CENTRE FOR TRANSNATIONAL COMMERCIAL LAW

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COVID-19 and its Impact on Commercial Contracts

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ABOUT US

Centre for Transnational Commercial Laws (CTCL), NLU Delhi is a premier research centre working towards the advancement of the study and practice of transnational commercial laws in India. The centre has been involved in rigorous research in this field in the past and strives to be a national leader in private and government transnational commercial law research and training.

In addition to releasing numerous reputed publications on this subject, CTCL regularly conducts various nationwide courses, workshops, and seminars/conferences on transnational commercial laws in association with UNCITRAL and other esteemed national and international authorities in this area. The centre also actively engages in deliberations involving the Unification and Harmonization of International Private Laws along with the UNCITRAL, UNIDROIT, The Hague Conference, and similar institutions & organizations.

CTCL is engaged in providing consultative services to Government, Institutions, and Organizations, dedicated to the development of Transnational Commercial Law and Practice**.** It has been a recipient of grants from the Ministry of Human Resources and Development (MHRD) for the conduct of the MHRD GIAN Course on Comparative Contract Law & Practice and on Cross Border Business Law and Practice, Transnational Commercial Law, International Business Transactions, Comparative Insolvency and Bankruptcy Law.

CTCL has been actively working with the Insolvency and Bankruptcy Board of India (IBBI), Regulatory Authority, specifically in formulation of the Continuous Professional Education (CPE) Policy for the Insolvency Professionals regulated by the IBBI. CTCL has also acted as rapporteurs for several events, conferences related to Insolvency, Bankruptcy, Business Laws and contributed to the final outcome/policy document. We have also been academic consultant in the British High Commission funded project with the Confederation of Indian Industries (CII) and AZB & Partners. CTCL has also been organising the Insolvency and Bankruptcy Moot Competition since 2017, UNCITRAL RCAP Asia Pacific Day events since 2016.

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INTRODUCTORY NOTE

This research primarily aims to analyze the impact of the COVID-19 on commercial contracts and suggest solutions to navigate through the pandemic induced contractual roadblocks. The paper includes four sections:

The first section attempts to evaluate the knock-on effects of the pandemic on international trade and contracts. It mainly focuses on the effect of COVID-19 on the performance of various industries, contractual obligations, business cycles, and insolvencies. Additionally, it evaluates how the pandemic has contributed to the interpretation of pre- pandemic negotiated contracts.

The second section deals with relevant doctrines and principles, including force majeure clauses, the doctrine of frustration, the doctrine of supervening illegality, etc. These are more oft than not invoked when the performance of a contract becomes impossible. It not only deals with the basic content of these doctrines and principles but also relates them significantly to an event like the COVID-19 pandemic.

The third section analyses whether an event resembling COVID-19 has been accommodated by international conventions i.e. UPICC, CISG, and PECL. A detailed study of each of these provisions under the international conventions has been carried out in this section.

The fourth section endeavours to provide comprehensive solutions to the readers on how best to escape the wrath of COVID-19 in terms of mitigating risks. It deals with addressing the possibility of losses before signing the contract, finding alternatives and suggesting ways to execute them.

Overall, the research shall serve as a comprehensive guide for the readers on the impact of COVID-19 on businesses and commercial contracts and also serve as a point of reference for future course of action.

CHAPTER 1

Knock-on effects of COVID-19: Industries & Contracts

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COVID-19 pandemic has taken the world by a surprise and left it in a state of shock. The global economic landscape has been severely hit by this unprecedented crisis. Almost all economic activities have turned topsy turvy in just a matter of a few months.[1] Consumer behaviour has taken a different shape and consumer preferences are constantly getting redefined.[2]

Businesses worldwide have been critically affected due to lockdowns, disruptions in demand and supply chains, lower sales and manpower losses during the first and second wave of COVID-19.[3] Even though vaccination drives have paved the way for the state of affairs to return to normal in near future,[4] yet the situation remains grim. With a new Delta variant at the doorsteps,[5] the possibility of further damage to the business world looms large.

The first section of this research project analyses the knock-on effects of the COVID-19 pandemic on international trade and contracts. The primary focus is on the recent variation in performance of various industries, contractual obligations, business cycles, and insolvencies.

At first, it is crucial to assess the implications of the pandemic on different industries.

1.1 Impact of Covid-19 On Various Industries

1.1.1 SHIPPING AND MARITIME INDUSTRY

The shipping and maritime industry occupy a predominant position in world trade, with almost 90% of the world trade being carried out via the sea.[6] This industry has faced one of the worst setbacks during COVID-19 due to the quarantine requirements for isolation of cargo, waiting periods, port closures, shrunken imports/exports, and mounting losses.[7]

As per the Review of Maritime Transport 2020, the United Nations Conference on Trade and Development (UNCTAD), the international maritime trade projected a decline of 4.1% in 2020.[8]

With a decline in imports and exports around the world, there has been a consequent fall in the

[1] Rosamund Hutt, 'The Economic Effects of COVID-19 around the World' (*World Economic Forum*, 17th February 2020). <https://www.weforum.org/agenda/2020/02/coronavirus-economic-effects-global-economy-trade-travel/> accessed 20 August, 2021.
[2] Kohli S., 'Timelin B., Fabius V., Vernanen S.M., How COVID-19 is changing consumer behavior - now and forever?' (*McKinsey*, 2020). <https://www.mckinsey.com/~/media/mckinsey/industries/retail/our%20insights/how%20covid%2019%20is%20changing%20consumer%20behavior%20now%20and%20forever/how-covid-19-is-changing-consumer-behaviornow-and-forever.pdf> accessed 20 August, 2021.
[3] Rynne B. and others, 'COVID-19 and the global economy' (*KPMG*) <https://home.kpmg/xx/en/home/insights/2020/06/covid-19-and-the-global-economy.html> accessed 20 August, 2021.
[4] Shine Jacob, 'Sitharam urges full vaccination for economy, industry to work normally' *Business Standard* (13 September, 2021) <https://www.business-standard.com/article/economy-policy/sitharaman-urges-full-vaccination-for-economy-industry-to-work-normally-121091200432_1.html> accessed 20 September, 2021.
[5] Francis T. and others, 'The Delta Variant is already leaving its mark on Business' *The Wall Street Journal* (15 August, 2021) <https://www.wsj.com/articles/-delta-variant--business-economy-11629049694> accessed 20 August, 2021.
[6] OECD, 'Ocean Shipping and Shipbuilding' <https://www.oecd.org/ocean/topics/ocean-shipping/> accessed 20 August, 2021.
[7] STA Law Firm, 'Impact of COVID-19 on the Shipping and Maritime Industry' (*MONDAQ*, 26 June 2020) <https://www.mondaq.com/marine-shipping/958770/impact-of-covid-19-on-the-shipping-and-maritime-industry> accessed 20 August, 2021.
[8] UNCTAD, 'Review of Maritime Transport 2020' <https://unctad.org/webflyer/review-maritime-transport-2020> accessed 20 August, 2021.

demand for cargo. The waiting period of 14 days[9] (or any other prescribed waiting period in different jurisdictions) has caused a delay in transportation and a further drop in demand for cargo.

There has been a rise in the number of disputes between owners and charters concerning the hire period (where charters were granted for a fixed period). The charter is usually entitled to a vessel for a restricted period but this was prolonged due to waiting periods and quarantine restrictions.[10] Similarly, there have been disputes in laytime settlements. Laytime is the period allotted to the charterer of the vessel for loading/unloading the vessel. In case this period is not adhered to, the owner of the vessel is liable to pay demurrage to the port authorities which is compensated back to the owner by the charterer.[11] Due to the Covid-19 restrictions, the vessels were not allowed to enter ports and, thus, had to stay on territorial waters for a longer time resulting in disputes in laytime settlement.[12]

1.1.2 AVIATION INDUSTRY

With travel restrictions in place, cancelled flights and air passenger traffic not returning to normal anytime soon, the air transport industry has been left devastated. As per International Air Transport Association (IATA), the lost revenues in the industry would be around US $252 bn and approximately $200 bn will be required from the government as relief for the aviation industry to survive the crisis.[13]

Major airline giants around the world have either collapsed, filed for bankruptcy, or ceased part of their operations. Some of the major airline companies that have fallen casualty to the pandemic include LATAM, Avianca Holdings, Virgin Australia, Flybe, Miami Air International, RavnAir, Trans State Airlines, Compass Airlines, BRA, Air Mauritius, Air Deccan, South African Airways, SunExpress Deutschland, Level Europe, etc.[14]

The passenger demand and passenger revenues have hit an all-time low with the air traffic levels declining by 54.7% in 2020, compared to 2019, and passenger numbers halving to 2.25 bn (almost the same as 2006 levels). The costs did not drop at the same rate as demand did. There is a rise in the unit costs as fixed costs are distributed over a lesser number of passengers.[15]

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[9] Aditi Divekar, 'Covid-19: India imposes 14 day quarantine on shipping vessels from China' *Business Standard* (24 March 2020) <https://www.business-standard.com/article/economy-policy/covid-19-india-imposes-14-day-quarantine-on-shipping-vessels-from-china-120032200066_1.html> accessed 20 August, 2021.

[10] STA Law Firm (n 7).

[11] Laytime, *Collins Online English Dictionary*, <https://www.collinsdictionary.com/dictionary/english/laytime> last accessed 20 August, 2021.

[12] STA Law Firm (n 7).

[13] Press Release, Deeper Revenue Hit from COVID-19, (*IATA*, 24 March 2020) <https://www.iata.org/en/pressroom/pr/2020-03-24-01> accessed 20 August, 2021.

[14] Laura Begley Bloom, 'You Won't Believe How Many Airlines Haven't Survived Coronavirus. How Does It Affect You?' (*Forbes*, 27 June 2020) <https://www.forbes.com/sites/laurabegleybloom/2020/06/27/airlines-coronavirus-travel-bankruptcy/?sh=7b91e7345f69> accessed 20 August, 2021.

[15] *ibid.*

This is because passenger traffic has reduced substantially but the fixed costs remain unchanged leading to cost per passenger rising and revenues declining.

The overall attractiveness of air travel has come down significantly and is unlikely to rise in the post-pandemic period. Several meetings are taking place through the online medium from home, which makes it unlikely for the business users (passengers using air travel for business purposes) to opt for air travel in the near future. Leisure travel is more likely to drive recovery in this sector. This is mainly because business trips are not resuming to pre-pandemic levels and leisure travel such as tourism has more scope of resuming to normal levels once the restrictions are removed. However, the magnitude of recovery remains unclear.[16]

Since the majority of the fleet stands grounded and passenger revenues are stalled, the ability of airline companies to fulfill their contractual obligations is hampered.

Currently, the lease agreements in the aviation industry are governed by two main principles: First, "as is, where is" and second, "Hell or High Water (HOHW) Clauses".[17] Under the as-is, where-is clause, the seller "expressly disclaims any warranties as to the condition of the aircraft."[18] HOHW clauses place an "absolute, irrevocable and unconditional obligation on the lessee to make the necessary lease payments, notwithstanding the happening of any circumstance of any nature whatsoever".[19] The interplay of these clauses with the force majeure clauses and doctrine of frustration (see section II) will play an integral role in determining the fate of contracts affected by the pandemic in the aviation industry.

