>8</sup>

The law in other U.S. states differs, with some taking less stringent approaches on some of these issues than the law in New York.

The related doctrines of impossibility, impracticability, and frustration of purpose may also apply in various states in the United States, depending on the jurisdiction and the language of the contract. Under some states’ laws, a party may be relieved from a contractual duty if performance is rendered impossible or impracticable, through no fault of that party, by the occurrence of an event that had not been assumed to occur when the contract was concluded.<sup>9</sup> Under the classical doctrine of impossibility, performance is typically excused only if the subject matter of the contract or the means of performance have been destroyed, rendering performance objectively impossible. Many U.S. states also recognize the broader doctrine of impracticality, which excuses performance if a supervening event renders performance unreasonably or extremely difficult or expensive, generally requiring something much more than a mere change in the level of difficulty or cost, such as higher wages, unless the increase or other change is far beyond the normal range. Most states also recognize the doctrine of frustration of purpose, which excuses contractual performance that remains possible but the expected value of performance to the party seeking to be excused has been destroyed by the supervening event.<sup>10</sup>



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## B. English law

Similar to the situation under the laws of most U.S. states, force majeure is not implied into contracts under English law. Where a force majeure clause exists in a contract, it is strictly interpreted under English law. The party invoking force majeure must typically establish that a supervening event beyond the reasonable control of the parties has occurred and that the force majeure event has caused an inability to perform its contractual obligations.<sup>11</sup> Furthermore, even where the contract does not expressly provide it, the court may find that the parties are obliged to take reasonable steps to avoid or mitigate the harm from a force majeure event.<sup>12</sup>

In the absence of a force majeure clause, the frustration doctrine may excuse performance. English law does not, as a general rule, categorize cases into related doctrines of impossibility, impracticability, and frustration of purpose. The applicable doctrine is now quite simply one of “frustration.”

Notwithstanding this difference in nomenclature, however, there appear to be strong similarities between the three U.S. doctrines outlined above and different limbs of the English doctrine of frustration. Ever since the well-known case of *Taylor v Caldwell*,<sup>13</sup> which involved a contract for hire of a concert hall that was subsequently destroyed by fire, English law has accepted that contracts whose performance has become impossible are frustrated. Furthermore, ever since the famous case of *Krell v Henry*,<sup>14</sup> which involved a contract for the rental of a suite of rooms with a view over the route of the King’s coronation, which was subsequently cancelled because the king became ill, English law has accepted that contracts may be terminated on grounds akin to “frustration of purpose.” Finally, modern formulations of the doctrine of frustration refer to events that “significantly

change the nature” of outstanding rights and obligations,<sup>15</sup> or render the contract “a thing radically different”<sup>16</sup> from that which was contemplated at the time the contract was entered into. By acknowledging that the doctrine of frustration extends to circumstances where performance is still technically possible, albeit radically different to what was contemplated at the time the contract was entered into, English law also appears to accept a doctrine akin to impracticability.

Many Commonwealth jurisdictions follow English law when it comes to the doctrine of frustration (and its different strands). As one would expect, there is a substantial degree of variance among them, with some hewing closely to the approach adopted in England while others differ more substantially.

## C. Civil law

Civil law jurisdictions approach force majeure or changes in circumstances in a variety of ways.

In some civil law jurisdictions, particularly those based on the Napoleonic Code, the codes contain provisions governing force majeure events and may excuse performance of a contractual obligation in certain circumstances, even if the contract does not expressly contain a force majeure clause.<sup>17</sup> These provisions may also guide the interpretation of force majeure clauses, depending on how detailed these clauses are and how much room they leave for the statutory regime to shape their meaning.

Civil law jurisdictions following this approach have generally incorporated the definition of a force majeure event in their civil codes.<sup>18</sup> The doctrine of force majeure varies by country in those that recognize the doctrine, with some adopting narrower

approaches than others. Judges are left to assess the application of statutory force majeure provisions or force majeure doctrines developed by courts on a case-by-case basis.

