Coronavirus - Covid-19 and Contracts – an international summary

Introduction

The World has had to cope over the centuries with the odd pandemic, such as the Black Death and the Great Plague, which gave us the children's song "Ring a Ring of Roses", but very few people foresaw Coronavirus Covid-19 and its paralysing global effect on business and social activity.

Covid-19 comes within the scope of events that are unforeseen, the effect of which can prevent a contract from being performed – in other words "force majeure". In saying that, however, it is not the virus as such that prevents performance of the contract, rather the effect of the virus, which is the prohibition against commercial and social activity in different countries.

The basic principle of frustration of contract is that performance of that contract is or becomes illegal or impossible due to an unforeseen event such as a new law or government imposed restrictions. However, the virus and the ensuing lockdown in affected countries should not be seen as an opportunity to evade liability under a contract, whether that be a contract for sale / purchase or lease of real estate, sale or supply of goods or services or any other contract. The courts in many countries will be likely to be reluctant to declare a contract as frustrated and thus cancelled, sue to what in the long term may be just a short term period of inability to perform. Several countries are providing financial support for businesses in order to protect jobs and to keep the economy functioning. This paper outlines the basic position in various countries in Europe, USA, Malaysia, and South Africa.

Europe

Ireland

As a general rule Irish law does not discharge obligations just because performance of the contract becomes difficult, onerous or costly, even where this is the result of unforeseen circumstances. Thus, a business cannot excuse non-performance or delayed performance simply because of the increased cost which is attributable to self-isolation of its workforce.

The law somewhat harshly recognises that the risk of such is for the parties to allocate under the terms of the contract. The most common means whereby a contract may provide relief is through what is known as a "*force majeure*" clause (from the Latin meaning "superior force"). This is frequently included in commercial contracts, such as manufacturing, transport and the supply chain where it will expressly deal with how unforeseeable events and circumstances will impact the commercial relationship. A comprehensive force majeure clause will identify specific event categories, such as changes in regulation, administrative actions by government or strikes. Some clauses refer in a more generic manner to "any other cause beyond the relevant party's control". Given that few existing force majeure clauses expressly refer to pandemics or the level of economic

shut-down occasioned by Covid-19, the wording of the clause will dictate whether it can be interpreted as affording relief.

The Courts have been consistent in refusing to engage in excessive interpretation when the plain English reading of a clause is perfectly clear. The factual circumstances will be highly relevant. Even if a pandemic isn't provided for, indirect fallout such as travel disruption, quarantines and closure of public services may well be covered. A clause which refers to events "beyond the control of the relevant party" can only be relied upon if that party has taken all reasonable steps to avoid its operation or mitigate its results. It is for the party exercising a force majeure clause to show that a relevant event has occurred. The clause may permit either delay, partial performance or, more commonly, termination of the contract.

If *force majeure* is not an option, other legal avenues may be open. Under the doctrine of "frustration", when an event occurs that results in a fundamentally or radically different situation from what was in the contemplation of the parties when the contact was made, a court may recognise that there is an impossibility of performance and discharge the parties from the contract. Establishing frustration is fraught with technical hurdles but has been used during war and in the case of the requisition or detention of ships. Attempts have been made recently to invoke frustration following Brexit and SARS. In both cases the courts refused to extend its application at least where land is involved. It could be argued that following SARS and other epidemics, including Swine 'Flu and Ebola, Covid-19 might not be regarded by the courts as being an unforeseeable event constituting legal impossibility of performance.

The mechanism for termination or suspension of a contract for either reason will depend on each contract however given the high threshold to be met when invoking these, businesses should take legal advice. The consequences of a misstep at this critical stage could involve significant claims for unlawful breach of contract. Business should also be on the lookout for trading partners that may opportunistically seek to invoke *force majeure* or termination to escape a contract that has simply become undesirable.

Scotland

In Scotland, if a contract is silent about force majeure, then the general position is that if performance of that contract is or becomes illegal or impossible due to an unforeseen event such as a new law or government imposed restrictions, the contract is "frustrated", and the parties to the contract walk away, absolved of all obligations. It is normal for leases of commercial real estate to contract out of this law, so that the tenant is bound to keep paying the rent and to perform all other tenant obligations even if the property is destroyed or rendered incapable of use and occupation.

There is case law that a contract for short term lease of a flat where the purpose of the lease was to allow the tenant a good view to watch a monarch's coronation, and then the

coronation itself was cancelled had the effect of frustrating the contract; similarly, the requisition by the army during a war, of a property that was let to a tenant also had the effect of frustrating the contract. However, it is thought that where performance of a contract is not time critical, or if the period for performance is lengthy, then lockdown and restrictions that are of a temporary (although of an uncertain) time period, would not frustrate the contract.