1.1.3 FASHION INDUSTRY

The pandemic has wreaked havoc in the fashion industry. The global profit of the fashion industry is expected to fall by 93% in 2020.[20] Since the majority of people are working from their homes and outdoor travel is getting limited, the demand for new clothes has declined in a larger number.[21]

Offline retail stores have almost shut down. Online sales are not keeping pace and promotions are nearing their limits.[22] With

[16] Benjamin Laker, 'Has COVID-19 wiped out the business traveller?' (*Forbes*, 17 November 2020) <https://www.forbes.com/sites/benjaminlaker/2020/11/17/has-covid-19-wiped-out-the-business-traveller/?sh=bea9398477d3> accessed 20 August, 2021.

[17] Srivastava R. and Soni R., 'Hell and High Water Clause: A Stumbling-Block for lessee in the Aviation Industry' (*SCC Online*, 5 June 2020) <https://www.scconline.com/blog/post/2020/06/05/hell-and-high-water-clause-a-stumbling-block-for-lessee-in-the-aviation-industry/> accessed 20 August, 2021.

[18] Sullivan and Worcester LLP, 'A lesson for sellers of aircraft: make sure your 'as is' disclaimers work the way you intended' (*Lexology*, 17 November 2014)
<https://www.lexology.com/library/detail.aspx?g=9800ef2b-e7f5-4176-8ec1-0cabbc3f873a> accessed 20 August, 2021.

[19] *Rhythm Hues, Inc. v. Terminal Marketing Company, Inc.*, 01 Civ 4697 (DAB) (GWG) (SDNY May 4, 2004).

[20] Imran Ahmed and others, 'State of Fashion' (*McKinsey & Company*, 1 December, 2020) <https://www.mckinsey.com/industries/retail/our-insights/state-of-fashion> accessed 20 August, 2021.

[21] Steven McIntosh, 'Coronavirus: Why the fashion industry faces an 'existential crisis'' *BBC* (London, 30 April 2020).

[22] Baum C. and others, 'Perspectives for North America's fashion industry in a time of crisis' (*McKinsey & Company*, 26 March 2020)

consumer incomes and revenues declining,[23] it seems unlikely that sales would recover back to normal anytime shortly.

The pandemic has led many major retailers and companies, including Neiman Marcus Group, J.C. Penney, J. Crew, Brooks Brothers, etc., to file for Chapter 11 bankruptcy protection under the US Bankruptcy Code. Others have seen significant revenue declines and losses this year, including Under Armour, which lost roughly $773 million in the first half of 2020, and Capri Holdings Ltd., which is anticipating a 70 percent decline in sales this quarter after losing $551 million in its 2020 fiscal year fourth quarter.[24]

1.1.4 FOOD & BEVERAGE INDUSTRY

The Supply Chain in the Food and Beverage Industry from "farm to fork" has been heavily impacted.[25] Production was hindered and even suspended in some parts due to the COVID-19 restrictions and shortage of labor. While manufacturers faced a tough time, the contract packagers thrived during the pandemic.[26] This was mainly due to the homebound consumers stocking their pantries with packaged food and companies outsourcing their work to contract manufacturers to meet the pandemic fuelled demand for packaged foods.[27]

While the governments around the globe closed down all non-essential services during the pandemic, the wholesalers and retailers of food items were allowed to operate.[28] Most of the restaurants and outdoor food outlets were shut down or allowed to operate in a limited capacity. This resulted in major losses in the restaurant and fine dining sector. However, the retail food business saw a hike during the pandemic. The data shows that there was a tremendous rise in the sale of food items from grocery stores. Big Basket and Grofers reported that the demand for groceries increased by almost five times.[29] The Indian online grocery market clocked $3.3billion in 2020[30] and online groceries like Big Basket, Grofers and JioMart became the norm for most Indians.[31]

There has been a drastic shift in this industry about the mode of operation, with a lot of users

<https://www.mckinsey.com/industries/retail/our-insights/perspectives-for-north-americas-fashion-industry-in-a-time-of-crisis> accessed 20 August, 2021.

[23] ET Bureau, 'Covid impact: Consumers uncertain, see income drop, erosion in savings' *The Economic Times* (16 July 2021).

[24] Layla Ilchi, 'All the Major Fashion Brands and Retailers Severely Impacted by the COVID-19 Pandemic' (*WWD*, 24 December, 2020) <https://wwd.com/fashion-news/fashion-scoops/coronavirus-impact-fashion-retail-bankruptcies-1203693347/,> accessed 20 August, 2021.

[25] Daniel Sachs and Matt Hinton, 'How food and beverage companies are rethinking crisis management amid COVID-19' (*Control Risks*, 2021) <https://www.controlrisks.com/campaigns/recall-management/how-food-and-beverage-companies-are-rethinking-crisis-management-amid-covid-19> accessed 20 August, 2021.

[26] Ed Avis, 'Contract Manufacturers excelled during COVID' (*Food Processing*, April 26, 2021) <https://www.foodprocessing.com/articles/2021/contract-manufacturers-excelled-during-covid/> accessed 20 August, 2021.

[27] *ibid*.

[28] Mason Hayes & Curran, 'COVID-19: Impact on Key Players in Food and Beverage Industry' (*Mason Hayes & Curran*, 3 April, 2020) <https://www.mhc.ie/latest/insights/covid-19-impact-on-key-players-in-the-food-beverage-supply-chain> accessed 20 August, 2021.

[29] Alnoor Peermohamed, 'BigBasket, Grofers, others may clock $3 billion sales' *The Economic Times* (22 May 2020)

[30] Sandeep Soni, 'E-grocery market led by BigBasket, Grofers, others up nearly 2X in 2020 to $3.3B due to Covid tailwinds' *Financial Express* (17 February 2021).

[31] Ananya Bhattacharya, 'The pandemic has made online grocery shopping a lasting habit for Indians' (*Quartz India*, 6 May 2021) <https://qz.com/india/2002480/the-pandemic-has-made-bigbasket-grofers-and-jiomart-a-habit/> accessed 20 August, 2021.

opting for online mediums for ordering food items and groceries. Further, a lot of consumers are willing to spend less on outdoor dining and food consumption.[32] While the chances of the food industry returning to pre-pandemic levels anytime soon are slim, the situation shows the possibility of improvement as the economies open up.

1.1.5 BANKING & FINANCE SECTOR

The banking sector has been deeply affected by the pandemic. Firstly, as there has been a loss of jobs and revenue for both businesses and households, the people in the banking sector have had trouble repaying the loans.[33] This has led to losses and negatively affected profits and bank capital.

Secondly, banks are negatively impacted as bonds and other traded financial instruments have lost value, leading to more losses for them.[34]

Thirdly, banks face increasing demand for credit, as firms require additional cash flow to meet their costs even in times of no or reduced revenues. In some cases, this higher demand has presented itself in the form of a drawdown of credit lines by borrowers.[35]

Fourthly, banks face lower non-interest revenues, as there is lower demand for their services. Banks might reduce credit provision to the economy, thus negatively affecting firms relying on such buffers, which, in turn, undermines their survival.[36]

After the above examination of the industry specific response to Covid-19 crisis, it became imperative to conduct an inquiry into the overall corporate sentiment during the pandemic. The next portion of this section deals with the various components of the corporate response to the given crisis.

1.2 Insolvencies during the COVID-19 Pandemic

1.2.1 ECONOMIC DOWNTURN AND INITIAL EXPECTATION OF INSTANT RISE IN INSOLVENCY FILINGS DUE TO COVID-19

The pandemic caused severe financial distress to businesses worldwide and led the global economy into one of the worst economic recessions since World War 2.[37] It has been observed in the past that economic depressions

[32] Katie Jones, 'These charts show how COVID-19 has changed consumer spending around the world, (*World Economic Forum*, 2 May 2020) <https://www.weforum.org/agenda/2020/05/coronavirus-covid19-consumers-shopping-goods-economics-industry> accessed 20 August, 2021.

[33] Mimansa Verma, 'The second wave of Covid-19 has worsened the bad loan crisis at Indian banks' (*Quartz India*, 26 August 2021) <https://qz.com/india/2048468/covid-19-worsens-the-bad-loan-crisis-at-banks-like-sbi-and-hdfc/> accessed 20 August 2021.

[34] Thorsten Beck, 'How is Coronavirus affecting the banking sector?' (*Economics Observatory*, 13 August 2020) <https://www.economicsobservatory.com/how-coronavirus-affecting-banking-sector> accessed 20 August, 2021.

[35] *ibid.*

[36] *ibid.*

[37] Press Release, 'COVID-19 to Plunge Global Economy into Worst Recession since World War II' (*World Bank*, June 8 2020) <https://www.worldbank.org/en/news/press-release/2020/06/08/covid-19-to-plunge-global-economy-into-worst-recession-since-world-war-ii> accessed 20 August, 2021.

of such high magnitude are usually followed by a high number of insolvencies as businesses succumb to financial stress.[38] It can be gauged through academic papers,[39] Federal Reserve blog posts,[40] and news outlets[41] that economists had predicted a rise in the number of insolvencies and bankruptcies as liquidity of funds to service the debts dwindled.

1.2.2 TRENDS OBSERVED IN INSOLVENCY FILINGS DUE TO THE PANDEMIC

- There has been a **decline in the number of total insolvencies filed for Q2 and Q3 in 2020** in most of the countries. On a comparison between the aggregate number of business insolvency filings from Q2 and Q3 of 2019 to the same quarter of 2020, most of the economies (except Hong Kong) have seen a fall in the number of insolvency filings. Australia, Italy, Lithuania, and Singapore have recorded the maximum decrease (around 50%).[42]

- **Reasons for drop in recent Insolvency Filings:** i) increasing barriers for the creditor-initiated insolvency filings, ii) suspending the duty to file for insolvency and the related, and iii) debt repayment emergency measures.[43]

  In simple words, the main reason for the decline in recent insolvency filings has been temporary amendments in bankruptcy procedures by almost all the countries around the globe, to provide lifelines to keep firms alive through the crisis, at a time when premature bankruptcy can worsen the recession.[44]

- **Uneven decrease:** There have been records of a rise in some insolvencies. For example, insolvency filing by foreign companies under Chapter 15 of US Bankruptcy Code meeting certain requirements have risen by three times

[38] Gary Richardson, 'Bank Distress during the Great Depression: The Illiquidity-Insolvency Debate Revisited' (*NBER*, December 2006) <https://www.nber.org/papers/w12717>; Ken Warwick and Jacques Augustin, 'The Impact of the Global Crisis on SME and Entrepreneurship Financing and Policy Responses' (*OECD*, 2009) <https://www.oecd.org/industry/smes/49316499.pdf> accessed 20 August, 2021.

[39] Robin Greenwood et al, 'Sizing up corporate restructuring in the COVID crisis', working paper 28104 (*NBER*, November 2020) <http://www.nber.org/papers/w28104>; Pierre-Olivier Gourinchas and others, 'COVID-19 and SME failures' (2020) NBER WP No 27877; Altman and Edward I.,'Covid -19 and the Credit Cycle' (2020) Journal of Credit Risk 16, 67-94.

[40] See Nicolas Crouzet and François Gourio, 'Financial Positions of U.S. Public Corporations: Part 2, The Covid-19 Earnings Shock' (*Federal Reserve Bank of Chicago*, 12 May 2020)
<https://www.chicagofed.org/publications/blogs/chicago-fed-insights/2020/financial-positions-part2> accessed 20 August 2021.

[41] See George Korenko and Sushrut Jain, 'Americans households are about to get hit by a devastating wave of bankruptcies'(*BusinessInsider*, 24 May2020) <https://www.businessinsider.com/american-households-about-to-get-hit-by-wave-of-bankruptcies-2020-5> accessed 21 August 2021; Eliza Ronalds, 'Wave of U.S. Bankruptcies Builds Toward Worst Run in Many Years' (*Bloomberg*, 07 May 2020) <https://www.bloomberg.com/news/articles/2020-05-07/wave-of-bankruptcies-builds-as-debt-and-virus-clobber-companies> accessed 21 August 2021; The Economist, 'America Inc faces a wave of bankruptcies' *The Economist* (16 May, 2020).