Although the definition of a force majeure event varies, these civil law jurisdictions typically provide that force majeure events free a party from compliance with the relevant contractual obligation when the performance of the obligation has been rendered impossible.<sup>19</sup> As a general rule, the force majeure event must occur after the execution of the contract; the event must take place outside the party's conduct and control; the event must not have been foreseen at the time of contract; and the effects of the event must have been unavoidable by the party.<sup>20</sup> Force majeure events typically can originate in nature, can be acts of God, and can have a political or human character.<sup>21</sup>

In many of these civil law jurisdictions, the unforeseeable element in the definition of force majeure is an objective standard assessed at the time of the execution of the contract. That is, a court will typically assess whether a reasonable person would have been able to foresee the occurrence of the event at the time of execution of the contract.<sup>22</sup> The unavoidability of the event is also generally an objective standard measured at the moment the event occurred and asks whether the event could have reasonably been avoided.<sup>23</sup>

As a general rule in these civil law jurisdictions that recognize the doctrine of force majeure, the mere fact that the performance of an obligation has become more onerous does not qualify as a force majeure event.<sup>24</sup> In cases in which the effects of a force majeure event only last for a determined period of time, a party typically will only be excused from performing the contractual obligation during that period. Once the event ceases to exist, the party is again obligated to perform.<sup>25</sup>

In most of these civil law jurisdictions, parties can agree in their contracts to specific language governing the definition and consequences of a force majeure event. Likewise, parties may opt out from the application of a statutory definition of force majeure altogether and from including a force majeure clause in their contracts. When this situation occurs, these civil law jurisdictions understand that an event that would otherwise qualify as a force majeure event is considered to be the risk of the debtor.<sup>26</sup>

However, not all civil law jurisdictions recognize the doctrine of force majeure in their codes or law developed by the courts. In many of these other civil law jurisdictions, related provisions or doctrines may be implied into contracts that permit the modification or termination of the contracts in light of certain changes in circumstances.

Some civil law jurisdictions have code provisions or court developed law that excuses performance of a contractual obligation if it has been rendered impossible due to a change of circumstances.<sup>27</sup> Some courts have expanded the provision regarding impossibility to encompass not only legal or factual impossibility but also economic impossibility.<sup>28</sup>

Another prominent example of a related doctrine recognized in many civil law jurisdictions, either in the code<sup>29</sup> or developed

by courts,<sup>30</sup> is the doctrine of *clausula rebus sic stantibus*. If performance has not been rendered impossible, but a (significant) change of circumstances has affected a commonly assumed basis for performance and has led to a serious disruption of the parties' bargain, the parties may have an obligation to negotiate a modification, and, if they cannot reach agreement, the court or arbitral tribunal may step in to decide.<sup>31</sup>

Some civil law jurisdictions based on the French legal system recognize the doctrine of *imprévision*, typically codified, which is related to the doctrine of *clausula rebus sic stantibus* but generally requires that an unforeseeable change of circumstances has an excessively onerous impact on performance to trigger the requirement to negotiate a modification.<sup>32</sup>

Although the details of these related principles and doctrines vary among civil law jurisdictions, to be excused from performance or to trigger the modification or termination of a contract, typically a party must establish that the event or change in circumstances impacts the mutually assumed basis for the parties' agreement and/or has led to a serious disruption of the parties' contractual bargain; the event or change was beyond the party's control; the event or change was not reasonably foreseeable at the time the parties entered into contract; the consequences could not be avoided by appropriate measures; and performance as agreed has been prevented or become excessively onerous as a result.<sup>33</sup>

Whether and to what degree the fact that the performance of an obligation has become more onerous qualifies as a force majeure event or satisfies a related doctrine varies among civil law systems, with many jurisdictions not excusing performance that is merely more burdensome.

## V. Recommendations for Companies Affected by COVID-19 or Other Unexpected Events

As discussed above, COVID-19 and the government measures taken in response are affecting companies around the world. Parties that have been or may be affected by these or other unexpected events may benefit from a thorough analysis of the interplay of the force majeure clauses, governing law clauses, and any dispute resolution provisions in their contracts to assess their rights, obligations, and remedies in the face of unexpected events.

Even in contracts without express force majeure clauses, the parties may have rights and obligations in the face of unexpected events that are implied under the governing law, such as the force majeure doctrine, the doctrine of *clausula rebus sic stantibus*, *imprévision*, or similar doctrines in many civil law jurisdictions or other related doctrines, such as impossibility, impracticability, or frustration of purpose, in common law countries.