England

1. *Preface*

The concept of *force majeure,* although recognised by other European civil legal systems, is broadly alien to the English Common Law. It is a concept which only derives its lifeblood from being present in a contract and as such needs to be carefully and - as best possible - clearly defined.

2. *Force Majeure* : Its purpose

The purpose of such a provision is to exclude a party's obligation to perform a contract owing to events which are beyond that party's control and could not have been foreseen at the time that the contact was made.

3. *Definitions*

Many agreements purporting to provide for an event of *force majeure* seek exhaustively to list those events which are likely to fall within the definition. These may comprise war, natural disasters, civil unrest, hurricanes or pandemics. [If the event has not been expressly listed a Court may be willing to examine the categories of event in order to decide whether or not it might fall within the concept of *force majeure*.]

It is best to be as specific as one can. The more general or amorphous the range of events, the more difficult it may be to establish that the specific occurrence comprises an event beyond control.

4. *Consequences*

If the parties between them agree (or it is found) that an event of *force majeure* has arisen, then broadly put, the parties are excused from performance unless it can be shown that there exist alternative means to implement and conclude the agreement.

5. ***Essential Criteria***

Accordingly, in order successfully to maintain a claim to be excused from performance on the basis of *force majeure* it is essential to establish compliance with the following three criteria:

(1) The event defined as *force majeure* within the agreement has arisen;

(2) It is not possible to conclude the contract by any other means; and

(3) There was nothing that could reasonably have been done to avoid the event or to lessen its consequences.

4. ***Covid-19***

All cases must necessarily be fact-specific. However, in general terms, it may properly be said that if an agreement purports to excuse performance upon the basis of a pandemic, then *prima facie* the agreement would appear to include the current virus.

5. ***Recognition and agreement***

If it is thought that there may be a case or claim to terminate performance upon the basis of an event of *force majeure* occasioned by the current pandemic, close attention must be paid to the wording of the agreement. The opposing party must be invited to agree that the event falls within *force majeure* - and in keeping with the contractual provisions - the consequences thereof will then apply. Ordinarily this means the contract may be terminated with neither party having any further or other liability to the other.

6. ***Termination***

Care must be taken when seeking to terminate by ensuring that this is done fully in keeping with the contractual provisions.

7. ***Insurance policies***

If one's business has been the subject to *force majeure* and there has been expense and outlay which may be irrecoverable, it may be wise to examine whether one might properly have regard to the provisions of insurance policies taken out to cover this eventuality. Certain will refer to loss or interruption of business occasioned by a notifiable disease. In the United Kingdom Covid-19 was declared a notifiable disease on 5th March 2020. Again, careful attention must be paid to any such policy as to whether it might extend retrospectively to the occurrence of Covid-19.

8. *General disclaimer*

The observations expressed in this Article are intended as a broad and pragmatic guide to essential principles and practice. However, all cases or claims may necessarily turn upon their own facts and the wording of the agreement in question.

France

Whatever the government might have declared or decided (in March the French Minister of Finance qualified the pandemic Covid-19 as force majeure), it is for the courts to take a position regarding covid-19 according to the principle of the separation of powers.

In the past, the courts have been very restrictive : in 2009, the dengue virus and the chikungunya virus were not judged to be health crises that constitute force majeure events.

We can assume (and hope) that the exceptional nature of the current pandemic will bring judges to be more flexible in the assessment of force majeure.

Article 1195 of the Civil Code now allows (since 2016) under certain conditions, to renegotiate a contract if the « circumstances » have changed since its signing. This is a way that will therefore have to be explored.

Germany

1. Are there any statutory provisions relating to force majeure?

The explicit term *force majeure* (*"höhere Gewalt"*) is only rarely used in German statutory law. The most important effects of *force majeure* events on rights and obligations are determined by general principles of German law, such as impossibility, significant change in the circumstances forming the basis of a contract and fault.

The most relevant provision directly addressing *force majeure* is Section 206 German Civil Code. Under this provision, the limitation period is suspended as long as a party is

prevented from asserting its claims by *force majeure* within the last six months of the limitation period. *Force majeure* under this provision means events that could not have been prevented even by the utmost care that could reasonably be expected. In consequence, the threshold is high and any negligence by a party will exclude its application. The suspension of limitation periods due to *force majeure* is generally accepted if the administration of justice comes to a standstill, be it because of war, natural disasters or pandemics.

2. How are force majeure clauses in commercial contracts applied and interpreted in practice?

Force majeure clauses are common in international commercial contracts, including contracts governed by German law, and are generally recognised by German courts.

The individual design of *force majeure* clauses varies significantly. They may only refer broadly to *force majeure*, incorporate examples or an exhaustive list of *force majeure* events, or exclude certain types of *force majeure* events. Under general principles of contract interpretation, German courts will seek to determine the intention of the parties at the time of drafting the *force majeure* clause, even if such intention contradicts its clear wording.