[42] Muro and Sergio, 'The Calm Before the Storm : Early Evidence on Business Insolvency Filings After the Onset of COVID-19' (2021) World Bank, Washington, DC. World Bank. <https://openknowledge.worldbank.org/handle/10986/35261> accessed 20 August 2021.

[43] *ibid*.

[44] Simeon Djankov, 'Why bankruptcies have declined during the economic shock' (*PIIE*, 9 November 2020) <https://www.piie.com/blogs/realtime-economic-issues-watch/why-bankruptcies-have-declined-during-economic-shock> accessed 20 August, 2021.

from Q1 to Q2. Chapter 11 filings have shown a rise of almost 45% etc.[45]

1.2.3 STORM OF INSOLVENCY FILING AWAITS

Even though there has been a decline in insolvency filing recently, it does not mean that the situation is under control. It has only been delayed due to government intervention in the form of extension of the time period of default for declaration of companies as insolvent, relaxation of corporate compliances, [46] imposition of moratoriums, [47] etc. Once these relaxations and extensions are removed, there is a storm of insolvency and bankruptcy filings awaiting.[48]

1.3 Hostile Takeovers of Companies during the pandemic

As a majority of the companies worldwide face a considerable fall in their equity share prices and market valuations (except for a few mega players which gained substantially during the pandemic),[49] the chances of attempts of 'hostile takeovers of companies' by powerful players remain high. These hostile takeovers are a familiar practice in the Mergers & Acquisitions (M&A) sphere and are usually undertaken using strategies such as 'tender offers' and 'proxy vote'. [50] In times of market turbulence, it is commonly observed that attackers try to take advantage of the lowered share price and engage in such practices.[51]

This policy of hostile takeover is also being employed during the pandemic by governments to take control of companies that are of strategic interest in foreign countries. [52] For example, China has been on a buying spree since the pandemic and has been aggressively taking over companies in dwindling economies.[53]

Governments worldwide have been actively resisting such hostile takeovers by implementing various policy measures. Some of these include the introduction of Foreign Direct Investment

[45] Muro and Sergio (n 42).
[46] Biswas S., and others, 'COVID-19 - Temporary Relaxations for Corporate Compliances' (*Cyril Amarchand Mangaldas Blog*, 8 April 2020) <https://corporate.cyrilamarchandblogs.com/2020/04/covid-19-temporary-relaxations-for-corporate-compliances/> accessed 20 August, 2021.
[47] Notification, COVID-19 Regulatory Package, (*RBI*, March 27 2020), <https://www.rbi.org.in/Scripts/NotificationUser.aspx?Id=11835> accessed 20 August, 2021.
[48] Andrew Keshner, 'Bankruptcy filings fell in 2021, but post-COVID 'shadow debt' may spell trouble' (*Market Watch*, 15 June 2021) <https://www.marketwatch.com/story/bankruptcy-filings-fell-in-2021-but-will-post-covid-shadow-debt-spell-trouble-for-americans-11623781507> accessed 20 August, 2021.
[49] Chris Bradley, 'The impact of Covid-19 on capital markets, one year in' (*McKinsey & Company*, 10 March 2021) <https://www.mckinsey.com/business-functions/strategy-and-corporate-finance/our-insights/the-impact-of-covid-19-on-capital-markets-one-year-in> accessed 20 August, 2021.
[50] Corporate Finance Institute, 'Hostile Takeover' (*CFI*) <https://corporatefinanceinstitute.com/resources/knowledge/deals/hostile-takeover/> accessed 20 August, 2021.
[51] Bellomarini L and others, 'Reasoning on Company Takeovers during the COVID-19 Crisis with Knowledge Graphs' (2020) <http://ceur-ws.org/Vol-2644/paper41.pdf> accessed 20 August, 2021.
[52] *Ibid*.
[53] Geeta Mohan, 'As global economies dwindle, world wakes up to China's hostile takeovers amid pandemic' (*India Today*, 21 April 2020) <https://www.indiatoday.in/business/story/world-wakes-up-to-china-hostile-takeovers-of-companies-amid-covid-19-pandemic-1669240-2020-04-21> accessed 20 August, 2021.

(FDI), Screening Regulations by EU Commission,[54] tweaking of FDI Policy to prevent investment through 'automatic route' from neighboring countries (mainly aiming at China) by India[55] and 'Golden Powers' law of Italy which allows the Italian Government to prohibit or restrict investment from foreign countries in certain strategic Italian industries.[56]

A frequently used strategy for preventing hostile takeovers is the shareholders rights plan, which is more commonly known as 'poison pill'.[57] In 2020, there was a 183% increase in the number of companies adopting poison pills.[58]

The Unocal Test or Enhanced Scrutiny Test is commonly used to evaluate the board's decision to adopt a poison pill. It consists of two prongs: first, the reasonableness test states that "the target board must demonstrate that it had reasonable grounds for believing that a danger to corporate policy and effectiveness existed".[59] Second, the board must show that its defensive measures were "reasonable in relation to the threat posed".[60]

Additionally, while adopting a poison pill, the board must also give due consideration to "any chilling effect the pill would have on anodyne stockholder activity".[61]

The 'Net-Operating Losses (NOL)' poison pill has been suggested for the COVID-19 situation even by policy advisors such as Glass Lewis which generally disfavor poison pills.[62] An NOL poison pill is used to deter outsiders from acquiring beneficial ownership of 4.99% or more of the company's shareholding without the prior approval of the company's board of directors and prevent an "ownership change" under Section 382 of the US Internal Revenue Code.[63]

These pills generally "feature a duration of three years or less and a trigger threshold that is lower than the common 15% or 20% thresholds, with some NOL pill triggers as low as 5%".[64] However, in a recent case of The Williams Companies Stockholder Litigation,[65] the Delaware court

[54] Werner Berg, 'The EU foreign investment mechanism is now operational' (*Baker McKenzie*, 14 October 2020) <https://www.bakermckenzie.com/en/insight/publications/2020/10/eu-foreign-investment-mechanism> accessed 20 August, 2021.
[55] KR Srivats, 'COVID-19: Govt steps in to curb opportunistic takeovers of Indian companies' *The Hindu Business Line* (New Delhi, 18 April 2020).
[56] Ferigo Foscari, 'Covid-19 - Italy expands Golden Power review of Foreign investments' (*White & Case*, 10 April 2020) <https://www.whitecase.com/publications/alert/covid-19-italy-expands-golden-power-review-foreign-investments> accessed 20 August, 2021.
[57] Corporate Finance Institute, 'Poison Pill' (*CFI*, 22 October 2019) <https://corporatefinanceinstitute.com/resources/knowledge/deals/poison-pill-shareholder-rights-plan/> accessed 20 August, 2021.
[58] Deal Point Data: *Top Takeover Defense Changes of 2020* at 2 (Jan. 2021) <https://www.dealpointdata.com>.
[59] Cornell Law Institute, 'Enhanced Scrutiny Test' (*Cornell Law Institute*) <https://www.law.cornell.edu/wex/enhanced_scrutiny_test> accessed 20 August, 2021.
[60] *Ibid.*
[61] *The Williams Companies Stockholder Litigation*, C.A. No. 2020-0707-KSJM at 3 (Del. Ch. Feb. 26, 2021).
[62] Bertinetti A., 'Poison Pills and Coronavirus: Understanding Glass Lewis' Contextual Policy Approach' (*Harvard Law School Forum on Corporate Governance*, 11 April 2020) <https://corpgov.law.harvard.edu/2020/04/11/poison-pills-and-coronavirus-understanding-glass-lewis-contextual-policy-approach/> accessed 20 August, 2021.
[63] Gottfried K and Donahue S, 'The Misplaced focus of the ISS Policy on NOL Poison Pills' (*Harvard Law School Forum on Corporate Governance*, 16 August 2018) <https://corpgov.law.harvard.edu/2018/08/16/the-misplaced-focus-of-the-iss-policy-on-nol-poison-pills/> accessed 20 August, 2021.
[64] *Ibid.*
[65] *The Williams Companies Stockholder Litigation*, C.A. No. 2020-0707-KSJM at 3 (Del. Ch. Feb. 26, 2021).

opined that "5% trigger was an outlier, as most pills (other than net operating loss ("NOL") pills) have triggers of 10% or higher".[66]

1.4 Effect of COVID-19 on commercial contracts

1.4.1 UNCERTAINTY/AMBIGUITY ON THE TIMELY PERFORMANCE OF CONTRACTUAL OBLIGATIONS

As discussed above, because of restrictions imposed in response to COVID-19, the timely performance of contractual obligations has become uncertain. The domino effect of the pandemic has been felt by industries across the globe. The imposition of lockdowns, restrictions on travel and other other measures have badly hit economies and put companies under huge financial pressure.[67] All of this has resulted in uncertainty on the timely performance of contractual obligations.

1.4.2 CONSEQUENCE OF UNFAVOURABLE COMMERCIAL TERMS IN PRE-PANDEMIC NEGOTIATED CONTRACTS

The pre-pandemic negotiated contracts do not accommodate for the pandemic-induced delay or breach of performance and as such could lead to additional costs or penalties for breach. In such a scenario, the parties to a contract may rely on force majeure clauses or doctrine of frustration or any other similar provision under the International or local laws governing the contract (see section III).

Some recent judgments by courts can be analyzed to better understand the interpretation of force majeure clauses in pre-pandemic contracts adopted by the judiciary. In the case of **Standard Retail Pvt Ltd v. G.S. Global Corp & Ors,** the Bombay HC held that no relief can be granted on the ground of impossibility of performance when the activity was classified as an "essential good or service", as there was no restriction on movement of such goods and services.[68] In the case of **M/s Halliburton Offshore Services Inc. v. Vedanta,** the Delhi HC held that, past non-performance cannot be condoned due to March 2020 lockdown due to COVID-19 and that the "Parties ought to be compelled to adhere to contractual terms and conditions and excusing non-performance would be only in exceptional situations."[69]

The courts' interpretation of the force majeure clause in most of the pre-pandemic negotiated contracts has been rigid. However, where there has been a clash between the due date of performance and the timeline of lockdown, the courts have granted relief under the force majeure clause.[70]

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[66] *Ibid.*

[67] Yungandhara Jha and others, 'Performance of Contractual Obligations during the COVID-19 Pandemic' (*Mondaq*, 12 May 2020) <https://www.mondaq.com/india/litigation-contracts-and-force-majeure/932798/performance-of-contractual-obligations-during-the-covid-19-pandemic> accessed 20 August, 2021.

[68] *Standard Retail Pvt. Ltd. v. G.S. Global Corp*. (2020) SCC OnLine Bom 704.

[69] *Halliburton Offshore Services Inc. v. Vedanta* (2020) SCC OnLine Del 542.

[70] Namit Vora, 'Force Majeure Clause and Contractual Obligations during COVID-19' (*Law Octopus*, 13 July 2021) <https://www.lawctopus.com/academike/the-force-majeure-clause-covid-india/> accessed 20 August, 2021.

1.4.3 POSSIBILITY OF TERMINATION FOR INSOLVENCY DURING COVID-19

The insolvency of a party is considered to be a "material breach of the contract". Termination on bankruptcy, or ipso facto clauses, are contract terms "according to which the insolvency of a party automatically terminates the contract or constitutes a material breach."[71] It gives a right to the non-defaulting party to terminate the contract.

