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Transport and trade in the age of pandemics

Contactless, seamless and collaborative UN solutions

Implications of the COVID-19 pandemic for commercial contracts covering the transportation of goods in the Asia-Pacific region and beyond

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Chapter 1. Background

1.COVID-19 and its legal implications

Unfortunately, epidemics of infectious diseases occur periodically, i.e., the Indian Plague in 1994, and more recently SARS in 2002, and Ebola in West Africa in 2014, so an epidemic event is not new. However, the scope and the level of disruption brought by the ongoing coronavirus disease pandemic (COVID-19) are unprecedented.

COVID-19 was first reported in Wuhan, China in December of 2019. It spread rapidly first around the Asia region and then around the globe. On January 30, 2020, the Director-General of the World Health Organization (WHO) announced that COVID-19 constitutes a "public health emergency of international concern."[1] On March 11, 2020 the WHO declared COVID-19 to be a pandemic. Several waves of the pandemic have been proclaimed since then. Besides causing the terrible loss of human lives, COVID-19 has affected most sectors of the economy worldwide by disrupting global manufacturing, trade, and supply chains and straining medical systems.

Immediately after the COVID-19 outbreak, most countries in the Asia-Pacific region implemented many restrictive measures to stop the virus's rapid spread. These measures included quarantine, declarations of a state of emergency, stay-at-home orders, lockdown and isolation of infected individuals or those at risk of infection, the closure of factories, retail establishments, ports, borders, and warehouses.

The impact of the various government responses on the transportation industry was unprecedented. Shipping lines and airlines drastically reduced international services, leading to a significant reduction in transport freight capacity, causing supply delays to and from almost all international destinations. The shipping rates in 2021 rose to historic heights due to the shortage of containers and lack of space onboard container ships.[2] Restrictions on international travel and travel bans led to the reduction of demand for air travel. Airlines grounded most of their fleets, which led to an increase in airfreight costs.[3]

In 2020, the pandemic and the consequent restrictive measures implemented by governments put a lot of pressure on businesses, making it difficult or even impossible for many companies to uphold their contracts. As a result, companies have started considering

[1]"Public health emergency of international concern" is defined in the International Health Regulations (2005) as "an extraordinary event, which is determined to constitute a public health risk to other States through the international spread of disease; and to potentially require a coordinated international response". This definition implies a situation that: is serious, unusual or unexpected; carries implications for public health beyond the affected State's national border; and may require immediate international action. Source available at https://www.who.int/ihr/procedures/pheic/en/
[2]Available at https://www.njordlaw.com/annual-report-2020-maritime-and-transport-law
[3]Available at https://lot.dhl.com/covid-19-pushes-multimodal-logistics-and-digitalization-for-manufacturers

defenses that might excuse delays or non-performance. The implications of COVID-19 for the transportation industry across the globe were performance failure, delays in the delivery of goods, the deterioration and spoilage of cargo, and the abandonment of cargo. In addition, transportation businesses faced the threat of damages for breach of contract. Thus, they started exploring legal provisions and contractual clauses that could absolve them from contractual liability: *force majeure*, frustration, and hardship.

The COVID-19 pandemic affected contracts at the domestic (agreements between parties in the same jurisdiction) and the international (agreements between parties from different jurisdictions) levels.[4] Domestically, jurisdictions have dealt with the situation by applying national law or passing COVID-19 emergency legislation. At the international level, international conventions and transnational law instruments are called for to address the contractual disruptions caused by the COVID-19 pandemic. This matter is covered in more detail below in Chapter 2, part 2," Force Majeure Treatment under international Conventions and Trade Rules."

2.Government reaction: COVID-19 specific legislation

After multiple restrictive measures that stress-tested many businesses, at the beginning of 2020, governments were called upon to pass legislation to support the economy, save jobs, and alleviate the burden on the private and public sectors caused by the pandemic. Facing this new reality, governments around the globe reacted in a variety of ways. Some passed legislation that aimed to excuse the contractual breaches and relieve the burden looming over the court system. Others passed temporary legislation in an attempt to keep businesses operating. Australia,[5]India,[6]Singapore,[7]and the United Kingdom announced changes to some aspects of existing bankruptcy and insolvency laws by raising the monetary threshold required to petition for insolvency and bankruptcy.

Most governments implemented measures to extend deadlines for filing tax returns, accelerated tax refunds, suspended tax audits, and provided other forms of tax relief measures. KPMG's "COVID-19 Global Tax Developments Summary", updated as of May 16, 2021, can be referred to for a country by country overview of the tax measures implemented by individual governments.[8]

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[4]UNODROIT Secretariat Note on “THE UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS AND THE COVID-19 HEALTH CRISIS”, Introduction (2) Available at https://www.unidroit.org/covid-19/586-covid-19/2891-covid-19-secretariat-notes

[5]Available at https://www.klgates.com/COVID-19-Australia-Temporary-Changes-to-Insolvency-Laws-to-Support-Businesses-During-Coronavirus-Crisis-03-23-2020

[6]Available at https://www.financialexpress.com/industry/ibbi-excludes-lockdown-from-resolution-time-frame/1939728/

[7]Available athttps://www.clydeco.com/en/insights/2020/07/commencement-of-the-insolvency,-restructuring-and

[8]The report is available at https://assets.kpmg/content/dam/kpmg/us/pdf/2020/03/covid-19-tax-developments-summary.pdf

It is impossible to analyze the whole body of specific legislation related to COVID-19 passed in all jurisdictions; moreover, this goal falls outside the scope of this research. However, below are a few examples of laws passed in the Asia-Pacific region that have alleviated contractual default on the domestic level and are relevant to the transportation industry:

A.China

In China, the Commission of Legal Affairs of the Standing Committee of People's Congress decided on February 10, 2020 that COVID-19 constitutes *force majeure* under China's Contract Law. To protect Chinese companies from failing to perform their contractual obligations, the China Council for the Promotion of International Trade started issuing *force majeure* Certificates (FMC). As of March 25 2020, 6,454 FMCs have been given.[9]However, these certificates had a limited legal effect, as contracts between China and international parties are often governed by English law, which only allows parties to claim *force majeure* in specific circumstances if provided by the contract.

Counterparties often viewed FMCs not as evidence of a contractual default but as a tool to renegotiate better deals. As commodity prices dropped, Chinese buyers tried to get out of the long-term contracts and buy at spot prices. The media called this "Price Majeure"[10] many years before the coronavirus pandemic. 2020 was not an exception. One of the examples was the liquefied natural gas market. Total was the first global energy supplier to reject the FMC from a liquefied natural gas buyer in China, trying not to accept delivery of the gas and backing out of a long-term contract.[11]

National legislative and administrative acts declaring COVID-19 as a *force majeure* event cannot establish the *force majeure* event in a particular contractual situation and absolve parties from liability for failure to perform their obligations. Whether a contractual *force majeure* event took place is still to be decided on a case-by-case basis, taking into account the wording of the contract and the circumstances in each particular case. It is only the legal determination of the events as a *force majeure* event, which may absolve a party from its contractual liability.

On June 16, the Supreme People's Court announced that it had issued the "Guiding Opinion on the Proper Handling of Civil Cases Involving the Novel Coronavirus Outbreak in accordance with the Law." It is a judicial policy document, guidance to the lower courts and other related authorities. Articles 11-17 of the Document are explicitly devoted to

[9] As quoted on https://www.twobirds.com/en/news/articles/2020/global/hong-kong-and-mainland-china-force-majeure-and-covid-19-and-you#section8
[10]Available at https://www.ft.com/content/e6df73b0-f5aa-11e1-bf76-00144feabdc0
[11]Available at https://www.cnbc.com/2020/03/06/coronavirus-impact-china-invokes-force-majeure-to-protect-businesses.html

transportation issues. However, the implication of the Guidelines is limited as it applies only to the contracts governed by Chinese law.