Moreover, even those companies that do not anticipate being affected directly or indirectly by COVID-19 may consider this a constructive time to review the terms of their contracts to examine their rights and obligations and options available for dispute resolution if performance becomes affected by some other unexpected event. Parties may draw lessons from the widespread impact of COVID-19 on international business in deciding

whether to seek to renegotiate existing contractual provisions or negotiate future contracts to more adequately address the potential impact of COVID-19 or other events that may affect the parties' ability to perform their contractual obligations.

In particular, specific issues may arise when entering into contracts with parties in certain jurisdictions, where special care must be taken to draft effective contractual provisions, including force majeure clauses, governing law clauses, and dispute resolution provisions. For example, the laws of some jurisdictions may necessitate the inclusion of additional language in contractual provisions, such as arbitration agreements, to ensure enforceable rights.

#### **A. Establishing a force majeure event**

Parties contemplating a declaration of force majeure or receiving such a declaration from a counterparty should consider a number of questions in assessing whether a force majeure event has occurred within the meaning of the contractual clause (or governing law) to support a declaration of force majeure with respect to the COVID-19 pandemic or government measures taken in response. Many of these questions are relevant, in the abstract, to other possible unexpected events that parties may face.

Preliminarily, parties should examine the specific cause that prevents/impairs/delays performance of a contractual obligation and whether that cause can be attributed to a covered event. Some force majeure clauses cover natural events but not human or political actions, or vice versa. Obviously, an express inclusion of epidemics or government measures in a list of examples in the clause may make a force majeure claim in light of the current pandemic more likely to succeed, depending on the language and other circumstances. Parties should also determine whether unforeseeability is required in the contract or interpreted under the governing law, as foreseeable events in many jurisdictions generally may not qualify as force majeure. And of course, for parties affected by the current pandemic, the coronavirus or a related government measure or some other covered event must be the actual cause preventing/impairing/delaying performance. Generally speaking, other causes not covered by the force majeure clause, including negligence or other fault, would likely affect the ability of the party to successfully invoke force majeure or a related doctrine as an excuse for performance. At the very least, it may result in residual liability of the obligor even in case of a force majeure event in certain circumstances.

A force majeure event may not exist if a party is able to avoid or overcome the inability caused by the alleged event and perform its contractual obligations. Even where an event otherwise qualifying as a force majeure occurs, if alternative means of performance are available – through other suppliers or manufacturers, for instance – the failure to perform typically cannot be excused as force majeure, but other doctrines such as *clausula rebus sic stantibus*, hardship, impossibility, impracticability, or frustration of purpose may be relevant.

Mere financial burden or decreased profitability would generally not qualify as force majeure, but again other doctrines

may be relevant under the governing law. For instance, where a government measure or a natural event decreases the demand for a certain product or service, such a change in the market would usually not be considered one that is unforeseeable or that renders performance impossible or impracticable, although the degree of onerousness may be relevant under the governing law.

#### **B. Obligations of the parties**

Before invoking – or deciding whether to accept or reject – force majeure to excuse performance, parties should carefully review what is required under the contractual provisions and governing law to successfully claim and defend it.

For example, force majeure clauses – and other applicable doctrines – often require the affected party to notify the other party, typically in writing, of the force majeure event as soon as practically possible. Some clauses stipulate that the notice must be delivered to the counterparty within a certain number of days. They also usually require the party invoking force majeure to use reasonable efforts to limit the impact of the event on the performance of the party's contractual obligations. Failure to satisfy these requirements – whether imposed by the contract or by the governing law – can result in the rejection of a force majeure claim or other defense under applicable doctrines and/or may not free the obligor from liability for non-performance entirely.

The contract and/or governing law may require the party invoking force majeure to undertake due diligence or reasonable efforts to continue performance. The party invoking force majeure may be required to mitigate the effect of the force majeure event, including by recourse to alternative sources of goods, services, equipment, or materials in some situations. The party invoking force majeure may also be required to provide periodic reports to its counterparty regarding the progress of the force majeure event and any changes in the ability to perform. Some clauses may even mandate that the party invoking force majeure must submit a plan for addressing the consequences of the event. Other contracts – or applicable doctrines – may require the parties to renegotiate or modify the contract to reflect changed circumstances; sometimes, the contract requires such renegotiation to take place within a certain number of days. Failure to fulfill these obligations may affect the force majeure claim or claim under another applicable doctrine.