These clauses thus serve two purposes. Firstly, they aim to "allow a party to avoid a contractual relationship with a financially unstable counterpart".[72] Secondly, they seek to "restrain a bankrupt debtor party from strategically electing to assume only those contracts that will grant it a windfall at the expense of the non-debtor party".[73]

Since we have discussed above the high possibility of insolvencies due to COVID-19, there is also a high possibility of termination of contracts due to parties being declared insolvent where such clauses were present in the agreement.

After a thorough analysis of the impact of COVID-19 pandemic on the business world and corporates, it is evident that although the blow received has been severe, yet there is scope for improvement. A systematic and comprehensive review of policies and application of legal measures will play an instrumental role in the process.

In the next section, the role of force majeure clauses and other important concepts which come into play in case of impossibility of performance of contract will be discussed in detail.

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[71] Ipso Facto Clause, PRACTICAL LAW STANDARD CLAUSES 1-381-3321.
[72] See Andrea Coles-Bjerre, 'Ipso Facto: The Pattern of Assumable Contracts in Bankruptcy' (2010) 40 N.M. L. Rev. 77.
[73] *Ibid.*

CHAPTER 2

Legal Principles relevant in Covid-19 related event

CENTRE FOR TRANSNATIONAL COMMERCIAL LAW

Even though what parties promise may be viable at the time of entering into the contract, change in circumstances might make it unviable for a party to discharge the obligations of the promises. The parties may rely either on force majeure clauses or doctrine of frustration to relieve themselves of such obligations. This section of the paper deals with the doctrines and principles that are invoked when the performance of a contract becomes impossible.

The Black Law's Dictionary defines the term force majeure as ''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.''[74] In other words, when the parties expressly include a force majeure clause in the contract, it can relieve the parties from performing their obligations in the event of a natural, unforeseeable and unavoidable catastrophe.

A force majeure clause can broadly be of two types. Firstly, the one that includes an exhaustive list of events like floods, earthquakes, and tsunamis, strikes, explosions, lockdowns, an act of God, an act of governments, terrorism, etc.[75] Secondly, the one which is non-exhaustive and simply mentions that the contract can be discharged upon the occurrence of an event that makes the performance impossible.[76]

The question of whether COVID-19 would come under the ambit of a force majeure event is dependent on the wording and phraseology of the contract and the details in the list of contingencies.[77] The force majeure clauses can be inclusive or exhaustive. The inclusive clauses are interpreted in a broader sense. Even if the term 'pandemic' won't be explicitly mentioned in the clause, the clause could be extrapolated to cover Covid-19 as a force majeure clause. The exhaustive clauses enumerate the definite force majeure events.[78] If such a clause does not encapsulate 'pandemic' in the list, then the parties may not be able to invoke force majeure clause because of Covid-19.

Although the term force majeure has not been specifically dealt with in the Indian Contract Act, 1872, the two relevant provisions are Section 32 and Section 56. These provisions have been discussed in detail below.

2.1 Covid 19 as Force Majeure in Contracts which expressly include epidemics/ pandemics- Section 32

[74] *Black's Law Dictionary* (11th edn rev, 2019).
[75] Janice M. Ryan, 'Understanding Force Majeure Clauses' (*Venable LLP*, February 2011) <https://www.venable.com/insights/publications/2011/02/understanding-force-majeure-clauses> accessed 14 September 2021.
[76] *Ibid*.
[77] Nishant Menon and Raheel Kohli, 'COVID-19 – A force majeure event or simply a pandemic?' (*Kochhar and Co.*, 2020). <http://www.kochhar.com/pdf/A_force_majeure_event.pdf> accessed 14 September 2021.
[78] *Black's Law Dictionary* (n 75).

A sample clause in a contract including force majeure events can be "Force Majeure events means/include fire, floods, epidemics, pandemics and strikes that materially affect the performance of the parties to the contract".

Section 32 of the Indian Contract Act, 1872 deals with contingent contracts.

"Enforcement of Contracts contingent on an event happening - Contingent contracts to do or not to do anything **if an uncertain future event happens**, cannot be enforced by law unless and until that event has happened. If the **event becomes impossible**, such contracts become **void**."[79]

(Emphasis Supplied.)

The contracts which expressly entail the terms upon the happening of which, the performance of the contract is discharged are said to encapsulate a force majeure provision.[80] The force majeure clause is derived from the existence of the contract. It is an exception to the breach of contract. This is because it makes the party immune from the legal obligations arising from the breach of contract.

It is the volition of the parties to invoke the force majeure clause.[81] For either party to relieve themselves of the contractual obligations on account of the occurrence of a force majeure event, they must prove four essential elements. Firstly, the occurrence which gives rise to the impossibility of the performance should necessarily be included in the force majeure clause.[82] Secondly, the non-performance was directly induced by the occurrence.[83] Thirdly, the occurrence which gave rise to non-performance was outside the control of the party.[84] Fourthly, an alternate or substitute process of fulfilling the performance should not exist.[85]

COVID-19 will naturally fall under the conception of this clause. However, in this context, for a party to successfully invoke a force majeure clause, the following five questions should be considered:

- Does the Covid-19 outbreak constitute a force majeure event?
- What are the requirements to invoke such a force majeure clause?
- Who has to bear the burden of proof in such a case?
- Can force majeure be applied now after the surge of a second wave when more than one year has passed?

[79] Indian Contract Act 1872, s 32.
[80] Tarun Dua and Geetanjali Sethi, 'India: Force Majeure In Times Of COVID-19: Challenges And The Road Ahead' (*Mondaq*, 11 May 2020) <https://www.mondaq.com/india/litigation-contracts-and-force-majeure/930674/force-majeure-in-times-of-covid-19-challenges-and-the-road-ahead> accessed 15 September 2021.
[81] Anandaday Misshra, 'India: Force Majeure' (*Mondaq*, 09 March 2020). <https://www.mondaq.com/india/contracts-and-commercial-law/901990/force-majeure> accessed 15 September 2021.
[82] Prithviraj Nathan, 'India: Legal Principles In Invoking Force Majeure Clauses – Case Law Analysis' (*Mondaq*, 01 May 2020) <https://www.mondaq.com/india/litigation-contracts-and-force-majeure/926356/legal-principles-in-invoking-force-majeure-clauses-case-law-analysis> accessed 15 September 2021.
[83] *Ibid.*
[84] *Ibid.*
[85] *Ibid.*

- What will be the consequences of invoking "force majeure"?

2.1.1. CONSTITUTING COVID-19 AS A FORCE MAJEURE EVENT

The Covid-19 outbreak does constitute a force majeure event. On 11 March 2020, the World Health Organisation officially declared the Covid-19 outbreak as a 'pandemic'.[86] On 24 March 2020, the Government of India declared a nationwide lockdown on account of the Covid-19 pandemic to safeguard the lives of the citizens.[87] The Covid-19 induced lockdown led to a vast scale disruption in the supply chain. This hindered the performance of many existing contracts that had to be postponed or canceled. Moreover, the Finance Ministry of India issued an office memorandum on 19 February 2020 which reads "Coronavirus should be treated as a natural calamity and force majeure should be invoked, wherever appropriate".[88] On 20 March 2020, the Ministry of Renewable Energy issued an Office Memorandum which read "the disruption of the supply chains due to spread of coronavirus in China or any other country should be considered as a case of natural calamity and Force Majeure Clause (FMC) may be invoked, wherever considered appropriate, following the due procedure".[89]

2.1.2. REQUIREMENTS TO BE FULFILLED

The party seeking to invoke the clause of force majeure is expected to comply with all the procedural requirements of the contract. The party is obligated to send a notice to the other party informing the invocation of the force majeure clause.[90] The party is obligated to issue the notice as soon as Covid-19 impacts the contractual obligations. The notice shall accompany evidence and documentation estimating the impact of Covid-19 in rendering the performance of the contract impossible.[91]

The party also has an obligation to mitigate the impact of Covid-19.[92] It must show that it undertook the 'best endeavours' to mitigate the impact of the pandemic. Furthermore, the party shall provide regular updates and ensure regular consultations with the other party.[93]

2.1.3. A) WHAT HAS TO BE PROVED

The party proposing to excuse itself from the performance of the contract on account of invocation of a force majeure clause has to prove

[86] *Ibid.*
[87] Anandaday Misshra (n 83).
[88] Ministry of New and Renewable Energy, 'Office Memorandum No.F' (18 April 2020) No. 283/18/2020-GRID SOLAR <https://mnre.gov.in/img/documents/uploads/file_f-1584701308078.pdf> accessed 15 September 2021.
[89] *Ibid.*
[90] Anandaday Misshra (n 83).
[91] Steven Slavens and others, 'COVID-19 and force majeure clauses: key considerations, implications, and practice tips' (*Torys LLP.*, 11 March 2020)
<https://www.torys.com/insights/publications/2020/03/covid-19-and-force-majeure-clauses> accessed 3 September 2021.
[92] Anandaday Misshra (n 83).
[93] "Impact of Covid-19 on Contracts" (March 2020) Nishith Desai Associates.

three things. First--the impediment was beyond reasonable control of the party. Second--the party could not have reasonably foreseen the occurrence of the event. Third--the event made the performance of the contract impossible and not merely difficult.

Firstly, the event must be beyond reasonable control of the parties and the parties must have undertaken the best endeavours to mitigate the impacts.[94] The term 'beyond reasonable control of the parties' can refer to the events which neither the person concerned with nor the person acting on their behalf can prevent. [95] Whether the event is beyond reasonable control of the parties or not depends on the factual scenario of each case considering the varying operation of businesses.

In M/S Haliburton Offshore Services Inc v. Vedanta Limited & Anr.,[96] the Delhi HC held that epidemics are inclusive of the events that are beyond reasonable the control of the parties. The emergence of Covid-19 pandemic or epidemic, which albeit refers to an infectious disease affecting a relatively smaller area, but has been used interchangeably by the Delhi HC, can be inferred to be beyond the control of the parties.[97] Further, the subsequent lockdown in the nations and the travel restrictions imposed globally form a part of "act of government'' which are clearly not within the control of the parties. Thus, as long as the parties took sufficient steps to mitigate the impact of Covid-19, the reasons for [non-performance of the contract can be said to be outside the control of the parties.

Secondly, the force majeure event must not be reasonably foreseen by the parties at the time of drafting of the contract. Unforeseen circumstances can be defined as the circumstances that "the parties would never imagine to have occurred during the execution phase of the contract, and unforeseen circumstances where there was a possibility for something to come up, but the manner of its occurrence, and its effects upon the operations carried out was unexpected, may both be considered within the scope of the term unforeseen circumstance".[98] Whether an event is unforeseen is determined not based on the possibility of their occurrence, but based on probability of its occurrence, and the impact of the event on performance of the contract and subsequent consequences.[99]

The question of invoking the force majeure clause on the occurrence of the pandemic can be answered by determining if the Covid-19 pandemic could be reasonably foreseen or not. Although the foreseeability of Covid-19 is a subjective matter, several experts have commented that a pandemic is "inevitable" and "quite unpredictable" and should qualify as a

[94] *Lebeaupin v Crispin* (1920) 2 KB 714, 719.
[95] *Re Application by Mayfair International Pty Ltd* (1994) 28 IPR 643.
[96] *Halliburton Offshore Services vs. Vedanta Ltd. and Anr.* (2020) LSI-360-HC (DEL).
[97] *Ibid.*
[98] Tuna Colgar, 'The practice of unforeseen circumstances in epc contracts' (*The Legal 500*, 19 March 2021) <https://www.legal500.com/developments/thought-leadership/the-practice-of-unforeseen-circumstance-in-epc-contracts/> accessed 3 September 2021.
[99] Koot van de Wim, 'The Owner's and Contractor's Due Diligence in Theory and Practices' Atamer / Süzer Baş / Geisinger, p. 51.

force majeure event.[100] Apart from this, the lockdown safety measures, including stay-at-home orders, travel restrictions, closure of non-essential businesses and lockdowns can be inferred to be unforeseeable by the parties, as long as the contract was entered into before the government had officially made public announcements.