B.India

On March 24, 2020, the Ministry of Shipping of India issued an advisory to all the 11 major port trusts for invoking a *force majeure* clause on port activities and port operations.[12] Most of the private ports and terminals operating in the country invoked *force majeure*.[13] As a result, specific penalties and charges (berth charge and demurrage) were waived by private ports between the end of March and the beginning of April 2020.

C.Singapore

Aimed to restore fairness and establish justice,[14] on April 7, 2020, the Singapore Parliament passed the COVID-19 (Temporary Measures) Bill, which provided temporary relief from some contractual obligations for the parties unable to perform.[15] The Bill was aimed at a broad class of financially distressed individuals and companies setting up new dispute resolution mechanisms.[16] It covered specified contracts, including transport, and applied to the agreements entered into or renewed before March 25, 2020, and obligations to be performed on or after February 1, 2020. The relief was temporary as the commitments had to be performed at the end of the suspension period.

D.United Kingdom

One month later, and in the same spirit of equity versus contractual enforcement, on May 7, 2020, the United Kingdom Cabinet Office made an unusual "legislative intervention" by issuing Guidance on Responsible Contractual Behavior in the Performance and Enforcement of Contracts impacted by COVID-19 emergency.[17] The Guidance was deemed unique as "freedom of contract" and "contractual certainty" have been building blocks of English law.[18]The UK government encouraged parties to act "fairly" and "in the spirit of

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[12]Available at https://pib.gov.in/PressReleasePage.aspx?PRID=1609718

[13]Available at https://www.hellenicshippingnews.com/kolkata-port-trust-becomes-first-state-run-port-trust-to-invoke-force-majeure/.

[14]On April 7, 2020, Mr. K. Shanmugam, Singapore's Minister for Law and Minister for Home Affairs, said in an interview with CNBS: "You're looking at economic devastation. Businesses destroyed, people's lives ruined, and in such a situation, you don't talk contract. You talk equity, you talk justice, you talk about what is the right thing to do". The video of the interview is available a thttps://www.cnbc.com/video/2020/04/08/singapore-government-to-protect-firms-from-broken-contracts-amid-virus-crisis-says-minister.html

[15]Available at https://sso.agc.gov.sg/Act/COVID19TMA2020

[16]Available at https://www.bakermckenzie.com/en/insight/publications/2020/04/singapore-covid19-temporary-measures-act-2020

[17]Available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/899175/_Update_-_Covid-19_and_Responsible_Contractual_Behaviour_-_30_June__final_for_web_.pdf

[18]Available at https://www.nortonrosefulbright.com/ja-jp/knowledge/publications/0a264bcc/uk-government-publishes-guidance-on-responsible-contractual-behaviour-applicable

cooperation" and called for "negotiation or mediation" before disputes "escalate into formal intractable disputes." The update listed fast-track dispute resolution procedures that have been developed in response to the COVID-19 emergency. The Guidance and the update are non-statutory and therefore have no force of law. The Guide was not very clear on the entities it applied to. There was a split of opinions on whether the Guidance covers the contracts where none of the parties are a UK entity, and the only nexus to the United Kingdom is English law as the governing law of the contract.

Chapter 2. *Force majeure*

The dire economic circumstances made companies revisit their contracts, analyzing provisions that could excuse performance obligations (such as *force majeure*, hardship, or material adverse event clauses). Parties also looked at common law doctrines of impossibility or frustration of purpose. The *force majeure* clause, that before the COVID-19 pandemic was often considered a boilerplate contractual provision, and overlooked by contract parties, suddenly obtained great importance. Some businesses assumed that a *force majeure* clause, if present in a given contract, may be a savior for companies grappling with the effects of the coronavirus outbreak.[19]

1.*Force* majeure treatment in Civil and Common law

The term *force majeure* comes from French *"superior force*" associated with cataclysmic events such as natural disasters, wars, diseases, new government regulation, or other situations beyond either party's control. Other names used to denote the same meaning are "Act of God," "vis Majeure," or "fortuitous event."

According to the Black's Law Dictionary, *force majeure* is "an event or effect that can be neither anticipated nor controlled. It is a contractual provision allocating the risk of loss if performance becomes impossible or impracticable, especially as a result of an event that the parties could not have anticipated or controlled."[20] Thus, the purpose of the *force majeure* clause is to limit a party's exposure to damages for non-performance. Also*, force majeure* provisions allow parties to agree on the terms under which the contract can be modified (parties may choose to terminate the agreement or decide on the time frame to wait on circumstances to change to perform).

Parties to an international contract can agree on the contractual terms, governing law of the agreement, and dispute resolution forum. The choice of law is critical when parties try to rely

[19]FIATA. Invoking force majeure in the COVID-19 crisis: Some practical tips. Available at https://fiata.com/fileadmin/user_upload/2021_documents/Publications/Invoking_force_majeure_in_the_COVID-19_crisis.pdf

[20]Black's Law Dictionary (11th ed. 2019).

on *force majeure* protection, as there is a significant difference in the treatment of *force majeure* between the civil and common law regimes.

Under civil law, *force majeure* is a legal doctrine regulated by national laws. Under common law, *force majeure* is a contractual provision, and there is no codification by law. This distinction between the treatment of *force majeure* as a contractual provision or a norm of national law is essential since Asia - Pacific region have countries of both civil and common law systems. Civil law countries are those where the codified law is the basis of the legal system (e.g., China, Indonesia, Japan, Thailand, South Korea). The codified law is designed to regulate every area of life. Common law countries are those where legal systems are dictated by published judicial precedents and not by codified law (Australia, Hong Kong, India (excluding Goa), Malaysia, New Zealand, Pakistan and Singapore). In some countries of the region, the primary system is mixed (e.g., the Philippines laws are a mixture of civil and common law with Islamic law added in the legal regime on some islands).[21]

From a practical point of view, parties to international transport agreements often choose English law, even in the absence of a nexus to the UK. The reason for the choice is that English law is considered stable and pro-business. Most sale of goods contracts, charter parties, bills of lading, and shipbuilding contracts will typically contain a *force majeure* clause modifying the parties' contractual obligations or excusing performance entirely in the event of *force majeure*.[22] Thus, for this research, the paper has to explicitly address English law, although the United Kingdom is not a country of the Asia-Pacific region. For contracts governed by English law, *force majeure* protection will not be presumed in the absence of explicit contractual provision. Contractual *force majeure* operates only to the degree agreed, as its scope and application depend on the wording of the clause. In other words, the application of *force majeure* is an issue of contractual interpretation. In the absence of *force majeure* provision, parties may rely on the doctrines of frustration or hardship (discussed below in more detail).

Suppose the contract is governed by civil law. In that case, the *force majeure* clause does not always have to be explicitly stipulated in the contract, as *force majeure* protection by national law sometimes will be applied.

Even if national law provides *force majeure* protection, parties to a contract can negotiate and develop their own contractual *force majeure* regulation, establishing their *force majeure* rules.

[21]Available at https://www.aseanlawassociation.org/wp-content/uploads/2019/11/ALA-PHILS-legal-system-Part-1.pdf
[22]Available at https://www.clydeco.com/en/insights/2020/02/novel-coronavirus-outbreak-implications-for-intern

2.*Force majeure* treatment under International Conventions and Trade Rules

The world most widely used trade terms, the Incoterms[23] edition of 2020, do not have a provision on *force majeure*. The logic is that Incoterms is incorporated into the text of an agreement by reference, but it does not constitute the text of the complete agreement. Thus, Incoterms does not regulate all the contractual issues, which are left to be agreed upon by the parties of a particular deal (i.e., *force majeure*, pricing, payment terms, governing law, dispute resolution forum, etc.).