German courts have generally understood *force majeure* to refer to (i) external events (*"von außen kommende Ereignisse ohne betrieblichen Zusammenhang"*), which (ii) are unavoidable even with the utmost care to be reasonably expected ("*äußerste, vernünftigerweise zu erwartende Sorgfalt"*). Courts have recognised epidemics as cases of *force majeure* in the context of travel law; this understanding may also inform uses of the term in the context of commercial contracts. Legal scholars generally recognise large epidemics as a possible form of *force majeure*.

Typically, *force majeure* clauses suspend the obligations of the parties for the duration of the impediment. However, many clauses require a party's reasonable effort to overcome impediments resulting from *force majeure* events. To determine which precise efforts are required of a party in a particular scenario, such clauses need to be interpreted on a case-by-case basis, taking into account, among others, the exact wording of the clause, the general contractual risk allocation between the parties and the overall circumstances.

Force majeure clauses also commonly incorporate certain notice requirements. The burden of proof that performance of an obligation is hindered or impeded by a *force majeure* event lies with the party wanting to rely on a right to refuse performance.

3. In the absence of statutory provisions and / or contractual arrangements on force majeure, which instruments are available to avoid the performance of contractual obligations?

German law offers several instruments to address the effect of *force majeure* events on contractual performance. However, there is no case law explicitly applying these general principles of contract law to epidemics.

The most important instruments to cover *force majeure* events are impossibility, significant change in the circumstances forming the basis of a contract and the general principle of fault:

3.1 Impossibility (Section 275 German Civil Code)

This provision applies not only where it is technically or legally impossible to fulfill the obligation, but also in cases where performance is technically still possible, but would require expenses and efforts which, considering the subject matter of the obligation and the requirements of good faith, would be grossly disproportionate to the interest of the other party in the performance of the obligation. For example, if a party was banned from performing its duties under a government ban, as in quarantine situations, this could constitute a case of so-called absolute impossibility, (temporarily) relieving the party from its obligations. In contrast, where parties carry the risk of procuring goods, especially in overseas trading and in wholesale trading contracts, they can be required to make significant efforts, e.g. to ensure alternative sourcing of material, components or goods. This can even mean that they must incur losses to perform the contract. Notably, impossibility does not usually cover situations where general market prices have gone up, making delivery more expensive. The main issue will be to determine the limits of what can still be expected of a party to overcome an impediment. As this depends on the specific circumstances of the individual case and the contractual risk allocation, there are no general guidelines.

If a party has caused the impediment, it can either not rely on the impossibility or will be subject to claims for damages.

If Section 275 German Civil Code applies, a party does not have to perform its obligations. German courts also apply Section 275 German Civil Code to temporary impediments, meaning that a party temporarily does not have to perform while the impediment exists.

Once a party is not required to perform its obligations under Section 275 German Civil Code, the other party is generally relieved from having to perform its corresponding obligations (i.e. typically from paying for the goods or services), unless the circumstances of the case warrant a different assessment, Section 326 paras. 1, 2 German Civil Code.

There is no clear guidance for cases where a seller needs to fulfill several competing obligations to deliver goods but is unable to fulfill all of them because of a *force majeure* event. While courts tend to require the seller to deliver the goods to all customers on a *pro rata* basis, some courts have held that it is for the seller to decide who should receive the goods. In consequence, the first buyers enforcing delivery would have an advantage.

It is upon the party relying on the impossibility to perform to prove the prerequisites of Section 275 German Civil Code.

3.2 Significant change in the circumstances forming the basis of a contract

Section 313 German Civil Code will apply where the balance between performance and counter-performance is significantly disturbed in a way that was not foreseeable to the parties when concluding the contract (*"Störung des Äquivalenzverhältnisses"*).

As a general rule, courts will apply this provision only cautiously and in extreme cases. The principle of binding contracts requires that the provision only be applied if holding the party to the contract would plainly be irreconcilable with law and justice. Yet, despite the lack of supporting case law, a major pandemic could reasonably be argued to be sufficient to apply Section 313 German Civil Code.

As Section 313 German Civil Code primarily leads to a modification of the contract and only as a last resort gives a party the right to avoid the contract (Section 313 para. 3), it can provide flexible solutions.

As with impossibility, the party relying on Section 313 German Civil Code needs to prove its prerequisites. Contractual *force majeure* clauses will take precedence over Section 313 German Civil Code.

3.3 General principle of fault

If damages are claimed due to a disruption of performance, a party is in principle not liable for damages if it can show that it did not act negligently, Section 280 et seq. German Civil Code, which is conceivable in case of a *force majeure* event. The same applies in case of delayed performance. However, this general standard can and often is modified by contract, be it explicitly or implicitly.