The contracts which were entered into after the outbreak of COVID-19 and the announcement of lockdown measures may not be discharged by invoking the force majeure clause since the element of unforeseeability ceases to exist.[101] Therefore, it can be inferred that an event will not be covered under the ambit of force majeure if the event occurred before the parties entered into the contract.[102] The Court of Appeal of Saint-Denis de la Réunion held that the contract entered into June 2006 will not be frustrated on account of the epidemic of Chikungunya which started in January 2006.[103] This is because the contract was entered into after the outbreak of the epidemic and thus the epidemic was not unforeseeable.[104]

Thirdly, the impact of Covid-19 has so fundamentally changed the nature of the contract[105] that it has become impossible, impractical and useless to perform the contract considering the intention and object of parties at the time of entering into the contract.[106] The force majeure clause will excuse non-performance only if the contract has become impossible due to the Covid-19. The question of whether the performance has become impossible has to be subjectively determined and will depend on reasonable remedies available to the party to overcome the consequences of the pandemic.

The Delhi HC had held that the Force Majeure clause could not be invoked because the parties had failed to discharge their contractual obligations even before the pandemic started. Thus, the pandemic did not directly induce non-performance of the contract.[107]

This point has been discussed in greater detail in the next part of the paper that deals with the frustration of contracts.

2.1.3. B) BURDEN OF PROOF

The party proposing to invoke the force majeure clause to excuse itself from the non-performance

[100] Patrick J and O'Connor, 'Allocating Risks of Terrorism and Pandemic Pestilence: Force Majeure for an Unfriendly World', (2003) Constr. Law.

[101] Khaled Dadi and Laura Smit, 'Impact of COVID-19 on ongoing and future M&A negotiations: Force majeure and unforeseen circumstances under Dutch law' (2020) DLA Piper <https://www.dlapiper.com/en/poland/insights/publications/2020/03/force-majeure-and-unforeseen-circumstances-under-dutch-law/> accessed 3 September 2021.

[102] 'The impact of the COVID-19 crisis and government measures in relation to the capacity of parties to perform their contractual obligations - force majeure, revision of contracts for unforeseen circumstances and MAC clauses' (*Hogan Lovells*, 2020) <https://www.hoganlovells.com/en/publications/covid-19-force-majeure-revision-of-contracts-for-unforeseen-circumstances-and-mac-clauses> accessed 3 September 2021.

[103] Court of Appeal of Saint-Denis de la Réunion, Dec. 29 2009, no. 08/02114; see also Court of Appeal of Besançon, Jan. 8, 2014, no. 12/02291.

[104] *Ibid.*

[105] *Energy Watchdog v. CERC &Ors.* (2017) 14 SCC 80.

[106] *Satyabrata Ghose v. Mugneeram Bangur & Co.*(1954) AIR 1954 SC 44.

[107] *M/S Haliburton Offshore Services Inc* (n 97).

of the contract is obligated to bear the burden of proof. [108] The party must produce adequate evidence in the nature of documents to prove that Covid-19 qualifies as a force majeure event. Any gazette, notification, guideline or memorandum issued by the national and/or state governments imposing restrictions on trade can be used as evidence. [109] Other important evidence can include definite forms of information from reliable media sources related to the COVID-19 outbreak, restrictions on public movement and/or mandatory shutdown of modes of travel. [110] Furthermore, documents revealing any cancellations disrupting travel itinerary, such as cancelled/rejected visas would be helpful.[111]

2.1.4. THE SECOND WAVE REFINEMENTS

After the emergence of the second wave of the Covid-19 pandemic in April 2021, the contracting parties are trying to invoke force majeure clauses based on an infection surge or the prolonged impact of shutdown orders. In the post-pandemic times, the party seeking to invoke the force majeure provision must carefully articulate in its notice the basis on which the circumstances or change in circumstances support their position. The failure to formulate a sound rationale in a notice could defeat their position or result in waiver.

2.1.5. CONSEQUENCES

There can be mainly six consequences of invoking a force majeure clause.

a) Temporary Suspension of Contract

The successful invocation of the force majeure clause would imply the application of Section 32 of the Indian Contracts Act, 1872. Both the parties can be excused from their contractual obligations on the invocation of a force majeure clause, however, the non-performance of the contract is not excused entirely. It is suspended only for the duration that the supervening force majeure event subsists. [112] The parties are expected to resume the performance of the contract once the force majeure event ends.

b) Termination of the Contract

The duration of the force majeure event lasting longer than the time stipulated in the contract can result in the right of the parties to terminate the contract.[113] The Memorandum issued by the Finance Ministry also stated that "If the performance in whole or in part or any obligation under the contract is prevented or delayed by any reason of force majeure for a period exceeding ninety days, either party may at its

[108] Nishant Menon, 'COVID-19 – A force majeure event or simply a pandemic?' (*Kochhar and Co.*, 2020) <http://www.kochhar.com/pdf/A_force_majeure_event.pdf> accessed 14 September 2021.
[109] *Ibid.*
[110] *Ibid.*
[111] *Ibid.*
[112] *Ibid.*
[113] Leigh Ellis, 'Force Majeure Clauses: Covid-19 & Termination of Business Contracts (contract rights)' (2020) Hall Ellis <https://hallellis.co.uk/force-majeure-events-contracts/ > accessed 15 September 2021.

option terminate the contract without any financial repercussions on either side".[114]

c) Re-negotiating the terms of Contract

After it becomes evident that the force majeure event has made it impossible for the parties to undertake the performance of the contract, the parties have an option to renegotiate. The parties can undertake effective measures to mitigate the impact of Covid-19 by mutual understanding and re-negotiating the terms and conditions of the contract. [115] If the parties are successful in renegotiating the terms of the contracts, the contract will continue according to the new terms and conditions.

d) Restitution and Risk allocation

When the performance of the contract has become impossible and the parties fail to renegotiate the terms of the contract, or either of the parties has received undue benefit after the agreement becoming void, they are liable to restore such advantage to the other party. The extent of restitution is subjectively determined from a case to case basis considering various external factors.[116]

Moreover, the parties have the freedom to determine the risk allocation of any expense that has to be borne by them provided that the loss was incurred due to the force majeure event.

e) Resolution of Dispute

If the parties fail to agree on the identification of the force majeure event and fail to renegotiate the terms of the contract, they shall have to assess the legal remedies available in terms of arbitration or litigation as per the terms of the contract.

f) Contingent on the Terms of the contract

The consequence of the invocation of a force majeure clause is contingent on the obligations mentioned in the contract. For example; a contract can have limiting liability or exclusion clauses. There can broadly be four types of contracts with varying liability clauses.

Firstly, some contracts explicitly detail the recourse to be taken by the parties on the occurrence of force majeure event (Covid-19) when the performance of the contract has been rendered impossible. Since the parties have already contemplated the recourse to be adopted on the invocation of the force majeure clause, these specific recourse measures shall be binding on the parties. For instance, the parties have the discretion to allow compensation to either party on the happening of the force majeure event even if the contract is not fully possible to perform.

Secondly, while some contracts acknowledge that the change in circumstances or occurrence of an event might impact the performance of the contract, they explicitly stipulate for the contract to be performed despite such circumstances. The parties cannot excuse themselves from contractual obligations even if the impact of covid-19 renders such contracts impossible to

[114] *Ibid.*
[115] "Impact of Covid-19 on Contracts" (March 2020) Nishith Desai Associates.
[116] *Ibid.*

perform. The Supreme Court in Satyabrata Ghose v Mugneeram Bangu[117] held that "if the parties do contemplate the possibility of an intervening circumstance which might affect the performance of the contract, but expressly stipulate that the contract would stand despite such circumstances, there can be no case of frustration because the basis of the contract being to demand performance despite the happening of a particular event, it cannot disappear when that event happens." Thus, if a force majeure clause of the aforementioned nature exists in the contract, parties cannot resort to Section 56 of the Indian Contract Act to claim supervening impossibility and suspend the contract.

Thirdly, some contracts explicitly provide for limited interruption of the performance of the contract through force majeure.[118] However, if these contracts are rendered impossible for an indefinite period due to Covid-19, the parties will have to seek the remedy of frustration.

Fourthly, some contracts might not expressly include a pandemic in the list of force majeure events. If such a contract has been rendered impossible to perform because of Covid-19 then the parties can seek remedy under Section 56 of the Indian Contracts Act, 1872. The next section of the paper discusses in detail such types of contracts.

2.2 Covid 19 as Force Majeure in Contracts that explicitly exclude epidemics/ pandemics--Section 56

Doctrine of Frustration/Impossibility

A sample clause in a contract excluding force majeure events can be "Force Majeure events include fires, earthquakes, floods and other such natural calamities that materially affect the performance of the parties to the contract. Any epidemics / pandemics will not amount to a Force Majeure event".

Section 56 of the Indian Contract Act, 1872:

"A contract to do an act which, after the contract is made, becomes **impossible**, or, by reason of some event which the promisor could not prevent, **unlawful, becomes void** when the act becomes impossible or unlawful.

"Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know, to be **impossible or unlawful**, such promisor must make **compensation to such promisee** for any **loss** which such promisee sustains through the nonperformance of the promise."[119]

(Emphasis Supplied)

[117] S *Ghose v Mugneeram Bangur & Co*. (1954) AIR 1954 SC 44.
[118] *Ibid.*
[119] Indian Contract Act, s 56.

In other words, Section 56 of the Indian Contract Act encapsulates a positive rule of law on the doctrines of impossibility and supervening illegality that make the contract impossible to perform in its physical and not literal sense. This means that it is not necessary for the contract to become impossible to perform, as long as the fundamental nature of the contract is hampered by the supervening event, the parties can claim frustration of the contract.[120] The parties can invoke the doctrine of frustration when due to the occurrence of a supervening event that alters the fundamental nature of the contract changes such that it becomes impossible, impractical or illegal to perform.[121]

A high threshold has to be established to claim frustration of the contract, in contrast to a force majeure clause.[122] The invocation of doctrine of frustration must be preceded by four conditions. Firstly, there must be a valid contract. Secondly, the performance of the contract is yet to be made or is ongoing. Thirdly, the aforesaid performance becomes impossible by way of facts or law. Fourthly, the contract must not enlist the specific event that has made the performance of the contract impossible.[123] When a contract gets frustrated the parties get permanently discharged from executing their contractual obligations.[124]

In Krell v. Henry, the court held that while it is not feasible to lay down an exhaustive list of events in which the parties' contractual obligations are discharged on account of frustration, the law on the subject matter is evolving.[125] There are several situations that have been recognised as grounds for frustrating a contract.

2.2.1 DEATH OR INCAPACITY OF THE PARTY

In a situation where the personal performance of the contract by a specific person or promisor is essential, the contract is excused from performance if the said promisor is dead or very ill to perform the task.[126]

In the Covid-19 scenario, if a party to a contract, whose existence is paramount, gets infected and subsequently dies, then the contract would get frustrated .