The United Nations Convention on Contracts for International Sale of Goods (CISG, sometimes referred to as the Vienna Convention) provides a set of uniform substantive law rules to govern the formation of international contracts for the sale of goods and the rights obligations of buyers and sellers.[24]The CISG does not use the term "*force majeure*" explicitly but provides for the regulation of an "impediment," i.e.:

"A party is not liable for 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 into account at the time of the conclusion of the contract or to have avoided or overcome it, or its consequences." [25]

This provision is in line with the UNIDROIT Principles of International Commercial Contracts[26], which repeats the above Article almost verbatim.

Please note that international transportation conventions give little guidance on the issue of *force majeure*. Few conventions address *force majeure*, and those that contain the term *force majeure* or Act of God rarely define it.

Thus, the Convention on the Contract for the International Carriage of Goods by Road (CMR) addresses *force majeure* type situations but does not contain the term *force majeure*. The Convention relieves the carrier of liability *inter alia* "through circumstances which the carrier could not avoid and the consequences of which he was unable to prevent".[27]The Hague Visby Rules, which is a set of international rules for the international carriage of goods

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[23] The Incoterms is a set of international trade rules published by the International Chamber of Commerce (the ICC). The Incoterms cover various practical elements of a sale contract such as the primary obligations of the seller and the buyer; the responsibilities of each; time of delivery and the transfer of risk. They also deal with insurance, export and import clearance and the division of other costs pertaining to the delivery of goods. Available at https://iccwbo.org/resources-for-business/incoterms-rules/incoterms-2020/

[24]Article 1(1), the CISG 'applies to contracts of sale of goods between parties whose places of business are in different states (a) when the states are contracting states or (b) when the rules of private international law lead to the application of the law of a CISG contracting state' Available at https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg

[25]Supra note 24, Section IV Exemptions, Article 79 (1).

[26]UNIDROIT Principles of International Commercial Contracts, Article 7.1.7. Available at: https://www.unidroit.org/english/principles/contracts/principles2016/principles2016-e.pdfn

[27]CMR Convention, Article 17.2

by sea, absolves the carrier and the ship from liability for loss or damage arising or resulting from “act of God”, “restraint of princes, rulers or people”, and “quarantine restrictions” and “any other cause arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier”[28]

3.Non-state law as governing law of the contract. UNIDROIT Principles of International Law

Parties to an international commercial contract also can choose a non-state law, which is loosely defined as “a body of law produced and enforced by non-state actors.”[29]

Non-state actors are relevant non–governmental organizations and international institutions, such as the International Chamber of Commerce (ICC) and the International Institute for the Unification of Private Law (UNIDROIT). UNIDROIT has issued the Principles of International Commercial Contracts (the Principles) as a codification of international contract law and “the only global instrument offering a set of comprehensive general rules applicable to different types of commercial contract.”[30] The Principles were first published in 1994. Revised versions were passed in 2004, 2010, and 2016. The Principles are not binding unless parties refer to them in their agreement. They have also served as a model for many domestic legal reforms and other law-harmonization initiatives. Although in a recent arbitration case, the arbitral tribunal has chosen the Principles as a governing law of a contract in arbitration proceedings in the absence of the contractual choice of law.[31]The regulation of *force majeure* (impediment) is envisaged in the Principles:

(1) “Non-performance by a party is excused if that party proves that the non-performance was due to an impediment beyond its control and that it 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.
(2) When the impediment is only temporary, the excuse shall have effect for such period as is reasonable having regard to the effect of the impediment on the performance of the contract.

[28]The Hague Visby Rules as amended by Brussels protocol, Article IV, part 2.
[29] Marc Hertogh “WhatisNon-State Law? Mapping the OtherHemisphere of the LegalWorld” University of Groningen Faculty of Law Department of LegalTheory The NetherlandsM.L.M.Hertogh@rug.nl. Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1008451
[30]Supra note 4, Introduction (3).
[31] Prakash Steelage Ltd, an Indian company, entered into a sale agreement with a Romanian company Uzuc S.A. to deliver stainless steel tubes. The tubes proved to be defective and pursuant to arbitration clause, parties resorted to arbitration in France as envisaged by contract. The contract failed to include provision on the governing law of the contract, and each party insisted on application of their national law; therefore arbitral tribunal decided to apply the Principles. The arbitral tribunal decision was appealed and confirmed by the Paris Court of Appeal. Paris Court of Appeal, 25 February 2020, No. 17/18001.Available at https://www.lexology.com/library/detail.aspx?g=4e28ebd8-4659-49a1-a1c8-fa5d0c0c60cd

(3) The party who fails to perform must give notice to the other party of the impediment and its effect on its ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, it is liable for damages resulting from such non-receipt.
(4) Nothing in this Article prevents a party from exercising a right to terminate the contract or to withhold performance or request interest on money due".[32]

Therefore, according to the Principles, for an obligor to be excused, non-performance must have been caused by the impediment that:

1) Was beyond the obligor's control;
2) Could not reasonably be foreseen by the obligor at the time of conclusion of the contract; and
3) The obligor could not reasonably be expected to avoid or to overcome, nor to avoid or overcome its consequences.

In 2020, the International Institute for the Unification of Private Law (UNIDROIT) issued a Note of the Secretariat on "THE UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS AND THE COVID-19 HEALTH CRISIS"[33]. This document serves as a practical guideline for contractual parties to interpret their existing contracts and to draft the new ones paying attention to the unique challenges posed by the pandemic. It aims to clarify the application of the *force majeure* clause in the situation of the COVID-19 pandemic for contracting parties, adjudicators and legislators.

Chapter 3. *Force majeure* contractual clause

The parameters of the *force majeure* clause vary from contract to contract. For a party to use *force majeure* protection, it must fulfill all the requirements of that particular *force majeure* clause.

The typical structure of the *force majeure* clause is the following:

1) the list of *force major* triggering events (e.g., war, military operation, strikes, epidemics, accidents to machinery, government actions, earthquake, floods, etc.);
2) causal connection, i.e., the requirement that the event "prevents, hinders, delays" performance;
3) notification requirements (form and deadline);
4) duration of *force majeure* while the performance is excused; and

[32] Supra note 26, Article 7.1.7.
[33] Supra note 4.

5) *force majeure* relief (e.g., the extension of time, suspension or variation of contract, right to renegotiate the contract or right to terminate the agreement)/

1.*Force* majeure triggering events

Guided by the principle of the freedom of the contract, parties to an agreement may draft and include into the contract a *force majeure* clause that best fulfills their needs however they see it fit. There are two types of *force majeure* clauses regarding triggering events: extremely detailed, listing all possible scenarios, or general ones, without an exhaustive list. The burden will be on the party seeking to rely on the clause to prove that the relevant *force majeure* event has occurred or exists.

While “epidemic” (“pandemic," “public health crisis”) is the most obvious *force majeure* event applicable to the current situation, other *force majeure* events such as “quarantine," “entry and exit restrictions," “government actions," “restraint of princes, rulers or people” or “requirements of government authorities," “stoppage or restraint of labor” if employees, supplies, or sub-contractors have been held up by the government measures imposed to stop and prevent the spread of COVID-19 can be potentially asserted.[34]For example, if a party appeals to its inability to load goods or perform haulage by truck, such wording as “shortage of labor” might need to be provided for in the contract.

For a contract governed by English law, when parties choose to include not a detailed but an abstract *force majeure* provision (with catch-all phrases referring to any unforeseen event) following the position of English courts, the clause must be read and interpreted in its entirety. For example, the Commercial Court in London held that the “unanticipated, unforeseeable and cataclysmic downward spiral of the world’s financial markets” did not trigger a contractual *force majeure* clause despite the presence of catch-all wording. The Court held that the phrase should be read in the context of the entire clause and that because none of the prescribed events were “even remotely connected” with the economic downturn, the clause was not triggered.[35]

In May 2021, it may be prudent to include in a *force majeure clause* the detailed description of the *force majeure* event must include *inter alia* the events of epidemic, pandemic, health crises, government and administrative restrictions, lockdowns, and shortage, stoppage, or restraint of labor.