3.4 New law to mitigate the consequences of the Covid-19 pandemic

A new law (*Act to Mitigate the Consequences of the COVID-19 Pandemic under Civil, Insolvency and Criminal Procedure Law of 27 March 2020)*) to mitigate the consequences of the Covid-19 pandemic in civil, insolvency and criminal procedural law intends to lessen the consequences of the pandemic for the affected citizens, the real economy as well as courts and public prosecutors offices. With regard to certain contracts and, more specifically, certain continuing obligations, the new Article 240 of the Introductory Act to the Civil Code provides for a temporary right for consumers and micro-entrepreneurs to refuse to fulfil a contract if certain conditions are met. Special regulations apply to rental and lease contracts and consumer loans.

Netherlands

Netherlands

1. Approach by the Dutch, as a Continental in comparison to the Anglo-Saxon legal system

1.1 One of the major differences between the Continental legal systems and the Anglo-Saxon legal systems is that although both are familiar with the concept of force majeure, the Continental system has defined that concept and incorporated it in its laws, whereas the Anglo-Saxon systems has not.

The consequences of this are that if an unforeseen event occurs, in the Continental systems, the law guides the parties in answering the questions (i) if the event may be categorised as force majeure and (ii) what are the consequences on the obligations of the parties under and in respect of such agreement, whereas under the Anglo-Saxon system the parties have to define beforehand which events may be categorised as force majeure and provide for the consequences that may have.

1.2 Under Dutch law the most relevant basic provisions are found in Book 6 of the Dutch Civil Code ("Burgelijk Wetboek"), BW; systematically: Book 6: The law of obligations; Title 6.1: Obligations in general; Section 6.1.9 Effects of non-performance; Subsection: 6.1.9.1 General provisions; articles 6:74 and 6:75.

Article 6:74 BW (falling short in performance)
- 1. Any falling short in respect to the fulfilment of an obligation results in the obligation of the debtor to remedy the damage the creditor has suffered as a consequence thereof, unless the falling short may not be attributable to the debtor.

Article 6:75 BW (force majeure)
Falling short cannot be attributed to the debtor, if the falling short may not be legally blamed on the debtor, be it by virtue of the law, a legal act or following "generally accepted principles in daily life (*communis opinio, scr.*)" to be on the account of the debtor.

(These are fair office translations only.)

1.3 The most striking difference lies in fact that the Continental system in the respective civil codes provides for general rules which are applied to determine if a situation may be classified as force majeure (thus without requiring the parties to define the unexpected and unthinkable upfront) and which consequences that may have for the parties.

2. General situations which hinder performance under COVID-19

2.1 The most basic situations found as a consequence of non-fulfilment of contractual obligations are
(i) performance has been prohibited by the authorities;
(ii) performance has voluntarily been suspended following strong advice by the authorities;
(iii) pre-emptive non-performance by e.g. termination or suspension of a future contractual performance.

2.2 These scenarios have to be considered in the light of the fact that the COVID-19 pandemic qualifies as an unheard of, and for modern times unprecedented, situation with worldwide effect and lacking an instant remedy.

As a consequence, uncertainty rules, and the authorities rely on the most basic measures, e.g. quarantine, isolation, limitation of spreading infection.

3. Force majeure or not?

3.1 It is impossible to determine, if all short falling in the performance under an agreement may qualify for allowing protection under the force majeure provision of the Dutch civil code (article 6:75 BW).
The only way to determine this is to examine the facts and then apply the provisions specified in article 6:75 BW meticulously, in each individual case. However, even after having done so, certainty will only be available if and when the Supreme Court has handed down judgement, and even then, only for that individual case.

3.2 Since the COVID-19 (or a similar) situation has not been dealt with in court in the past 75 years, there is no specialty jurisprudence which may guide the way. However, there is jurisprudence which relates to non-performance and the remedies thereof in general.

4. Additional remedies e.g. Unforeseen Circumstances

4.1 In a situation which would not allow a successful application of the provisions of force majeure, there would still be remedies left, e.g. the provision of article 6:258 BW, which deals with the concept of what a court could undertake in case a contract between parties shows or a party to a contact is confronted with, unforeseen circumstances.

4.2. The relevant legal provision is article 6:258 BW, which reads in a fair office translation:

Article 6:258 BW (unforeseen circumstances)
-1. The court may, following a claim by one of the parties, change the consequences of an agreement or dissolve the agreement entirely or partially on grounds of unforeseen circumstances which are of a nature, that the other party may, based on the principal good faith (*in the performance of an agreement, scr.*), not be expected to keep up the agreement unchanged. These changes may be given retrospective effect.
-2. A change or the dissolution shall not be granted in as far as the circumstances based on the kind (wording, scr.) of the agreement or on basis of the "generally accepted principles in daily life (*communis opinio, scr.*)", be for the account of the party which seeks protection under this provision.