2.2.2. LEGALLY IMPOSSIBLE- DOCTRINE OF SUPERVENING ILLEGALITY

The doctrine of impossibility may include impossibility which is legal in nature. This applies to a case where it might not be physically impossible for a task to be performed but such that the government has released regulations

[120] Devesh Juvekar and Mayur Shetty, 'Dissecting Frustration of Contract – Impossibility of performance' (*Law Street India*, 16 May 2017) <http://www.lawstreetindia.com/experts/column?sid=207> accessed 3 September 2021.
[121] *Naylor Group Inc v Ellis-Don Construction Ltd* (2001) 2 SCR 943.
[122] Jack Yong and Flora G., 'Force Majeure vs. Frustration of Contracts in the Time of COVID-19' (*Lawson Lundell LLP*, 1 April 2020) <https://www.lawsonlundell.com/china-blog/force-majeure-vs-frustration-of-contracts> accessed 13 September 2021.
[123] *Ibid.*
[124] *Naylor Group Inc* (n 121).
[125] *Krell v Henry* (1903) 2 K.B. 740.
[126] *Robinson v Davison* (1871) LR 6 Ex 269.

that have made the performance of the contract illegal.[127]

Any contract can be considered frustrated if any legislative or "administrative intervention has so directly operated upon the fulfillment of the contract for a specific work as to transform the contemplated conditions for a specific work as to transform the contemplated conditions of performance."[128] In a situation where the vendor of land owing to a change in law is no longer the owner of the land, the failure to execute the sale deal would come under the ambit of impossibility of performance.[129] As it has been laid down by the Apex Court in Naihati Jute Mills Ltd v. Khyaliram Jagannath, the ramifications of an intervention in the form of new regulations or laws imposed by the government has to be taken into consideration while discussing the possibility of discharging the contractual obligations.[130]

In the case of Covid-19, as the government had imposed curfews and lockdowns in many places, the performance of any task which would require going out and contravening the lockdown may be considered impossible. Similarly, the performance of contracts that require international travel might also be held as impossible under this doctrine as the government regulations include a ban on international travel.[131] However, whether the consequential government bans will be treated as an event to invoke the force majeure clause will depend on the wording of the contractual provisions and rules of legal interpretation of force majeure clauses.[132]

2.2.3 HARDSHIP- EXCEPTION

A mere commercial hardship or inconvenience to perform the contract cannot qualify as a force majeure event.[133] This is because the invocation of the force majeure clause requires actual impossibility and not a mere difficulty in performance. For instance, since Covid-19 disrupted the supply chains, an unexpected increase in the prices will not make the contract impossible. The economic and market conditions that render the contract commercially unprofitable, can be said to be commercial hardships.[134] A party cannot be absolved from the performance of a contract merely because it has become onerous and difficult to discharge

[127] Cooley Alert, 'Applicability of Force Majeure and Related Doctrines in Response to COVID-19' (*Cooley*, 17 March 2020) <https://www.cooley.com/news/insight/2020/2020-03-17-applicability-of-force-majeure-and-related-doctrines-in-response-to-covid-19> accessed 3 September 2021.

[128] Varun Singh, 'Frustration of Contracts: The Indian Perspective' (*Legal Service India*) <https://www.legalserviceindia.com/legal/article-626-frustration-of-contracts-the-indian-perspective.html> accessed 3 September 2021.

[129] *Tsakiroglou & Co Ltd v Noblee Thorl* (1961) 2 All ER 179.

[130] *Naihati Jute Mills Ltd v Khyaliram Jagannath* AIR (1968) SC 528; (1968) 1 SCR 821,830.

[131] GEP, 'The impact of covid on business travel: should companies reconsider travel contracts and strategies?' (*GEP*, 8 May 2020) <https://www.gep.com/blog/mind/the-impact-of-covid-on-business-travel-should-companies-reconsider-travel-contracts-and> accessed 15 September 2021.

[132] Pollock & Mulla, *The Indian Contract and Specifi Relief Acts* (16th edn, LexisNexis 2019) 1181.

[133] Tarun Dua and Geetanjali Sethi, 'India: Force Majeure In Times Of COVID-19: Challenges And The Road Ahead' (*Mondaq*, 11 May 2020) <https://www.mondaq.com/india/litigation-contracts-and-force-majeure/930674/force-majeure-in-times-of-covid-19-challenges-and-the-road-ahead> accessed 15 September 2021.

[134] Ujjawal Dixit, 'Negotiating a pandemic-proof contract: Why Force Majeure isn't enough and what needs to be added' *Financial Express* (Noida, 28 July 2020).

the responsibilities.[135] In Standard Retail Pvt Ltd. vs M/s Global Corp, the Bombay HC held that mere hardship in performance of an obligation in view of the COVID-19 pandemic is not a force majeure event.[136] It further stated that since the lockdown was temporary and only for a limited period, the petitioners could not use it as an excuse to not perform their contractual obligations permanently. Therefore, to invoke a force majeure clause the parties must show that the supervening event made it impossible to perform the contract instead of making it merely difficult to perform it.

2.3 Covid 19 as Force Majeure in Contracts with force Majeure Clauses that are silent on 'Pandemics'

The contracts with force majeure clauses that are silent on pandemics can be of two types. First--the contracts with a list of exhaustive force majeure clauses. Second--the contracts which encapsulate inclusive force majeure clauses.

2.3.1 EXHAUSTIVE FORCE MAJEURE CLAUSES

The contracts with exhaustive force majeure clauses are the ones that specifically list out all such events that would be considered as force majeure. An example would be: "Force Majeure events means fire, floods and earthquakes that materially affect the performance of the parties to the contract." In such contracts, a party will have to rebut the presumption that 'pandemic' was intentionally excluded from the list of the events, in order to get the benefit of S.56 of the Act. To discharge themselves from performing the contract, the parties will have to prove that the occurrence of a pandemic was beyond the contemplation of the parties. They may refer to the memorandums exchanged during negotiations or rely on its obligations under the contract and show how a pandemic that could have affected the same was beyond what was foreseeable to the parties at that time. It can also be argued that if the parties intended to exclude such a pandemic from the ambit of the clause, then there is no reason as to why it would not have been mentioned in the text of the clause itself.

2.3.2 INCLUSIVE FORCE MAJEURE CLAUSES- ACT OF GOD

Most contracts entail an inclusive force majeure clause which typically includes both a list of specific events and an open ended phrase such as "such other events beyond the control of parties" or "act of god". Such an open-ended phrase is designed to cover events not specifically listed in the clause. For instance, an inclusive force majeure clause may read "Force Majeure events includes fire, floods, strikes and other such natural calamities or an 'Act of God' that materially affect the performance of the parties to the contract"

[135] *Tsakiroglou* (n 129).
[136] *Standard Retail Pvt Ltd. v M/s Global Corp* (2020) SCC OnLine Bom 704.

Force majeure clauses in most contracts contain the phrase 'Act of God'. This phrase indicates an unforeseeable circumstance which cannot be prevented.[137] This could be a result of natural occurrences without any human intervention in any direct or exclusive manner; and this should be extraordinary and absolutely unforeseeable.[138] If it were to be foreseeable, it may no longer be impossible to prevent..[139]

In the contracts where the force majeure clause does not encapsulate the words 'epidemics or diseases', but mentions the phrase 'Act of God', then this phrase would raise a question of interpretation to be decided by the court as to whether Covid 19 would fall within its scope.[140]

Even if epidemics/pandemics are excluded, most force majeure clauses include "natural calamities" as instances of force majeure events. Office Memorandum No. F. 18/4/2020-PPD, dated February 19, 2020, issued by the Ministry of Finance (Dept. of Expenditure), advises that the outbreak of COVID-19 is to be considered as a "natural calamity". Although this is merely an advisory note issued by the Ministry, it will have a persuasive value in the characterisation of COVID-19 as a "natural calamity".

The courts apply the rule of ejusdem generis to construe such clauses narrowly– that when a list of specific items belonging to the same class is followed by a general word, the general words are to be treated as confined to other items of the same class.[141] The term 'Ejusdem Generis' in Latin means 'of the same kind'.[142] For example, if a statute dealing with automobiles list out cars, bikes, tractors, scooters etc, the court can apply the rule of Ejusdem Generis to exclude aeroplanes from the ambit of the statute.[143] The court can narrowly interpret the statute on automobiles to exclude aeroplanes arguing that the statute lists out only land-based automobiles.[144] The question of the Covid-19 pandemic falling under the ambit of such contractual provisions has to be determined on a case to case basis.

When the force majeure clause does not explicitly exclude pandemics/epidemics, a party arguing that COVID-19 is covered within the force majeure clause will have to satisfy the court that a pandemic is an implied term in the contract. An implied term may be read in when entering into the contract, especially where the parties know that it is reasonable, equitable, and objective, and that it gives business efficacy to the contract.[145]

All of these tests can be considered to be satisfied in the case of COVID-19. This is because the intent of parties that may be attributed to the

[137] *P.K. Kalasami Nadar v Ponnuswami Mudaliar* (1962) AIR 1962 Mad 44.
[138] *Ibid.*
[139] *Province of Madras v I.S and G Machado* (1955) AIR 1955 Mad 519.
[140] *Pollock & Mulla* (n 144).
[141] Janice M. Ryan, 'Understanding Force Majeure Clauses' (*Venable LLP*, February 2011) <https://www.venable.com/insights/publications/2011/02/understanding-force-majeure-clauses> accessed 14 September 2021.
[142] *Circuit City Stores, Inc. v Adams* (2001) 532 U.S. 105.
[143] *Ibid.*
[144] *Ibid.*
[145] *Nabha Power Ltd. v PSPCL* (2018) 11 SCC 508.

drafting of an inclusive force majeure clause is to cover unforeseeable events.

While this section of the paper briefly analysed several situations where the parties can be discharged from their contractual obligations due to Covid-19. The first part of the section details the obligations of parties to a contract that entails a force majeure clause. The second part of this section discusses the doctrine of frustration which is invoked when the force majeure clause is absent in the contract. The third section deals with those contracts in which the clauses are silent of pandemics and discusses whether force majeure due to Covid-19 can be invoked in such contracts.

While this section solely focussed on the remedies made available to the parties as per the Indian contract law, the next section of this research paper discusses how the International Sales conventions regulate the performance of contractual obligations in events like Covid-19.

CHAPTER 3

International Conventions: Accommodates COVID-19?

CENTRE FOR TRANSNATIONAL COMMERCIAL LAW

This part of the research project analyses whether an event like Covid-19 is accommodated by international sales conventions and if yes, then how these conventions can be applied to regulate the performance of contractual obligations.

3.1 UNIDROIT Principles of International Commercial Contracts

UPICC is a set of 211 principles which helps regulate and harmonize international commercial contracts. These rules were drawn up in 1984 by UNIDROIT and were first released in 1994, with subsequent revised editions coming out in 2004, 2010, and recently in 2016. The principles have a flexible approach towards the use of force majeure and hardship clauses to aid parties in finding suitable answers to new situations caused by a change of circumstances. Factors such as time of the conclusion of contract, place of the conclusion of the contract, and the nature of containment measures must be kept in mind while analyzing these clauses. There are at least four different scenarios relating to the time of contract (i) Pre-COVID 19 stages or before 31 December 2019; (ii) on or after 31 December 2019 but before 11 March 2020 (pandemic declared by WHO) (iii) during Covid-19 times or the state of emergency of the relevant jurisdiction and (iv) the post-Covid-19stage. The place of conclusion of contract would help in analyzing the state of measures adopted and severity of coronavirus pandemic in that place.[146] Further, the pandemic and the measures adopted to contain it are considered since all the impediments and changes of circumstances started with the coronavirus. The containment measures then created hurdles in the performance of the contract owing to lockdowns, economic shutdown, bans on air travel, etc.[147]

There are various provisions in the UPICC that deal with the exemption of liability for non-performance of contractual obligations. These include clauses dealing with force majeure, exemptions, and hardship.