[34]“COVID-19 Trade & Shipping: Implications arising from Coronavirus” Available at https://www.clydeco.com/en/insights/2020/02/novel-coronavirus-outbreak-implications-for-intern
[35]*Tandrin Aviation Holdings Ltd v Aero Toy Store LLC* [2010] EWHC 40Available at https://www.mondaq.com/uk/marine-shipping/104672/tandrin-aviation-holdings-ltd-v-aero-toy-store-llc-2010-ewhc-40

2.Foreseeability of the event

To claim *force majeure*, the parties could not have "reasonably foreseen the event" or "an impediment that [a party] could not reasonably be expected to have taken into account at the time of the conclusion of the contract."[36] After the COVID-19 pandemic has been raging on for more than a year, the practical implications of the unforeseeability requirement regarding such *force majeure* events as the pandemic and restrictive government measures may have changed. Will the *force majeure* clause still be applicable when the parties know the existence of the pandemic and its consequences and government actions? Whether these events were foreseeable will be up to a court or arbitral tribunal to decide, and there were conflicting judgments on this issue coming from different national courts.

French Civil Law Code qualifies *force majeure* as the event that "could not reasonably have been foreseen at the time of the conclusion of the contract." In line with this definition, in France, the Besançon Court of Appeal refused the exonerating effect of *force majeure* of the H1N1 flu epidemic because the epidemic "had been widely announced and foreseen, before the implementation of the sanitary regulation behind which [the Party] tries to hide."[37]

English courts have interpreted the requirement of foreseeability differently from French courts. For example, in *Gas Supply and Trading SAS v Naftomar,* the judge held that "the fact that bad weather could have been foreseen did not affect the operation of *force majeure* clause."[38]The judge referred to another case stating that "some wars, strikes, abnormal weather could be foreseen, but it was more of a question of causation as to whether the foreseen event caused a party failure in performance."[39]

In Australia, courts are split on the issue of the foreseeability of the event. However, under the ruling in *Asia Pacific Resources Pty Ltd v Forestry Tasmania*, a party cannot invoke *force majeure* clause claiming "circumstances beyond the control of the parties" if the party that intends to rely on *force majeure* by applying it to the circumstances that were in existence at the time the contract was made. In other words, the party cannot argue that the event was not reasonably foreseeable.[40] This ruling is a stark contrast to another Australian case which held that no settled rule of construction prevents a party to a *force majeure* clause from relying on the events in existence at the time the contract was entered into as events beyond that party's control.[41]

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[36] Supra note 24, Section IV Exemptions, Article 79 (1)
[37]Available at https://www.jdsupra.com/legalnews/covid-19-force-majeure-fait-du-prince-15912/
[38]*GasSupply and Trading SAS v NaftomarShipping and TradingCoLtd* (2005) EWHC 2528
[39]*Navrom v Callitsis Ship Management SA* (The Radauti) [1987] 2 LloydsRep 27 282 per Staughton J (affirmed [1988] 2 Lloyd'sRep 416, CA)
[40]*Asia Pacific Resources Pty Ltd v Forestry Tasmania* (No 2) [1998] TASSC 50
[41]*Reardon Smith LineLtd v Ministry of Agriculture, Fisheries and Food*(1998),Aust Contract R 90-095; (Unreported, Supreme Court of Tasmania, Cox CJ, Underwood and Wright JJ, 5 May 1998).

According to the Note of the UNIDROIT Secretariat on the UNIDROIT Principles of International Commercial Contracts and the COVID-19 Health Crises, the time of conclusion of the contract and the place of conclusion of the contract should be analyzed to determine whether an impediment consisting of the outbreak of COVID-19was unforeseeable.[42]

While the initial outbreak of the COVID-19 pandemic may have been unforeseeable, after the formal announcement of COVID-19 as a pandemic by WHO in March 2020, the transportation businesses should be aware of the practical difficulties with invoking *force majeure* clauses relying on words such as “viral disease," “epidemic” or “pandemic.” When writing this paper, in spring 2021, the pandemic spread slows for some time, only to continue later. Given that some of the COVID-19 associated government restrictive measures have already been witnessed in 2020, it can be argued that the circumstances bringing about the business disruption related to COVID-19 can be classified as foreseeable in 2021. In such circumstances, a transportation provider may have difficulties invoking the *force majeure* clause. In case of a contractual *force majeure*, it may be prudent to revisit and analyze the wording of the clause and expand it beyond the words related to the epidemiological diseases, as to the requirement of “foreseeability.”

According to some legal scholars, if the event was foreseeable, provision for it should have been made in the contract.[43]Thus, when drafting a new contract, now one can dispose of with the requirement of “foreseeability” of the pandemic or government restrictive measures event by contractually defining *force majeure* as “any event whether foreseeable or not.”

3.*Force majeure*: Causation

Once the occurrence of the *force majeure* event has been established, then the affected party must show the connection between the event and the hindrance to contractual performance. The usual wording of the *force majeure* clause is that the event impeded, affected, hindered, prevented, or delayed the performance of the contractual obligation, which means it was legally or physically impossible to carry out. The verb “prevent” in this context means that it is no longer physically possible or legally permissible to perform the contract.[44]

A contracting party is required to show that it was unable to fulfill its contractual obligation despite reasonable efforts to do so. The fact that contractual performance became more expensive or not economical does not trigger the *force majeure* clause. Contracting parties

[42] Supra note 4, II Force majeure, 20 and 21
[43]Force majeure and Frustration of Contract. Second Edition. Edited by Ewan McKendrick, p.6
[44]Available at https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=2e4f51ca-b64d-4493-84ab-ef246690fcdc

will be unable to invoke *force majeure* based on a general economic or market downturn unless the *force majeure* clause includes relevant wording.[45]

A.Reasonable Steps, Duty to Mitigate

Force majeure provisions will also typically include the requirement of the impossibility of avoiding the outcome, i.e., the party could not have avoided the impact of the event itself or its consequences by taking reasonable steps to mitigate the effects of the *force majeure* event (also called "best endeavors" or "reasonable endeavors"). Such obligation can be observed in the ICC 2000 *Force majeure* Clause: "The party invoking *Force majeure* must, in any case, prove the existence of condition (c), i.e., that the effects of the impediment could not reasonably have been avoided or overcome."[46]

The courts construe this "obligation to mitigate the consequences" as an implied duty even if the contract does not contain this requirement. This issue is fact-specific and should be analyzed on a case-by-case basis by the relevant Court or arbitration tribunal.

In *Channel Islands Ferries Ltd v. Sealink*,[47] the Court of Appeal held that any clause that included language referring to events 'beyond the control of the relevant party' could only be relied upon if all reasonable steps had been taken by the party to mitigate its results. Thus, the *force* majeure clause covering strikes beyond the party's control did not cover strikes that increased wages could have settled.

The duty to mitigate is situation specific. For example, in case of a lockdown announced in the port of destination, an attempt at mitigation can include an alternative route, an alternative destination point, and other alternative methods to perform contractual obligations.

One can argue that freight forwarders must take reasonable steps to inform their customer of the problems encountered in the supply chain and manage and mitigate the issues arising in such situations. The duty to mitigate played a more significant role for transport operators in the context of the COVID pandemic as failure to mitigate led to spoilage of goods, their loss, damage, or abandonment.

In 2020, as the pandemic spread, companies faced new challenges. For some goods, the demand decreased; for other goods, the market demand rapidly increased, so some companies could not sell their stock, and other companies could not have the goods delivered. Lengthy delays in delivering perishable goods made the goods useless for sale even if the cargo was released before its expiration date. As retail businesses closed through

[45] *Thames Valley Power Limited v Total Gas & Power Limited* [2005] EWHC 2208
[46] Available at https://iccwbo.org/content/uploads/sites/3/2020/07/icc-forcemajeure-introductory-note.pdfpage 4 of 9
[47] *Channels and Ferries Ltd –v- Sealink UK Ltd* [1988] 1 Lloyd'sRep 323

the enforced lockdown and the containers were locked up in ports and warehouses, some goods were left unclaimed or abandoned.