4.3 This provision requires legal proceedings to be raised if the parties would be unable to reach an out of court solution.
As this article reflects one of the basic principles of Dutch contract law, it may always be called upon by a party to an agreement.
Furthermore, the interpretation of (the contents of) agreements under Dutch law is based on the principle good faith, which has also been reflected in the so called Haviltex-judgements handed down by the Supreme Court.

Very short and only to give a limited insight: not only the wording of the agreement is decisive but also all relevant circumstances influence the interpretation of (the performance under) an agreement, e.g. what the specific parties, hence and forth, may have expected.

5. What to do if confronted with COVID-19 consequences on the performance of a contract?

5.1 Take out legal advice immediately and well before talking to the other party, in order not to damage your own position.
Bear in mind, that the Dutch law on contracts may not be assumed to be similar to that in other jurisdictions.

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Belgium

In Belgium, the pandemic is not recognised as constituting force majeure. The decisions of the government make it that, nonetheless, to some extent.

Italy

"Force Majeure" is not defined by the Italian Civil Code. However, as a general rule, parties to a contract are not liable if they can prove that performance became impossible or was delayed due to an extraordinary and unpredictable event (supervening impossibility of performance). If performance is definitely impossible, the obligations in the contract are cancelled. In cases where performance is only partially possible, or the hindrance continues, the other party may terminate the contract.

If extraordinary and unpredictable events do not make the performance impossible, but cause an excessive burden to one of the parties, the contract may be terminated or amended by the court.

Therefore, even when the contract does not contain a Force Majeure clause it is possible under Italian law to invoke extraordinary and unpredictable events, like the need to comply with emergency regulations due to a pandemic, in order to be released from the fulfilment of contractual obligations.

In addition, a decree of the Italian Government of 17 March 2020 states that the respect of the rules for the protection of health during Covid-19 pandemic must always be considered as a reason of exemption from liability in case of delay or failure to fulfil contractual obligations. This rule applies both to public and private contracts and in fact could make it easier to prove the existence of the impediment to performance.

Finally, international sales contract which are subject to Italian law are also subject to Vienna Convention of 1980 (CISG) which prevails over domestic rules, unless it is excluded by the parties. CISG regulates Force Majeure at Article 79.

Spain

The Spanish Civil Code states that where force majeure occurs, nobody is liable for events which cannot be foreseen or which, been foreseen, but are inevitable. However, in the Spanish legal system there is another legal concept (case law) dealing with frustrated contracts because of the COVID-19: the *Rebus Sic Stantibus* clause.

Although the principle of *pacta sunt servanda* is based on contract law, the *Rebus Sic Stantibus* clause allows for introducing modifications in the contract or its termination when an unforeseeable event makes important changes in the contractual relationship, or when the performance of that contract is or becomes illegal or impossible. This clause is an anomaly of our legal system that is used by the case-law. In practice, it means that the parties should renegotiate the terms of their contracts in order to adapt the contract to the new reality.

One example is the royal decree used by the Government to protect tenants of real estate. If the landlord owns more than 10 properties, he must allow a maximum 4 month moratorium of the rent. If the landlord owns 10 or fewer properties, the moratorium is voluntary, indirectly alluding to the *Rebus Sic Stantibus* clause

Greece

The notion of force majeure is recognized by Greek law and Hellenic Civil Code (HCC).
Every unintended occurrence or event (not the result of willful conduct or negligence) is considered to be an event caused by force majeure and does not incur liability.
Force majeure is a civil law concept which aims to allow the contract to be executed in circumstances where contracting parties, who are not in default, are prevented from performing their contractual obligations due to disrupting supervening events beyond their control. The inclusion of a force majeure clause allows contracting parties to agree to the occurrence of certain events which excuse a party's performance of its contractual obligations and can, accordingly, prevent the contract from becoming frustrated.
In the light of the above, as a general rule, contractual parties cannot be held liable for breaches of contract that resulted from events of force majeure (Articles 336, 342, 380, HCC).
In the event of a lack of ability to perform by a contracting party (who is not at fault), this party is released from the obligation to perform (Article 380, HCC).
In sales contracts, unless otherwise stated and agreed upon in the contract, the buyer bears the risk for the random destruction or deterioration of goods at the time of delivery (Article 522, HCC).