#### **C. Contractual consequences of invoking a force majeure clause**

Before declaring force majeure or responding to a counterparty's declaration, parties should review what the contract provides about the consequences of invoking a force majeure clause (and also consider the practical consequences). Depending on the language of the clause, declaring force majeure may discharge only a specific obligation or in some instances the entire contract. Some contracts may give the party or its counterparty the right to terminate the contract in certain circumstances. Some contracts stipulate the effect of a force majeure declaration on other obligations under the contract. For instance, some long-term delivery contracts (such

as long-term sale and purchase agreements) may excuse delivery of specified volumes in case of force majeure, which may raise questions about the extent to which such volumes must be delivered later and under what terms. Some clauses identify obligations that may not be excused – the most common example is payment.

Some clauses may also specify how long a suspension of obligations remains in effect. For example, a clause may not permit the indefinite suspension of performance but may provide instead that force majeure only excuses performance for a specific period of time. Some clauses may also require the parties to renegotiate or modify the contract to reflect changed circumstances.

#### D. Dispute resolution

When a party seeks to excuse performance based on a force majeure clause or a related doctrine, the party generally has several options regarding next steps, depending on the language of the contract. First, it could seek to negotiate with its counterparty on how to address the declaration and the impact of the event on the parties' commercial relationship. Second, if the parties cannot reach agreement, either party may consider whether it is able to pursue formal dispute resolution under the contract to resolve the dispute.

The parties should examine what dispute resolution, if any, is available under the contract to resolve a dispute between the parties as to whether a force majeure event has occurred or a related doctrine is applicable, whether the contractual requirements have been satisfied, and, if so, what the contractual consequences are. In particular, parties should examine whether the contract contains an arbitration clause, requiring the parties to arbitrate any dispute, or a forum selection clause, specifying the national court system in which the parties can or must litigate a dispute. Parties to international contracts often (but not always) include arbitration clauses as the means to resolve disputes. Given the frequent use of international arbitration clauses in cross-border contracts, it is likely that a large number of disputes regarding the declaration of force majeure or a related doctrine seeking to excuse contractual performance will be resolved through international arbitration in the months and years ahead.

It is vitally important in these circumstances to review the dispute resolution provision of the contract to assess whether there is an effective and enforceable means to resolve any disputes. In particular, given the pressing need to resolve any such disputes promptly, parties may want to explore whether it is possible to seek interim or provisional relief, either from a court or arbitral tribunal, depending on the dispute resolution clause in the contract. Some international arbitration rules provide for the possibility of emergency arbitration to address urgent issues that require decisions within a matter of days. Many arbitration rules or applicable arbitration laws also permit parties to seek interim or provisional relief from local courts, prior to the appointment of a tribunal. The options available to the parties will depend on the dispute resolution clause in the contract.

Looking beyond the COVID-19 pandemic, there are many unexpected events and government measures taken in response that might constitute force majeure events or fall within the scope of related doctrines excusing performance depending on the contract terms and governing law agreed by the parties. Before such events occur, parties may find it timely to reflect on how such unforeseen events or changes in circumstances may affect their commercial relations, and the extent to which the contractual provisions in their existing or contemplated future contracts adequately address these risks, and, equally importantly, the extent to which they provide for effective and enforceable dispute resolution mechanisms to resolve any disputes.

#### VI. Conclusion

In conclusion, there are no easy answers as to whether a force majeure clause or related doctrines may apply to excuse a party's performance in light of the COVID-19 pandemic and the government measures taken in response. This will require a case-by-case analysis of the language of the contract in light of the governing law and the circumstances of the parties' commercial relationship.

Whether or not companies are directly affected by the impact of COVID-19 and government measures taken in response, the outbreak is a reminder to all companies to review the terms of their contracts to determine their rights, obligations, and potential remedies, as well as dispute resolution options in the event of diseases, epidemics, and other unexpected events that may severely impact contractual performance. In general, force majeure clauses should be drafted to clearly indicate the events that qualify as force majeure; the standard of the degree of impact on performance, such as prevent, impair, or delay; the additional requirements that must be satisfied by the party declaring force majeure, including notice; and the consequences of a force majeure declaration, including the excused obligations, period of suspension, and any termination rights. Other clauses such as hardship and modification clauses should similarly be drafted clearly to identify the circumstances in which they apply and the agreed consequences. The interpretation of force majeure clauses and other related clauses depends heavily on the language of the contract, interpreted in light of the agreed governing law. Moreover, contracts should ideally include a carefully drafted dispute resolution clause that allows for an effective and enforceable means to resolve disputes that may arise, such as international arbitration. Parties are encouraged to consult legal experts who can help to draft such clauses and help to avoid or resolve disputes that may arise through international arbitration and other forms of dispute resolution.