The period after which goods are considered abandoned is not uniform and varies from 60 days (in China[48]) to 90 days (in European Union[49]). The abandoned cargo poses the related problems of subsequent additional charges and liability for the containers that have been locked up in ports and warehouses. If a consignee is unable to take the delivery of the cargo, this entails demurrage or storage charges. When a container is released, the consignee will have little or no interest in collecting the goods and incurring those charges. (Freight forwarders are advised to double-check the contracts to ensure their contractual liability whether they act as agents or principals under the contract). If no one claims cargo, and it requires destruction, there will be more charges in disposal and cleanup. The associated costs related to delays in delivery or abandoned goods can exceed the value of the goods.

When cargo has been detained for extended periods because of the government measures and suffered loss or damage, it can be challenging to ascertain the cause of the loss or damage (lockdown, the commercial impact of COVID-19, the specific contract, or negligence in handling of the cargo). Causation arguments in such situations are not easy. If cargo is lost or damaged, the parties may need to rely on the limits of liability and exclusions within the relevant transport conventions (if these apply) or within their contractual arrangements, should such limitations be incorporated into the contract. A freight forwarder seeking to avoid liability for a loss or delay related to government measures may have to establish that it took all reasonable care in its custody of the goods. If a container becomes caught up in delays, quarantines, the forwarder may still have an ongoing duty of care towards the cargo. It will not be relieved of its obligations because of the initial problem outside the forwarder's control.[50]

For parties negotiating contracts, it may be advisable to include more detailed provisions regarding the duty to mitigate by each party, use precise language, and enumerate specific alternative ways of contractual performance instead of the generic language stating that parties must simply mitigate.

B.*Force majeure* declaration

Force majeure relief can take the form of a prolongation or delay to honor the contractual terms or contract termination.

[48]Available at https://www.ukpandi.com/news-and-resources/articles/2018/china---abandoned-cargo-advice/
[49]Article 149 of the UnionCustomsCode. Available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02013R0952-20161224&from=EN
[50]Available at https://kennedyslaw.com/thought-leadership/article/covid-19-frustration-and-force-majeure-in-the-logistics-industry/?utm_source=vuture&utm_medium=email&utm_cam

To claim the *force majeure* relief, the party invoking the *force majeure* clause shall duly inform the counterparty and strictly follow the procedure for serving *force majeure* notice under the contract.

The declaration of a *force majeure* requires specific facts to analyze particular circumstances, the company's business, and the contractual relationship. The existence of the COVID-19 pandemic by itself is not sufficient grounds for the announcement of a *force majeure*. There must be a causal connection between the triggering event and the non-performance of the contract.

When serving the notice, the party invoking the *force majeure* must clearly state the triggering event, and the connection between the event and its inability to perform the contract in whole or in part is. In addition, contracts usually contain the timeframe within which the notice is to be served, which is calculated based on the time of occurrence of the event. Agreements also prescribe the form of the notice and the address to which the statement is to be served. Failure to provide a timely *force majeure* notice may result in a loss of the right to claim *force majeure*, damages, or other adverse consequences (national legislation and contract provisions should be consulted for more detailed regulation).

Under the UNIDROIT Principles, the party who fails to perform must give notice to the other party of the impediment and its effect on its ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, it is liable for damages resulting from such non-receipt.[51]

If notice is not given without delay, the relief is effective when notice reaches the other party. The other party may suspend the performance of its obligations, if applicable, from the date of the notice.[52]

It is debatable whether a party should provide a preliminary notice once it becomes evident that performance may be delayed or rendered impossible. The long-term business interests and the relationship with the party should be considered and whether such preliminary declaration might lead to contract termination by the other party.

A party that received the declaration of the *force majeure* should carefully review and check whether the statement falls within the scope of the *force majeure* provision and the applicable law and if the form of the notice and the deadline were complied with. The recipient must decide on the method and the term of the response and whether to terminate

[51]Supra note 29, Article 7.1.7 (3)
[52]ICC Force Majeure and Hardship clauses, March 2020. Long form. Part 5. Available at https://iccwbo.org/content/uploads/sites/3/2020/03/icc-forcemajeure-hardship-clauses-march2020.pdf

the contract in response to the notice or take other actions (i.e., notifying third parties, filing a claim under an insurance policy, etc.).[53]

Some laws and contractual terms may also place an obligation on a recipient of the *force majeure* notice to acknowledge its receipt. For example, the Uniform Commercial Code (law applicable to the interstate commercial transactions of sale of goods in the US) requires that a recipient of a *force majeure* notice must respond within thirty days, or the contract will lapse concerning any affected deliveries.[54]

In 2020, two major freight forwarders, DHL Global Forwarding Ocean Freight55 and CEVA Logistics,[56] released declarations of *force majeure*. On February 24, 2020, DHL Global Forwarding Ocean Freight / Danmar Lines invoked a *force majeure* for Europe- Asia Trade Lanes citing the following reasons: ocean carriers stopped their service to and from China, and in some cases, the cargo was offloaded by the ocean carriers at ports other than the booked destination.[57] In addition, DHL declared that it was reserving the right to modify all or part of its Europe Asia trade lanes, change working procedures and agreed rates, to charge surcharges.

On March 25, 2020 another operator, CEVA Logistics followed in suit. CEVA Logistics declaration of *force majeure* stated: “The COVID-19 virus and the necessary response measures being taken by governments are entirely outside the control of CEVA Logistics. As they were unforeseeable, they fall within the definition of *force majeure*’". In its declaration invoking *force majeure*, CEVA Logistics reserved the right to "modify all or part of its services, to change its working procedures and any previously agreed rates and prices, to levy surcharges."

C.The effect of *force majeure*

Force majeure provisions have different effects on parties' rights and obligations, depending on the triggering factors, on whether the triggering event has permanent or temporary nature, as temporary impediment leads to the suspension of a party's obligation to perform and permanent impediment frees parties from the obligation to perform.

Depending on their wording, such clauses may have various consequences, including excusing the affected party from full or partial performance, excusing that party from delay in performance, entitling them to suspend or claim an extension of time for performance, or

[53]Please see the Chapter 2, Part 2, Section C “Insurance” on insurance issues in respect to invocation of force majeure.
[54] N.Y. U.C.C. § 2.616; Cal. Com. Code § 2616; Tex. Bus. &Com. Code § 2.616; Fla. Stat. § 672.616
[55]Available at https://www.dhl.com/content/dam/dhl/local/dk/dhl-global-forwarding/documents/pdf/dk-dgf-loc-coronavirus-ofr-force-majeure24feb2020.pdf
[56]Available at https://www.ti-insight.com/ceva-forced-to-declare-force-majeure-due-to-covid-19-virus-spread/
[57]Notice how force majeure declaration was not blanket document on all the destination, but only on those affected, and how it cited the reasons for default

right to terminate. Below is a discussion regarding parties excused from performance entirely, but many principles are common to these different clause varieties.

Some contracts provide that the continuation of a *force majeure* event for a certain period (*e.g.*, 90 to 180 days) may give rise to a right of termination. However, in other scenarios, *force majeure* may give rise only to a suspension of the required performance.

Chapter 4. Legal and Tax implications of invoking *force majeure*

Below is the overarching overview of the effect of invoking *force majeure* on the agreement in question and other contracts. Partiesseekingtoinvoke, or who are faced with, a declaration of a *force majeure* should consider a multitude of legal and tax consequences, including the following ones:

1.Wrongful *declaration* of *force majeure*

A wrongful declaration of *force majeure* may result in damages and the termination of the contract. Thus, before calling a *force majeure*, the party declaring *force majeure* should weigh the wording of the *force majeure* clause, governing law of the agreement, issues of causation, notification, and consequences on the contract. Also, in the case of invoking a *force majeure* on a long-term contract with a stable counterparty, one should weigh the risk of breaking or terminating the contract.