3.1.1. ARTICLE 7.1.7, UPICC: FORCE MAJEURE

"(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.

(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

[146] Stefan Vogenauer, *Commentary on the UNIDROIT Principles of International Commercial Contracts* (2nd edn, Oxford Publication) [11].
[147] Stefan Vogenauer (n 146) [12].

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."

(Emphasis Supplied)

The liability of the obligor from paying damages for not performing the contract is extinguished by the application of this provision. It further suspends the performance of a contract in case the impediment is temporary, while not affecting other rights of the obligee. To excuse a party for non-performance, the impediment:

- Must be beyond the control of obligor;
- Could not be reasonably foreseen by obligor at time of the conclusion of the contract; and
- Could not be reasonably expected to have been avoided or overcome, nor its consequences.[148]

It must be noted that to invoke this article a strict impossibility of performance is not required, but a hurdle and a causal link between the hurdle and non-performance is required. In the case of Covid-19, the parties will have to prove a causal link between the pandemic, or the containment measures adopted due to it, and the non-performance of contractual obligation.[149] The nature of containment measures or restrictions is also considered. For invoking this provision, the nature of containment measures imposed by the government must be compulsory. Here, the mandatory nature of measures refers to strict and compulsory containment measures, disobeying which would attract legal sanctions.

Furthermore, these measures should bring all economic activities to a stop and leave no room for any economic transaction to occur. For example, a mandatory shutdown of economic activity, complete lockdown, etc. A simple advisory by the government such as a recommendation to be cautious in production or restriction on a fixed number of people in a factory may not always constitute impediment and thus, not meet this condition.[150] The criteria given in this article is based on the notion of "reasonableness" and thus, it must be kept in mind while interpreting this article.[151] One should consider what a person acting under good faith and in the same situation as parties would consider reasonable would have done.[152]

Whether Covid-19 meets the requirements?

BEYOND THE CONTROL OF PARTIES

[148] Unidroit Principles of International Commercial Contracts 2016, art 7.1.7 (1).
[149] Stefan Vogenauer (n 146) [15].
[150] Stefan Vogenauer (n 146) [16].
[151] Stefan Vogenauer (n 146) [17].
[152] UPICC, art 1:302 ["Under these Principles reasonableness is to be judged by what persons acting in good faith and in the same situation as the parties would consider to be reasonable. In particular, in assessing what is reasonable the nature and purpose of the contract, the circumstances of the case and the usages and practices of the trades or professions involved should be taken into account."].

The spread of the Covid-19 pandemic and the containment measures adopted to contain it is clearly beyond the control of all parties to a contract. The parties cannot possibly influence the origin or outbreak of Covid-19 nor can they control the implementation of containment measures by the government.[153] Even in cases of one of the parties being a public institution, a single State institution cannot control the decision taken by the government. The decision, in the end, will be directed towards public welfare and not towards meeting the requirements of a State agency. This requirement is concerned with an impediment, such as pandemic in the instant case and how it affects the performance of contracts. However, it must be kept in mind that impediment must be external and objective and it should not refer to the subjective condition of the promisor. For example, in cases where a promisor due to illness, which he contracted (1) willingly to avoid performance or (2) through failure in observing mandatory measures, could not perform the contract.

REASONABLY UNFORESEEABLE BY PROMISOR AT TIME OF CONCLUSION OF CONTRACT

This requirement requires an in-depth analysis of the situation due to the various complexities involved. Firstly, the facts of each case must be considered. Then, the time and place of conclusion of the contract are to be factored in. With time, it has to be seen whether the contract was concluded before or after the Covid-19 was declared a pandemic or health emergency. With respect to the place of business[154], it should be considered whether at that place the situation had reached a certain threshold of gravity and gathered the attention of people. Since pandemic followed no specific pattern geographically when it spread across the globe, the efforts to look at the distance from the place of origin or where the virus is present, proved to be futile.

The situation became more complex when the pandemic affected contracts of international nature. Here domestic measures need to be considered. Most of the governments went for complete lockdown, strict confinement measures, and mandatory restrictions. Even countries such as China, which controlled the pandemic and recorded no cases for the incubation period have time and again suffered occasional cases of infection.[155] There is no foreseeability as to when the pandemic will end.

Therefore, the contracts concluded before 31 December 2019 and after 31 December 2019 but before 11 March 2020 (when pandemic declared by WHO)[156] can invoke this article and seek exemption. During this period, parties could not have reasonably foreseen the pandemic and even if they had known about it, the effects of containment measures could not have been

[153] Stefan Vogenauer (n 146) [18].
[154] UPICC, art 1.11 ["the relevant "place of business" is that which has the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract"].
[155] Stefan Vogenauer (n 146) [23].
[156] Domenico Cucinotta and Maurizio Vanelli, 'WHO declares COVID-19 a Pandemic' (2020) 91 Acta Biomedica 157.

foreseen at such an early stage. However, for the contracts concluded after 11 March 2020, this requirement is not met. These contracts were concluded after Covid-19 became a pandemic and its presence was known in the public domain. In such a scenario, the promisor cannot take the defense that Covid-19 was not reasonably foreseeable.

NOT REASONABLE TO EXPECT TO AVOID OR OVERCOME IMPEDIMENT OR ITS CONSEQUENCES

This requirement is met when the promisor proves that he could not reasonably be expected to avoid or overcome the impediment or its consequences. With respect to the direct consequences of the pandemic, the promisor can easily prove that he was not in a position to avoid or overcome the impediment. For example, if due to sickness caused by the Covid-19 virus, the promisor is unable to perform the contract linked to one's person (such as a dancer obligated to dance at a club), this requirement is easily met. Even in cases of containment measures becoming an impediment, if there was a complete shutdown of activity due to Covid-19, the promisor cannot be expected to avoid or overcome it.[157] However, there are situations where despite the containment measures, alternate sources of supply or routes are open. In such cases, this requirement would not be met and exemption cannot be sought since it becomes reasonable to expect the promisor to avoid or overcome the impediment. Though this provision dealing with force majeure cannot be invoked, still the promisor is entitled to invoke hardship and ask for renegotiation of the contract.

This excuse will have effect "for such period as is reasonable having regard to the effect of the impending event on the performance of the contract".[158] It must be kept in mind that the period of excuse from performance is not equal to the time-span of the impediment, whereas it is dependent on the impediment's effect on the possibility to perform the contractual obligations. Thus, the period of the excuse from the performance can be shorter or longer than the duration of the impediment. For example, if due to Covid-19 a mill was shut down for 4 months, but the manufacturing could be continued only after 2 months, then the non-performance of the promisor is excused for a total of 6 months.

This provision further requires that the promisor who fails to perform the contract "must give notice to the other party of the impediment and its effect on its ability to perform."[159] In case, a notice is not given within a reasonable time, the promisor will be liable for damages resulting from failure to provide notice. For example, if in the absence of any notice from the promisor that s/he is unable to deliver goods in time due to impediment (or pandemic in the present case), the promisee resells goods to a third party, then

[157] Stefan Vogenauer (n 146) [24].
[158] UPICC, art 7.1.7 (2).
[159] UPICC, art 7.1.7 (3).

that promisee can claim damages from the promisor. However, in certain scenarios, the widespread news of the impediment in the public sphere may reduce or balance the damages recoverable from the promisor since it can be deemed that promisee was aware of the impediment.

3.1.2. ARTICLE 10.8, UPICC: SUSPENSION IN CASE OF FORCE MAJEURE, DEATH, OR INCAPACITY

"(1) Where the **obligee has been prevented by an impediment** that is beyond its control and that it could neither avoid nor overcome, **from causing a limitation period to cease to run** under the preceding Articles, the general **limitation period is suspended so as not to expire before one year after** the relevant **impediment has ceased to exist.**

(2) Where the impediment consists of the incapacity or death of the obligee or obligor, suspension ceases when a representative for the incapacitated or deceased party or its estate has been appointed or a successor has inherited the respective party's position. The additional one-year period under paragraph (1) applies accordingly."

(Emphasis Supplied)

This article deals with the effects of impediments and provides remedies in such situations. The force majeure events prevent the parties from pursuing their rights or at least result in the expiration of the limitation period. Thus, to protect the rights of persons facing such extraordinary situations, this article suspends the general limitation period and provides for an additional one-year time from the date when the impediment ceases to exist.

This allows the parties to decide which course of action to take. It must be noted that for invoking this article, the impediment must be beyond the control of the obligee and it could neither be avoided nor overcome. Since, Covid-19 pandemic is such an impediment, the parties affected by it can invoke this article and get their limitation periods suspended to get an additional one year for pursuing their rights.

If the maximum period has passed before the persons could pursue their rights, the obligee can take the defense of expiration of the maximum limitation period. For instance, X's lawyer plans to file a complaint against Y for professional malpractice. The limitation period was to expire on 31 March 2020. The lawyer of X had completed the complaint and was to file it on 28 March 2020. However, on 11 March 2020 Covid-19 was declared a pandemic, and containment measures adopted by various governments led to complete lockdowns. As a result, courts were closed indefinitely until further notice. In this case, the limitation period of X gets suspended and will resume for a period of one year on the date when the Covid-19 pandemic is over. However, in case the pandemic does not cease to exist for the next ten years, then X's right is barred by the maximum limitation period.

3.1.3. ARTICLE 7.1.6, UPICC: EXEMPTION CLAUSES

"A **clause which limits or excludes one party's liability for non-performance** or which **permits one party to render performance substantially different from** what the other party reasonably **expected** may **not be invoked if it would be grossly unfair to do so**, having regard to the purpose of the contract."

(Emphasis Supplied)

Though the principles enshrine no general principle allowing the courts to ignore abusive or unconscionable terms, this provision allows the court to strike down grossly unfair clauses .[160] These clauses are used to directly limit or exclude the liability of a party unable to perform the contract in the event of non-performance. These are particularly used to allow the performing party to unilaterally change the nature of performance in a manner to transform the contract.[161]

For instance, there is a tour operator who provides luxury accommodation on tours at a high price in the Covid-19 times. The operator adds an exemption clause which provides that he may change the accommodation if the situation so requires. If he puts up his clients in second-class hotels, he will be liable to them despite the exemption clause exempting his liability. The clients expect to be put up in luxurious hotels and not in second-class hotels. Thus, enforcing such a clause would be grossly unfair and the courts can strike it down.

It must be noted that there are certain clauses that merely define the scope of the obligation of the parties and these do not qualify as exemption clauses and can be enforced. In the above example, if the tour operator adds a clause claiming that it will incur no liability for the quality of room service provided in the hotels. This term would not qualify as an exemption clause since it is merely serving the purpose of defining the scope of his obligation.

3.1.4. ARTICLE 6.2.1, UPICC: HARDSHIP

"Where the **performance of a contract becomes** more **onerous** for one of the parties, that party is nevertheless **bound to perform its obligations** subject to the following provisions on hardship."