- 1 John A. Trenor is a partner in the International Arbitration Group at Wilmer Cutler Pickering Hale and Dorr LLP (WilmerHale). Hyun-Soo Lim is an associate in the Litigation Department. This article is adapted from a series of client alerts and webinars addressing contract issues in light of the COVID-19 pandemic. *See generally* WilmerHale COVID-19 Center, at <https://www.wilmerhale.com/en/insights/topic-centers/coronavirus-covid19-center>.
- 2 ICC Force Majeure Clause (Short Form), <https://iccwbo.org/content/uploads/sites/3/2020/03/icc-forcemajeure-hardship-clauses-march2020.pdf>. The ICC also provides an even longer draft “Long Form” force majeure clause and a draft hardship clause. *Id.*
- 3 *See, e.g., In re Cablevision Consumer Litigation*, 864 F. Supp. 2d 258 (E.D.N.Y. 2012).
- 4 *See, e.g., Reade v. Stoneybrook Realty, LLC*, 63 A.D.3d 433, 882 N.Y.S.2d 8 (1st Dep’t 2009).
- 5 *See, e.g., Team Marketing USA Corp. v. Power Pact, LLC*, 41 A.D.3d 939, 942 (N.Y. App. Div. 2007) (quoting 30 Lord, Williston on Contracts § 77:31 (4th ed.)).
- 6 *See Phibro Energy, Inc. v. Empresa De Polimeros De Sines Sarl*, 720 F. Supp. 312, 318 (S.D.N.Y. 1989) (citing *Kel Kim Corp. v. Central Markets, Inc.*, 524 N.Y.S.2d 384, 385 (1987)).
- 7 *See Team Marketing USA Corp. v. Power Pact, LLC*, 41 A.D.3d 939, 942 (N.Y. App. Div. 2007).
- 8 *See Phibro Energy, Inc. v. Empresa De Polimeros De Sines Sarl*, 720 F. Supp. 312, 318 (S.D.N.Y. 1989).
- 9 *See* Restatement Second, Contracts § 261; *see also Consumers Power Co. v. Nuclear Fuel Services, Inc.*, 509 F. Supp. 201, 209 (W.D.N.Y. 1981).
- 10 *See, e.g., Chase Precast v. John J. Paonessa Co.*, 409 Mass. 371, 373 (1991).
- 11 *B&S Contracts v VG Publications* [1984] ICR 419.
- 12 *Channel Island Ferries Ltd v Sealink United Kingdom Ltd* [1988] 1 Lloyd’s Rep. 323, 328.
- 13 *Taylor v Caldwell* (1863) 3 B. & S. 826.
- 14 *Krell v Henry* [1903] 2 K.B. 740.
- 15 *National Carriers Ltd v Panalpina (Northern) Ltd* [1980] UKHL 8.
- 16 *Davis Contractors Ltd v Fareham Urban District Council* [1956] AC 696.
- 17 *See, e.g.,* French Civil Code, Art. 1218; Spanish Civil Code, Arts. 457, 1105, 1602, 1625; Argentinian Civil Code, Art. 955, 1203, 1258, 1371; Chilean Civil Code, Art. 45, 1547, 1672; Colombian Civil Code, Art. 64, 1616, 1985-1985.
- 18 *See, e.g.,* French Civil Code, Art. 1218 (“In contractual matters, there is force majeure where an event beyond the control of the debtor, which could not reasonably have been foreseen at the time of the conclusion of the contract and whose effects could not be avoided by appropriate measures, prevents performance of his obligation by the debtor. If the prevention is temporary, performance of the obligation is suspended unless the delay which results justifies termination of the contract. If the prevention is permanent, the contract is terminated by operation of law, and the parties are discharged from their obligations under the conditions provided by articles 1351 and 1351-1.”). *See also* Argentinian Civil Code, Art. 955; Chilean Civil Code, Art. 45; Colombian Civil Code, Art. 64.
- 19 Marel Katsivela, *Contracts: Force Majeure Concept or Force Majeure Clauses*, Unif. L. Rev. 102 (2007).
- 20 Dietrich Maskow, *Hardship and Force Majeure*, 40 Am. J. Comp. L. 657 (1992).
- 21 *See, e.g.,* Chilean Civil Code, Art. 45 (“Force majeure is an unforeseeable and irresistible event, like a shipwreck, an earthquake, acts of war, acts of authority by a public servant, among others.”); Colombian Civil Code, Art. 64 (same); Ecuadorian Civil Code, Art. 30 (same).