2.Impact of invoking *force majeure* on other agreements

A *force majeure* declaration may affect other contracts: (existing and future ones, even with the party other than the one against which *force majeure* has been invoked), insurance, financing agreements, and disclosure obligations in a merger and acquisition transaction.

Invoking the *force majeure* clause may affect the representation and warranties clause in other contracts. The representation and warranties clause assures no default on any major contract; it serves as the basis for an indemnification claim in case of a breach or inaccuracy. The representation and warranties clause can be found in various agreements and is designed to disclose material information about parties to the transaction.

It should be kept in mind for future contracts that standard representation and warranties need to be amended to reflect that a *force majeure* has been called.

A.Loan agreements and other finance agreements

As companies are suffering financial losses, many companies may require additional financing. One of the standard representations and warranties that can be found in loan agreements is "No default under a material contract," so it bears importance in a situation

where a party invoking *force majeure* may require financing. Also, financial agreements include representations or obligations to provide notice of material events that could lead to litigation or anticipated loss outside of the ordinary course of business. Invoking *force majeure* protection may constitute a default in financial agreements.

B.Business sale transactional agreements

Another scenario is when a business is put up for sale as most Stock Purchase Agreement/ Sale and Purchase Agreements (SPA)s or any other business sale agreements contain representation and warranties wording. One can potentially assume a scenario when a company invoking *force majeure* becomes a party to the business sale transaction; invoking *force majeure* in the past will be revealed in a due diligence report.

C.Insurance

In the transportation industry, cargo insurance, event-specific insurance, and business interruption (BI) insurance assumed relevance in the context of COVID-19 crises. Currently, it is a widely discussed topic whether BI insurance applies to the COVID-19situation. The regulators and courts in different jurisdictions hold opposite views on whether pandemics are an insurable event[58]. The scope of insurance policies varies as some cover losses in case of destruction of the premises; other policies require action by the health authority. In the United States, where this issue is being widely litigated, courts have recognized that BI insurance does not generally cover business continuity losses without any physical damage. Most policies additionally include specific viral exclusions underscoring the uninsurability of such exposures[59].

According to the International Federation of Freight Forwarders Associations (FIATA) recommendation, before a party declares *force majeure*, it is prudent to check the wording of the BI policy as to whether the invocation of a *force majeure* clause would preclude the

[58]In China, where historically few companies hold BI insurance, the China Banking and Insurance Regulatory Commission issued several notices from late January to early February 2020 instructing insurance companies to deal with the claims arising from or relating to the COVID-19 outbreak with priority, to expand the coverage of insurance policies to a proper extent, and to pay all the eligible claims promptly. In mainland China BI Insurance, before COVID-19, covered the profit losses incurred during a business interruption caused by physical damage of the property resulting from natural disasters or accidents. BI due to epidemics or administrative orders was usually excluded; however, nowadays, the policy has become more flexible.

Under Thai law, there are no standalone BI policies, and BI provisions are typically found as parts of property or fire insurance policies. On March 17, 2020, The Thailand Office of Insurance Commission issued the Order, which stated that insurance policies issued before or on the date of the Order are obligated to contain a clause stating that the insurer shall not be excused from their liability during the COVID-19 crises, where such liability arises from the government measures to limit the COVID-19 pandemic.

[59]Available at https://www.insurancejournal.com/news/national/2021/03/16/605442.htm

company from the right to claim business interruption.[60] The party in receipt of the *force majeure* notice also must check the wording of the insurance policy and applicable law. In conclusion, national legislation and individual policies need to be analyzed to conclude whether a particular insurance policy applies to a *force majeure* declaration. In practice, BI is likely to be triggered due to COVID-19 if a policy contains a specific non-damage BI extension for viral diseases.

D.Tax and transfer pricing Implications

If a *force majeure* is called on a transaction between related companies and the transaction qualifies as a "controlled transaction"[61], this may lead to transfer pricing implications.[62] On December 18, 2020, the Organization for Economic Cooperation and Development (OECD) issued "Guidance on the Transfer Pricing Implications of the COVID-19 pandemic."[63] The Guidance is aimed to help tax administrations and multinational companies reporting for the financial periods affected by the pandemic in evaluating the implementation of the taxpayers' transfer pricing policies. It provides clarification on the application of the arm's length principle. The report addresses the issue of the effect of *force majeure* on allocation of losses occurred due to the COVID-19 pandemic.

One challenge may be that contracts between related entities rarely have a *force majeure* clause. So, if the parties may need to revise or revoke their agreements, a renegotiation should conclude with a similar outcome as 'an "at arm's length" contract. If a relevant agreement contains such a clause, care should be taken to analyze whether the disruption qualifies as a *force majeure*. For example, suppose a company wants to assert *force majeure* in the absence of a contractual provision. In that case, it may seek to amend the agreement and add a *force majeure* clause asserting that renegotiating "at arm's length" would have similar results.

Other transfer pricing implications of the COVID-19 pandemic addressed in the OECD report are challenges in performing comparability analysis (as the pandemic has reduced reliance

[60]FIATA Invoking Force majeure in the COVID-19 crisis: Some practical tips. https://fiata.com/fileadmin/user_upload/2021_documents/Publications/Invoking_force_majeure_in_the_COVID-19_crisis.pdf

[61]Transfer pricing refers to the prices of goods and services that are exchanged between companies under common control, e.g. a subsidiary company sells goods or renders services to its holding company or a sister company. The transaction between related enterprises for which an arm's length price is to be established is referred to as the “controlled transaction”. The application of transfer pricing methods helps assure that transactions conform to the arm's length standard. In a scenario when *force majeure* is invoked on a contract between related entities, which qualifies as controlled transaction there will be transfer pricing implications.

[62]COVID-19: Impact on the other TP. Contemplating *force majeure* and other contractual considerations in Intercompany Agreements. Available at: https://www.bakermckenzie.com/-/media/files/insight/publications/2020/04/bloomberg-tax/baker-mckenzie_bloomberg_contemplating-force-majeure-and-other-contractual-considerations_4_8_20.pdf?la=en

[63] Available at: https://www.oecd.org/tax/transfer-pricing/guidance-on-the-transfer-pricing-implications-of-the-covid-19-pandemic.htm

on the historical data and previous years' comparables are not relevant for the current year). Price adjustment mechanisms are suggested to be included in a controlled transaction agreement, which allows for a lack of contemporaneous information. Still, it may lead to VAT and customs duties implications. It is debatable which comparables should be taken into consideration (loss-making comparable, geographic comparable). Another issue is allocating non-recurrent COVID-19 related costs between related entities (IT support, office expenditure to support social distancing), receipt of government assistance, etc.).

Chapter 5. Contractual remedies in the absence of *force majeure* contractual clause and other legal doctrines that excuse non-performance

1.Contractual remedies

If a company intends to get protection for contractual delay or non-performance in the absence of a relevant contractual *force majeure* clause, it can resort to:

a. Governing law of the contract (multiple civil law national laws have statutory *force majeure*);
b. Renegotiating the contract terms to reflect changed underlying economic situation;
c. "Change in law" contractual provision, which absolves party from liability if the new law makes the performance illegal, impossible, or more onerous;
d. Termination clause, which allows parties to terminate the contract under certain specific circumstances, the parameters of which are agreed by the parties;
e. Common law concepts of frustration, impossibility, or impracticability (Although the well-drafted *force majeure* clause, which gives parties flexibility and can be tailor-made for the party's needs, is preferable to the application of the legal concept of frustration. The advantages of applying a *force majeure* clause are that it can provide various alternative options: i.e., an extension of a term of the performance, suspension of the contract for the duration of the intervening event, and (as a worst-case scenario option) eventual termination of the contract.