Greek law also recognizes the concept of unexpected changes in circumstances (Article 388, HCC). In particular, if the contracting parties proceed to an agreement based on certain circumstances and these circumstances change following unforeseeable and unpredictable events (rendering the fulfillment of a party's contractual obligations overly burdensome), then that party may request the court to adjust the obligations according to the new circumstances or terminate the contract in whole or in part.
If disease or epidemic is not expressly included, that may create problems in the interpretation of the contract and whether the clause covers the case of COVID-19.
Therefore, even if "pandemic" is not explicitly defined in the relevant clause as a 'force majeure' event, it is presumed to constitute such an event, if the relevant term makes reference also to any event of completely exceptional nature which was impossible to have been foreseen and is outside of the control of and diligence owed by the contracting party.
The Contracting Party invoking the clause should:
• send notice to the other party,
• provide supporting evidence, and
• indicate that "due diligence" measures have been taken to avoid any adverse effects of the force majeure event.
In any case, the invocation and application of the force majeure clause will depend both on the express wording of the respective clause in each contract, as well as the specific factual circumstances of each particular case.
Temporary or permanent exemption from the performance of contractual obligations is possible by applying the provisions on non-performance with no fault by the contracting party, which are laid down in Greek Civil Law.

Cyprus

If there is no force majeure clause in a contract, or if the supervening event is outside the scope of the clause, then, under Cyprus law, non-performance of a contract may be excused through the doctrine of frustration which would render the contract void.

In general the doctrine of frustration will apply under Cyprus law if the following main elements are met: a valid contract must be in existence, an event that could not have been foreseen or anticipated by the parties when entering into the contract must have occurred and such event shouldn't have been caused by either party, the event has arisen following the formation of the contract and the contract must not yet be fully performed, the further performance of the contract is impossible or illegal or completely different from what the parties have agreed to. In addition to the above, the contract should not contain a clause relating to the unforeseen event.

Due to its drastic effect, the Courts tend to apply the doctrine of frustration strictly. A contract will not be frustrated merely because the circumstances in which it was made were

altered, it will be essential to prove that the change of circumstances are so fundamental as to be regarded as striking the root of the contract. Similarly, disappointed expectations of the parties, as well as increases in expenses or the event that performance of the contract has become more onerous will not be sufficient reasons to justify frustration. In order to reach a decision, the courts will examine the contract, the circumstances under which it was made, the belief, knowledge and intention of the parties being evidence of whether the changed circumstances have destroyed altogether the basis upon which the contract was agreed on.

Poland

The outbreak of the COVID-19 epidemic caused a rapid deterioration of both Polish and global economy. The state of the epidemic introduced on March 20, 2020 and interrupted supply chains have resulted in profound changes on the market and put many entrepreneurs in a very difficult situation.

In connection with the above, contract clauses regarding force majeure have become current as a circumstance excluding liability for non-performance or improper performance of the contracts. Below we present a preliminary review of issues related to the occurrence of the COVID-19 epidemic as a case of force majeure in the field of economic contracts.

COVID-19 as force majeure

As a rule, the concept of force majeure is not defined in the provisions of Polish law. In the civil law doctrine it is assumed that force majeure is an event meeting jointly the following conditions:

- external in nature,
- irandom or natural,
- impossible or very difficult to predict,
- outside the scope of human rule.

Legal scholars mention epidemics among cases of force majeure. It is therefore justified to consider the COVID-19 epidemic as force majeure.

COVID-19 as a basis for evading the effects of non-performance of contracts?

The question whether the COVID-19 epidemic will exclude the party's liability for non-performance or improper performance of the contract cannot be explicitly answered because each contract is different and the impact of the epidemic on each contract is different. In each case, therefore, individual analysis of specific contractual clauses is necessary.

As a rule, force majeure is a circumstance that leads to a lack of liability for non-performance or improper performance of the contract. There must, however, be a causal link between the damage and force majeure (i.e. a state of force majeure would indeed have a direct impact

on the non-performance of the contract). In most contracts, the parties independently define the concept of force majeure, which is binding for the purposes of a given legal relationship (usually they refer to the above-mentioned conditions formulated by the doctrine of civil law to some extent).

As a rule, it is assumed that in most contracts, liability for non-performance or improper performance of the contract can be released in cases of force majeure.

The burden of proof in the event of an attempt to evade the consequences of non-performance of the contract in the event of force majeure in each case (e.g. in the event of a legal dispute regarding compensation or contractual penalties) always rests with the party who did not perform the contract. For example, in the case of companies that can switch to a remote work system, it will be difficult to prove that performance of the contract has become impossible, because the cause and effect relationship between the epidemic and failure to perform the contract will not be properly demonstrated. But such an effect can be demonstrated, for example, in the case of a prolonged trade ban covering certain entrepreneurs, a ban on the organization of mass events, theater performances, concerts, etc. One may also consider invoking force majeure in the hotel, transport or tourist sector.

Informing the counterparty

If you are unable to properly perform the contract concluded with the contractor due to the circumstances arising from the COVID-19 epidemic, we recommend that you immediately notify the other party. This is a basic obligation in the light of the principle of cooperation between the parties in the performance of the contract. The lack of such notification may prevent the contractor from taking measures that could reduce the extent of damage resulting from non-performance or improper performance of the contract. Therefore, failure to inform the contractor loyally about the situation may further increase the liability of the party not performing the contract.