- 22 For France, *see, e.g.,* Fabrice Gréau, *Force Majeure, Répertoire du droit civil* (2018) 235.
- 23 For France, *see, e.g.,* Cour d’appel, Paris, 29 March 2016, 15-12113.
- 24 Mahmoud Reza & Javad Zamani, *Force Majeure in International Contracts: Current Trends and How International Arbitration Practice Is Responding*, 33 Arbitration Int’l 3, 395 (2017).
- 25 *Id.* *See also* Argentinian Civil Code, Art. 956 (“An unforeseeable, objective, absolute and temporal impossibility will only discharge the debtor’s obligation when the obligation contains an imperative timeframe for performance or when impossibility irreversibly frustrates the creditor’s bargain.”); Chilean Civil Code, Art. 1547.2; Ecuadorian Civil Code, Art. 1574; Spanish Civil Code, Art. 1625.
- 26 *See* I. de la Maza, C. Pizarro & A. Vidal, *Los Principios Latinoamericanos de Derecho de los Contratos*, at 54-55, 95 (2017).
- 27 For Switzerland, *see* Article 191 of the Swiss Code of Obligations; for Germany *see* Section 275 of the German Civil Code; for Austria *see* Section 920 of the Austrian Civil Code.
- 28 For Austria, *see* OGH 2 Ob 543/53, SZ 26/194 and Riedler in Schwimmann/Kodek, *ABGB: Praxiskommentar* (4th ed. 2014) Sec 901, mn 11.
- 29 *See, e.g.,* Sec 313 of the German Civil Code.
- 30 For Austria, *see* OGH 5 Ob 121/07s, JBI 2008, 176 (*Rummel*); *see also* Bollenberger in *ABGB: Kurzkomentar* (5th ed. 2017), sec. 901, mn 6 (discussing other relevant Supreme Court decisions); Riedler in Schwimmann/Kodek, *ABGB: Praxiskommentar* (4th ed. 2014), sec. 901, mn 8 (same).
- 31 *See, e.g.,* German Civil Code, sec. 313 (“(1) If circumstances which became the basis of a contract have significantly changed since the contract was entered into and if the parties would not have entered into the contract or would have entered into it with different contents if they had foreseen this change, adaptation of the contract may be demanded to the extent that, taking account of all the circumstances of the specific case, in particular the contractual or statutory distribution of risk, one of the parties cannot reasonably be expected to uphold the contract without alteration. (2) It is equivalent to a change of circumstances if material conceptions that have become the basis of the contract are found to be incorrect. (3) If adaptation of the contract is not possible or one party cannot reasonably be expected to accept it, the disadvantaged party may revoke the contract. In the case of continuing obligations, the right to terminate takes the place of the right to revoke.”).
- 32 *See, e.g.,* French Civil Code, art. 1195 (“If a change of circumstances which was unforeseeable upon conclusion of the contract makes performance under the contract excessively costly for a party that had not accepted the risks associated with it, that party may request to renegotiate the contract to its contractual counter-party. It shall continue to perform its obligations during the renegotiations. In case the renegotiations are denied or failed, the parties may agree to terminate the contract, on the date and under the conditions determined by them or ask the judge by mutual agreement to adapt it. In the absence of agreement within a reasonable time, the judge may, at the request of a party, revise the contract or terminate it on the date and on the conditions, he determines.”).
- 33 For Switzerland, *see* SFT, 127 III 300, Judgement of 24 April 2001; for Austria, *see* OGH 5 Ob 121/07s.