2.Frustration

If a particular contract lacks a *force majeure* clause or if it is not applicable, companies may look for protection to other common law doctrines excusing non-performance. Under common law, frustration allows the discharge of a contract when a superveningevent occurred after the contract was formed. The event was unexpected and beyond the parties' control; none of the parties was at fault. The event makes the performance of the contract

impossible, illegal, or radically different from the original anticipation of the contracting parties.[64]

The consequences of the application of the frustration concept are drastic as frustration automatically ends the contract,[65] which happens irrespective of the wishes of either party. In the event of termination by frustration, all obligations from both sides are extinguished, including payment obligations, and the parties may only seek recovery in restitution.

It is a debatable statement whether the presence of a *force majeure* clause in the contract is sufficient by itself to exclude the operation of the concept of frustration.[66] Some authors contend that for a contract governed by common law, an explicit *force majeure* clause supersedes frustration. Others claim that the presence of a *force majeure* clause does not in itself exclude the operation from the concept of frustration.[67]

It is generally accepted that a contract is not frustrated when express provisions have been made in the agreement for the alleged frustrating event[68] or when the event was foreseen (foreseeable) at the time of entry into a contract.[69] Thus, failure to duly notify the counterparty under the *force majeure* wording of the contract cannot give rise to frustration claims.

Frustration applies only in extreme cases and cannot be invoked if the performance of the contract became more onerous. The High Court of England ruled that Brexit would not frustrate the European Medicines Agency's 25-year lease of premises in Canary Wharf, London, even though it would be forced to relocate its premises to an EU Member State. The Court denied the frustration relief. The European Medicines Agency was not excused of its obligations to pay the rent.[70]

To assert frustration, parties must prove that the obligation is more than just difficult to perform as the Court looks at alternate means of performance of a contract**.** In an often-cited case *Tsakiroglou & Co Ltd v Noblee Thorl GmbH* the defendant had to perform shipment from Sudan to Hamburg through the Suez Canal, which was closed to navigation due to the military operations against Egypt. The defendant did not carry the goods and argued that the contract had been frustrated because although he could still have transported the peanuts within the contractually agreed time, this would mean going via the Cape of Good

[64]*DavisContractorsLtd. v. Fareham U.D.C.* [1956] A.C. 696, 729
[65]Force majeure and Frustration of Contract. Second Edition. Edited by Ewan McKendrick, p.9
[66]Supra note 63 at 34
[67]*Supra* note 67 at 34
[68]*Metropolitan Water Board v. Dick, Kerr and Co. [*1918] A.C. 119.
[69]*Walton Harvey Ltd. v. Walker and Homfrays Ltd.* [1931] 1 Ch. 274; cf. W.J. Tatem Ltd. v. Gamboa [1939] 1 K.B. 132 and Ocean Tramp Tankers Corporation v. VIO Sovfracht (The Eugenia) [1964] 2 Q.B. 226.
[70]*Canary Wharf (BP4) T1 Ltd v European Medicines Agency* [2019] EWHC 335 (Ch). The case analysis available athttps://www.skadden.com/insights/publications/2020/02/coronavirus-covid19-implications

Hope (which would have taken four times as long and increased the cost of transport considerably). According to the ruling, shipping of the peanuts via the Cape of Good Hope did not render the contract fundamentally different. The fact that it was more difficult or costly to perform was insufficient to amount to frustration.[71]

Despite the high bar to establish and the harsh results, frustration remains an option for the affected party in extreme situations, notably if a contract lacks a *force majeure* clause. Some courts (e.g., Indian courts) have been using the concepts of frustration and impossibility to perform interchangeably.[72]For example, in India, the doctrine of frustration of Contract implies that an act initially agreed to be done becomes impossible to carry out due to unpreventable circumstances, thus rendering the original contract null and void.[73]

In *Standard Retail Pvt. Ltd. v. M/s. G. S. Global Corp & Ors*, the petitioners, submitted that given the COVID-19 pandemic and the subsequent lockdown declared by the Central Government, its contracts with Respondent # 1 were terminated as unenforceable on account of frustration and impossibility to perform. Although the Respondent No. # 1 complied with its obligations and shipped the goods from the Republic of Korea. However, the Petitioners couldn't perform their obligations to pay back. Therefore, the petitioners sought to restrain respondent #2 (Wells Fargo Bank) from negotiating the letters of credit. The Bombay High Court, while dismissing the petition, held that the *force majeure* clause in the present contract applies only to Respondent No. 1 and cannot come to the aid of the Petitioners. The *force majeure* clause providing for termination at the option of one party cannot be invoked by the other party and cannot be enforced against any third party in a contract.[74]

Similar to the common law doctrine of frustration are doctrines of "impossibility" (Cambodia, Malaysia), "substantial change of circumstances" (Vietnam), and "commercial impracticability" (under the US law as codified in the Uniform Commercial Code)[75] as well as common law doctrines of "impossibility" and "frustration of purpose."[76] The legal standard for the application of these concepts is specific to the national law of the country. Thus, the same circumstances may relieve parties from obligations to perform contractual obligations in one jurisdiction but not in another.

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[71] *Tsakiroglou & Co Ltd v Noblee Thorl GmbH* [1962] AC 93

[72] The Doctrine of Frustration under section 56 of the Indian Contract Act. Working Paper Indian Institute of Management. Available at https://web.iima.ac.in/assets/snippets/workingpaperpdf/8569076382020-10-01.pdf

[73] Indian Contract Act, 1872, Section 56

[74] Bombay High Court Order passed on 8 April 2020 (No 404 of 2020) in *Standard Retail Pvt. Ltd. v. M/s. G. S. Global Corp & Ors*. The commentary of the case available at https://www.jurist.org/commentary/2020/05/tushar-behl-force-majeure-india-covid19/#

[75] Uniform Commercial Code, Article 2-615,

[76] As categorized separately in Restatement Second Contracts. The statutory test for the frustration of purpose is similar to the common law test.

3.Hardship

Another concept that gained importance in the current situation of ongoing pandemic and economic disruption is hardship, which aims to protect the disadvantaged party from a contractual performance that appeared more onerous, with the economic balance of the contract having been heavily upset.[77] This provision is used to renegotiate the contract and adjust it towards the party whose interests have been upset.

The concept of hardship has been recognized by the UNIDROIT Principles[78] and by the national legislation of some countries. The solutions by national laws may be substantially different from country to country. Some national laws allow parties to renegotiate a contract; others will enable them to terminate the agreement on the grounds of hardship.

The ICC hardship clause in the 2020 edition allows parties to choose between termination and adaptation by a judge or termination by a judge or arbitrator having jurisdiction over the contract.[79]

Economic impediments are considered a hardship. The ICC hardship clause states, "The ICC *force majeure* and hardship clauses balance business people's legitimate expectations of performance with the reality that circumstances change, making performance so hard that the contracts simply must change."[80]

The concepts of *force majeure* and hardship are not recognized by common law, but such contractual provisions exist in contracts, and English courts apply them. "When both clauses appear in one contract, they are difficult to distinguish and often create confusion as they are understood to operate in the same way."[81] However, the concepts are based on different principles: *force majeure* is founded on the rationale of the impossibility of performance, and hardship is based on changed circumstances. Nevertheless, the goal of *force majeure* and hardship is the same, i.e., to excuse the party's non-performance or delay.

In the current economic and contractual disruption situation, hardship should be looked at closely as economic reasons impede contractual performance.