In any case, before informing your business partner about the impossibility of proper performance of the contract due to the COVID-19 epidemic, we recommend that you consult us in order to determine the possible risks and properly justify the breach of contractual obligations. It should be remembered that in the time of crisis caused by the outbreak of the COVID-19 epidemic, many business entities will certainly be interested in negotiations, during which it may be possible to find solutions satisfactory for both sides.

What other measures can be taken?

Another tool in the Polish legal system that may have significance for economic relations changed by the crisis caused by the epidemic is Art. 357^1 of the Civil Code, regulating the effects of the so-called an extraordinary change of circumstances (rebus sic stantibus).

It states that "if, due to an extraordinary change in relations, the performance would be connected with excessive difficulties or would threaten one of the parties with gross loss, which the parties did not anticipate at the conclusion of the contract, the court may, after

considering the interests of the parties, in accordance with the principles of social coexistence, mark the manner of execution obligations, the amount of the benefit or even decide to terminate the contract. When terminating the contract, the court may, if necessary, decide on the accounts of the parties, following the principles set out in the previous sentence."

Modifying the performance of the obligation, the amount of the benefit, or even termination of the contract using the abnormal clause of changing circumstances will require a court request. You will need to show before the court how the extraordinary change in circumstances affected your performance or the contract.

Switzerland

The concept of force majeure is not explicitly ruled in the Swiss Code of Obligations (hereinafter "CO"), but can be based on article 119 CO. According to this provision, a claim becomes invalid by operation of law where its fulfilment is impossible (not only for the individual debtor, but also for any other debtor who would be in the same situation). Therefore, in such a case, the debtor is no longer required to perform, but, on the other hand, also loses his counter-claims which were based on his own performance (i.e. claim for the purchase price in case the transfer of the purchased good has become impossible). To the extent the impossibility to fulfil the claim is not the debtor's fault, the debtor does not have to pay damages, either.

The Corona-virus pandemic may thus qualify as a force majeure; however, every case must be examined individually. In particular, the pandemic needs to render the claim itself impossible, not the payment of money (which is, according to Swiss law, never impossible).

Israel

In Israel, at a very early stage, the Accountant General at the Treasury stated that the Corona virus does not meet the definition of Force Majeure, and he suggested that delays in construction due to the Corona virus would not be considered as force majeure. However, of course, it is for the courts to decide is a contract is frustrated by an event that constitutes force majeure.

In many Commercial contracts as well as Mergers and Acquisitions agreements, there is a specific clause that relates to extreme situations and sets out the rights of the parties in certain circumstances. If the contract does not have a specific clause, the Contracts Law (General part) and the Contracts Law (Remedies for Breach of Contract) apply.

The Contracts Law (Remedies for Breach of Contract) lists some cumulative conditions, in order to protect a breaching party under certain circumstances of frustration, as follows:
Circumstances exist under which the party couldn't and wasn't required to foresee or know in advance when signing the contract, the breaching party could not prevent those circumstances and due to these circumstances the fulfillment of the contractual obligation is impossible or would be fundamentally different from the agreed conditions.

Time will tell if the Corona Pandemic meets these conditions under Israeli Law.
In the past, the Supreme Court decided that almost everything, including war, is foreseeable while signing a contract, but over the years, the Supreme Court has softened its approach and recognized certain events, for example- general strike, as events that frustrate contractual obligations.

Considering the exceptional nature of the Pandemic, the very strict measures which have been taken to deal with it including regulations and orders and its global extent, it is very likely that the Corona – or the related regulations and orders imposed by the government - may be recognized as grounds for frustration contract under The Contracts Law (Remedies for Breach of Contract).

USA

The applicability of a force majeure provision is contract-specific and there is generally a high bar for enforcement of such a clause. Recent events, including the declaration of COVID-19 as a "pandemic" by the World Health Organization ("WHO") and the implementation of local, state, and national mandates related to travel, movement, and health and safety, have altered the force majeure landscape in a manner that may impact the availability of such provisions as a breach of contract defence for nonperforming parties.

A contract may either explicitly list all events that qualify as a force majeure event or generally define a force majeure event as an event beyond the parties' control. While the latter provision leaves more room for interpretation, courts will generally be the final authority on whether the event qualifies as a force majeure event under a given contract and whether the performance of the nonperforming party is truly impossible. As an added complexity, even if the force majeure provisions specifically list the event in question, a party typically cannot invoke a force majeure defence if (i) the event was foreseeable, (ii) the event could have been mitigated by the non performing party, and (iii) the performance is merely impracticable or economically difficult rather than truly impossible.

If a force majeure clause in a contract is silent on pandemics, epidemics, quarantine, or other viral outbreaks, there may be other language available that triggers a force majeure clause. For example, many force majeure clauses contain an "acts of government" provision, and a government directive (e.g., shutting down an event or limiting movement of individuals) would likely trigger such a force majeure provision.