[77]Available at https://iccwbo.org/publication/icc-force-majeure-and-hardship-clauses/
[78]*Supra* note 26, Article 6.2.2.
[79]ICC Force majeure and Hardship Clauses March 2020, ICC Hardship Clause. Article 3. Available athttps://iccwbo.org/content/uploads/sites/3/2020/03/icc-forcemajeure-hardship-clauses-march2020.pdf
[80]Available at https://iccwbo.org/publication/icc-force-majeure-and-hardship-clauses/
[81]Berger and Behn “Force Majeure and Hardship in the Age of Corona: A Historical and Comparative Study”, July 2020 McGill Journal of Dispute Resolution

4.New wording of *force majeure* and hardship clause by ICC

In March 2020, the ICC amended the language of the *force majeure* and hardship clauses as published on its website.[82]The ICC has published a long and short version of the clause, which can be incorporated into contracts directly or by reference to a long or short form of the clause.

The new version of the clauses allows parties to terminate the contract should the impediment exceed 120 days.

Also, the new *force majeure* clause by the ICC addresses the issue of the non-performance by third parties engaged in the "performance of one or more contractual obligations" (subcontractors). The explanatory note makes it clear that the provision does not apply to "those who supply products or services to the third party."[83] The provision applies only if the requirements of a *force majeure* are established for the affected party as well as for the 3rd party, which is in line with the provisions of the United Nations Convention of the International Sale of Goods (CISG):

"If the party's failure is due to the failure by a third person whom he has engaged to perform the whole or a part of the contract or to have avoided or overcome it or its consequences."[84]

This provision may gain rising importance these days as the coronavirus pandemic wreaked havoc on production and subsequent transport chains and third parties fail to perform.[85]

5.BIMCO and FIATA new guidance on *force majeure* clause

Non-governmental industry associations also took a stance on the difficulties transport operators face in the coronavirus pandemic by clarifying the *force majeure* issue.

The International Federation of Freight Forwarders Associations (FIATA) has issued several position papers related to coronavirus crises, "Guidance on invoking *force majeure* in the coronavirus crises,"[86] encouraging parties to review their contracts together with the applicable national laws to determine the scope of the regulation. The position paper reminded parties about the need to collect evidence and documentation that the *force*

[82]ICC Force majeure and Hardship Clauses March 2020, Article 3. Available at https://iccwbo.org/content/uploads/sites/3/2020/03/icc-forcemajeure-hardship-clauses-march2020.pdf
[83] Supra note 79, clause 2.3
[84]United Nations Convention of the International Sale of Goods, Section IV, Article 79 (2) (b) Available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09951_e_ebook.pdf
[85] S¸. EsraKiraz* and EsraYıldızU¨stu¨n† "COVID-19 and force majeure clauses: an examination of arbitraltribunal's awards" Available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7798591/pdf/unaa027.pdf
[86]"Invoking force majeure in the coronavirus crises: Some practical tips". Available at http://fiata.com/fileadmin/user_upload/documents/Position_Papers/Force_Majeure_Coronavirus_FIATA_position_paper.pdf

majeure events were beyond the party's control. The party took reasonable steps to mitigate the consequences and reminded parties to look at the situation from the business perspective before invoking a *force majeure* protection.

The other was more specific, "Guidance on the addition of COVID-19 specific clauses in bills of lading,"[87]reminding businesses to properly incorporate new clause by drafting it in a way that is clear and conspicuous as well as that the wording is consistent with the other terms and conditions, applicable conventions and laws. The words in all carrier transport documents must be identical to ensure that all parties are on notice about a new COVID-19 *force majeure* addendum to avoid any potential issues should a dispute arise.

Baltic and International Maritime Council (BIMCO) is engaged in drafting a new *force majeure* clause, which will provide a high threshold for invoking *force majeure* to avoid abuse. The aim is to publish the new BIMCO *force majeure* clause during the first half of 2021.[88]

Chapter 6. Conclusions and Recommendations

The COVID-19 crisis has led to substantial economic disruptions. Therefore, it may be wiser for parties not to hold each other to contractual obligations strictly because renegotiation and amendment of certain aspects of a contract and behavior may benefit both parties. Before invoking judicial protection, the situation should be analyzed from a business perspective. Mediation and arbitration or renegotiating the terms of the contract in question should be the first step. However, these options may not apply to all situations.

The conclusions are recommendations are thus structured considering the following three scenarios:

1) The company intends to enter into a new agreement and needs to provide a force *majeure* clause adequate for the current conditions of the ongoing pandemic;
2) The company intends to invoke *force majeure* contractual protection under the earlier agreement;
3) The company intends to invoke protection other than the *force majeure* clause to absolve it from the contractual delay or performance failure.

In the **first scenario** of a new agreement, not a boilerplate but a detailed and tailor-made *force majeure* clause is advisable. For example, it may be prudent to list all the triggering

[87]Available at https://fiata.com/fileadmin/user_upload/2021_documents/Publications/Guidance_on_the_addition_of_COVID-19_specific_clauses_in_bills_of_lading.pdf
[88] Available at https://www.bimco.org/news/contracts-and-clauses/20201211-new-bimco-force-majeure-clause-ready-for-review#:~:text=if%20force%20majeure%20renders%20performance,the%20contract%20as%20a%20whole.

events and eliminate the event's unforeseeability by defining *force majeure* as "any event whether foreseeable or not." It is advisable that a legal counsel is consulted on whether such provision is enforceable under the contract's governing law.

It is further advisable to include detailed provisions regarding the duty to mitigate by each contracting party. Contract drafters should use precise language and clearly list tailor-dressed options referring to alternative contractual performance methods instead of the generic language on mitigation. Potential extra costs caused by *force majeure* invocation and relevance of price adjustment clause to the particular circumstances should also be thoughtfully considered.

It might be prudent to add "change of law" and "hardship" clauses, which will allow to terminate or renegotiate the contract should the obligation become excessively onerous. If the performance of the contract is to be suspended for the duration of *force majeure*, then the exact period of such suspension should also be defined.

In the **second scenario**, before a contracting party decides to invoke *force majeure* under the agreement, it should analyze what consequences (business, legal, and tax) the application of *force majeure* would bring, including the impact on other agreements (finance, loan agreements, M & A transactions, insurance, etc.). It should be kept in mind that national laws and regulations declaring the COVID-19 pandemic as a *force majeure* event do not determine the contractual *force majeure* event in a particular case. The existence of *force majeure* relief is still to be decided by the court/ arbitration tribunal on a case-by-case basis.

If a business decides to proceed with *force majeure* declaration, then the following issues should be considered:

a) whether the triggering event paves the way to *force majeure* excuse under the contract;
b) whether the event disrupts the contractual performance temporarily or permanently;
c) *force majeure* declaration must comply with the form provided by the contract (the form, the address it is sent to, description of triggering event, the connection between the event and party's inability to perform; timeframe to serve the notice);
d) need to keep record of evidence of the efforts to mitigate (i.e., communication with the counterparty and third parties; record the efforts made to safeguard the cargo and attempted alternative methods of performance by each party (alternative routes, destination points, etc.);
d) since the COVID-19 pandemic has been ongoing for more than one year already, many triggering events have become foreseeable, and parties may have difficulty arguing *force majeure*. In this connection, the wording of the *force majeure* clause regarding the "foreseeability" requirement should be carefully checked against the date when the contract was entered into.

Finally, there is the **third scenario**, when a contracting party needs to invoke legal protection relevant to the delay or performance failure in the absence of the *force majeure* clause in the contract. The contract's governing law should be checked as civil law legislation often provides *force majeure* protection under the national law. If the contract or agreement is regulated by common law, one can claim for the application of the concept of frustration, although the bar to prove that the contract was frustrated is, typically, very high. Furthermore, other provisions of the contract should be scrutinized to identify if its other clauses can absolve liability "material adverse change" or "change of law" conditions that trigger termination of a contract. Given the ongoing pandemic, parties may want to rely on the contractual "hardship" or "price adjustment clause" to try to renegotiate or terminate a contract.