Recent governmental regulations intended to contain the COVID-19 outbreak may similarly make it easier to invoke a force majeure clause not initially triggered by the pandemic alone.

Other Contractual Defences

Even when the parties have not specifically agreed to a force majeure provision in their contract, the common law defences of commercial impracticability and impossibility may be implicated with mandated work stoppages and shutdowns and other events caused by COVID-19.

Many states recognize the doctrine of commercial impracticability as a defense to the performance of a contract. Generally, the doctrine states that when, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged. While this seems straightforward, many courts have limited use of the doctrine to situations in which both parties held a basic (though unstated) assumption about the contract that proves untrue. A government ordered shut down of business could certainly be argued to upset the basic premise of being able to operate a party's business. However, simple economic impracticability – that is, that performance has become more expensive than anticipated – will not qualify for the defence. Lastly, some courts have held that a party claiming commercial impracticability "must use reasonable efforts to surmount the obstacle to performance."

Impossibility is a related defence that is often conflated with the doctrines of commercial impracticability and "frustration of purpose," Commonly-cited examples of these doctrines include: (1) the death or incapacity of a party necessary for performance, (2) the destruction or deterioration of a thing necessary for performance, and (3) a change in the law that prevents a person from performing. Again, a mandated work stoppage or shutdown would seem to be implicated here.

Ultimately, whether a party can exercise its rights under a force majeure clause or whether a party may invoke a common law defence to performance is a fact-intensive analysis that must be determined on a case-by-case basis.

South Africa

The principle of "*vis maior*" and its bed fellow "*casus fortuitus*" form part of South African law. The former has been described as a "*greater, superior or irresistible force*" and the latter as "*a fortuitous or unavoidable accident*". As a result, the supervening impossibility may create a situation where performance of an obligation in terms of a contract becomes impossible through no fault of either of the parties.

There is very little distinction between the effects of *vis maior* and *casus fortuitus* which includes "*any happening, whether due to natural causes or human agency, is unforeseeable with reasonable foresight and unavoidable with reasonable care*".

The intervening impossibility may be permanent or partial. If it is permanent, the contract may be cancelled.

The effect of partial impossibility of performance depends on whether the obligation which has become impossible of performance, is divisible or indivisible from the contract. In the former case, the divisible contract must be divided, be discharged for the duration of the partial impossibility and the remainder of the contract remains extant. For example, if the *vis maior* prevents a tenant from occupying premises for the purposes for which it was leased.

In the case of indivisibility, the creditor has the option of either cancelling the contract or accepting reduced performance in exchange for reduced counter-performance.

In *MV Snow Crystal, Transet Ltd t/a National Ports Authority v Owner of MV Snow Crystal*, in 2008, Scott JA stated the following:

> "*As a general rule, impossibility of performance brought about by vis major or casus fortuitus will excuse performance of a contract. But it will not always do so. In each case, it is necessary to 'look to the nature of the contract, the relation of the parties, the circumstances of the case, and the nature of the impossibility invoked by the defendant, to see whether the general rule ought, in the particular circumstances of the case to be applied'."*

The doctrine of "*frustration*" and the principle of whether the sanctity of contracts (*pacta sunt servanda*) should prevail over an unforeseen change of circumstance (*clausula rebus sic stantibus*) does not form part of the law relating to *vis maior*. However, the parties may take other steps in the contract to deal with the effects of a supervening impossibility.

Malaysia

The legal position in Malaysia is that unless the contract provides for a force majeure clause, the parties have to resort to the law of frustration as codified in our Malaysian Contracts Act 1950, which is based on The Indian Code, derived from English common law.

This can pose a problem where the parties do not seek to completely discharge their obligation to perform a contract and render it void, which the law on frustration unfortunately renders as an all or nothing remedy.

Force majeure clauses are commonly found in Construction contracts in Malaysia, and each standard form has to be interpreted in accordance with its specific provisions. Some standard forms in Malaysia, e.g. PAM 2006 issued by The Architects Association, make express reference to "endemics" whereas others like FIDIC set a criteria for fulfilment, normally related to a party being exceptionally precluded from performing its obligations, but do not limit the circumstances allowing for the invocation of the clause. These clauses allow for deferment of performance of obligations and allow for extension of time and costs.

The Government is currently looking at tabling a bill in parliament to pass as law ,deferment of performance of obligations under contracts affected by the pandemic and if passed , would apply to all contracts without exception.

Endnote

This paper is produced as a brief outline guide to the principles of law relating to force majeure in the contributing countries. It is not presented as a full and exhaustive

commentary on the applicable law. In the event of any matter or question arising, the relevant contract should be referred to for its specific terms, and detailed and specific legal advice should be sought.

CLG – Commercial Law Group
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