Article 6.2.2 of the UPICC defines Hardship

"There is **hardship where the occurrence of events fundamentally alters the equilibrium of the contract** either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished, and

(a) the **events occur or become known** to the disadvantaged party **after the conclusion** of the contract;

(b) the events **could not reasonably have been taken into account** by the disadvantaged party at the time of the conclusion of the contract;

[160] UPICC, art 7.1.6, 237, para 1.
[161] UPICC, art 7.1.6, 237, para 2.

(c) the events are **beyond the control** of the disadvantaged party; and

(d) the **risk of the events was not assumed** by the disadvantaged party."

Article 6.2.3 talks about the effects of Hardship

"(1) In case of hardship the disadvantaged party is **entitled to request renegotiations**. The request shall be made without undue delay and shall indicate the grounds on which it is based.

(2) The request for **renegotiation does not** in itself **entitle** the disadvantaged **party to withhold performance.**

(3) Upon failure to reach an agreement within a reasonable time either **party may resort to court.**

(4) If the **court finds hardship it may**, if reasonable,

(a) **terminate the contract** at a date and on terms to be fixed, or

(b) **adapt the contract** with a view to restore its equilibrium."

(Emphasis Supplied)

The conditions created by the spread of the Covid-19 pandemic and its containment measures not only have an impact on the ability to perform the contract but also greatly change the circumstances of performance and fundamentally alter the equilibrium of the contract. The provisions on hardship deal with these types of situations. The section dealing with hardship begins by underlining the binding character of the contract as provided in Article 6.2.1. "This article makes it clear that as result of the general rule of binding nature of a contract [162], the performance of contractual obligations as envisaged by parties is considered binding notwithstanding a change in circumstances, regardless of the burden it may impose on the performing party." [163] However, this general rule is not absolute and is subject to exceptional cases when supervening events lead to a fundamental alteration of equilibrium of contract. This creates an exceptional situation known as "hardship", provided certain requirements are met.

<u>Requirements</u>:

The requirements which need to be fulfilled to invoke the provisions on hardship are enshrined in Article 6.2.2, as reproduced above. By the phrase "disadvantaged party", the Principles mean a party to the contract whose performance has become difficult due to supervening events which have caused the hardship. The issue at hand is to determine if the outbreak of the Covid-19 health crisis and its after-effects result in hardship cases for parties affected by it.

- **Events must fundamentally change the equilibrium of the contract**

The possibility to invoke defence of hardship in times of Covid-19 would depend on the specific circumstances of each case. The conditions created by Covid-19 should cause such a change

[162] UPICC, art. 1.3.
[163] UPICC, art 6.2.1, 267.

in the circumstances which changes the equilibrium between the parties to a contract in a fundamental manner. There exists no clear-cut formula to determine what constitutes "fundamental", so while determining the fundamentals of a thing all relevant circumstances of and surrounding the contract must be considered.[164]

Furthermore, a new situation caused by Covid-19 must change the situation so substantially, that it may objectively lead the parties to not conclude the contract. This fundamental change should increase the cost of performance of one party or diminish the value of the said performance for one of the parties (including cases where the performance no longer has any value at all for the receiving party). It must be noted that hardship concerns only the performance which has not been rendered.

To understand how hardship causes an increase in the cost of performance, take the instance of a distributor of hand sanitizers and gloves. Owing to Covid-19, an export ban is imposed in Country A, from where s/he got his supplies. Owing to the export ban, s/he is now forced to acquire them at a greatly higher price from another supplier in some other country. The cases of this kind mostly relate to the party which is expected to perform a non-monetary obligation but owing to the hardship, the performing of contractual obligation starts incurring costs.

The second case involves situations where the value of performance diminishes due to change in circumstances. During the Covid-19 crisis, this situation has occurred quite often, especially in countries where economic activity was suspended for some time. A lessee running a pizza joint is obliged to continue paying the rent to the lessor even when due to Covid-19 the government allows eateries to operate only on a takeaway basis. Another instance is of a cricket club whose cricket season has been affected by the pandemic. The club must continue paying salaries to its players even when the matches have to be played without any spectators for the remaining season.

- **Events must occur or become known after the conclusion of the contract**

Apart from the above conditions, if the above examples are accepted to cause a fundamental change in equilibrium, there are still some additional requirements that need to be met. As per Article 6.2.2, containment measures such as export ban in Country A or stadium restrictions in cases of cricket clubs, must occur or become known to disadvantaged parties after the conclusion of the contract. This requirement is easily met in cases where a contract was concluded before 31 December 2019. From this date, the possibility of containment measures having been adopted before the conclusion of the contract would vary with country and time. In any case, this requirement would not

[164] Stefan Vogenauer (n 146) 18, para 35.

pose any issues since the date of conclusion of the contract can be accessed and it can be easily established if the events had occurred at that time or not.

Another element that merits analysis is a/the determination of the relevant moment of occurrence of the event. Considering that measures are regulated by law and are generally known as prevalent in the common knowledge of the public, the time gap between the occurrence of the event such as Covid-19 or its containment measures and effective knowledge of parties would be negligible. Similarly, another complexity in international contracts, given the widespread reach and accessibility of news across the globe, can be negated as the news of the containment measures being taken in other countries can reach the obligor in no time. Thus, the obligor cannot be said to take the defence of being ignorant of such happenings and invoke the hardship clause.

- **Events must not be reasonably foreseeable**

Another condition for invoking the hardship clause is that the disadvantaged party could not have reasonably foreseen the extent of the spread of Covid-19 health crisis or its consequences at the time of concluding the contract. Similar to the force majeure clause, "the solution would be arrived at by considering the relevant circumstances of each case such as where and when contract was concluded, where parties had their place of business, and when and how the consequent containment measures were adopted by the public authorities in their respective countries."[165]

If the contract was concluded after there was widespread knowledge in the public domain of Covid-19 crisis, and the country where the contract was concluded had seen a few cases, then the parties had requisite information to foresee the event. In such cases, this requirement is not met and hardship clauses cannot be invoked. However, in cases where the contract was concluded before 11 March 2020 and there were no or negligible cases of the virus spreading in the country, then this condition is met. The hardship clauses can be invoked since, at that point, the effect of Covid-19 pandemic and its containment measure cannot be reasonably taken into account.

- **Events must be beyond the control of parties**

This requirement is not difficult to meet for the outbreak of the Covid-19 pandemic since both the pandemic and its mandatory containment measures are beyond the control of parties to the contract.

- **The risk of the events must not be assumed by parties**

This condition means that there can be no hardship if the risk of change in circumstances was assumed by the parties.

[165] Stefan Vogenauer (n 146) 20, para 39.

There is no need for the risks to be taken over expressly, the risk may become evident from the very nature of the contract. The parties to the contract exclude hardship clauses by assuming the risk of relevant change in circumstances, often expressly, but sometimes it is implicit in the contract, which can be ascertained by looking at the relevant circumstances surrounding the contract.

In case of voluntary assumption of consequences of a pandemic, the disadvantaged party will not be able to seek remedies as envisaged in the hardship clauses. For example, a foreign contemporary dancer accepts to perform at a concert with local dancers in Country A, where first Covid-19 cases have been reported. The guest dancer agreed to perform despite knowing that a few days before the concert, two of the local dancers had tested positive. Eventually, the guest dancer tested positive and had to go into quarantine for 14 days, suffering monetary losses. This dancer cannot take advantage of hardship clauses and claim remedies since he had voluntarily assumed the risk of Covid-19 pandemic in the contract, this is implicit by interpreting the contract in light of all circumstances.

In the Covid-19 times, the contracts concluded before Covid was declared a pandemic (11 March 2020) can be said to meet this requirement since, at that time, parties could not assume this specific risk in their contract. However, in contracts signed after this date, if the adaptation clause has mentioned Covid-19 as the specific event which caused the imbalance between the parties, they do not meet this requirement and cannot invoke the hardship clause.

If all of the above requirements are met, the Covid-19 pandemic qualifies as a hardship. In case of hardship, the change of circumstances puts one of the parties in a disadvantaged position. The UPICC seeks to reinstate the balance between the parties which has been disturbed or changed. The disadvantaged party can request negotiation of the original contract to adapt to new circumstances. The request should be made without undue delay and must indicate the grounds on which it is based.[166]

The reasonable time to request renegotiations will depend on the circumstances of each case. "The request to open renegotiations does not in itself entitle the disadvantaged party to withhold its performance" unless there are exceptional circumstances which objectively warrant it, circumstances that could be linked with the impossibility to remove - even partially - the consequences of performance before renegotiation takes place.[167] After the request is

[166] UPICC, art 6.2.3 (1).

[167] UPICC, art 6.2.3, comment 4 ["A enters into a contract with B for the construction of a plant. The plant is to be built in country X, which adopts new safety regulations (in light of risks posed by Covid-19 pandemic) after the conclusion of the contract. The new regulations require additional apparatus and thereby fundamentally alter the equilibrium of the contract making A's performance substantially more onerous. A is entitled to request renegotiations and may withhold performance in view of the time it needs to implement the new safety regulations, but it may also withhold the delivery of the additional apparatus, for as long as the corresponding price adaptation is not agreed."].

made, the renegotiations should be conducted by both parties in a constructive manner by avoiding any form of obstruction and giving all information.[168]

If there is a failure in reaching an agreement within a reasonable time, either of the parties may resort to court. [169] "If the court finds hardship it may, if reasonable, (a) terminate the contract at a date and on terms to be fixed, or (b) adapt the contract with a view to restore its equilibrium." [170] However, if neither of these remedies is possible, the court may direct the parties to resume negotiations or conform to the terms of the contract as they are. [171] The contracts concluded before the end of 2019 or in the first stages of the development of the pandemic are likely to get some apportionment of damage caused by extraordinary circumstances.

Relationship Between Force Majeure And Hardship

There may be situations that can qualify as both a force majeure event and a hardship event. This may happen since the provision dealing with force majeure does not have any specific meaning of "impossibility" of performance in its wording, rather it depends upon a supervening "impediment" which is beyond the control of parties as provided in Article 7.1.1 (1). Such an impediment may also fulfill the conditions of Article 6.2.2. For instance, if an export ban is imposed by the government due to the pandemic, then a party's access to raw materials will be impeded. If this raw material is nearly exclusively available in that country, then given all the respective conditions are fulfilled, such an impediment can qualify both as force majeure and hardship.

The fact that raw materials can be procured from an alternative source, but with great difficulty and at a substantially higher price, can be considered as an "impediment". However, at the same time, such costly alternative purchases could fundamentally alter the equilibrium of the contract. In such a situation, it is the discretion of the party to choose which remedy to pursue. If a party invokes force majeure, then it is done to temporarily excuse the non-performance and suspend obligations, with the option that the other party can end the contract if the delay in performance becomes a fundamental non-performance. However, if the party invokes hardship, it is done for renegotiating the terms of the contract and keeping the contract alive on revised terms [172], but not for withholding the performance of the contract .

CONCLUSION

The UNIDROIT Principles of International Commercial Contracts provide a useful tool to deal with the distress caused to contractual relationships. The Principles deal with the

[168] UPICC, art 6.2.3, comment 5.
[169] UPICC, art 6.2.3 (3).
[170] UPICC, art 6.2.3 (4).
[171] UPICC, art 6.2.3 (4), comment 7.
[172] UPICC, art 6.2.2, comment 6.

situation of the Covid-19 pandemic through provisions of force majeure and hardship. Thus, in a way, it accommodates an event as unprecedented as Covid-19 within its framework.

3.2 United Nations Convention On Contracts For The International Sale Of Goods

United Nations Convention on Contracts for the International Sale of Goods (CISG), also known as the Vienna Convention, is a multilateral treaty signed in 1980. It tries to establish a uniform framework for facilitating international commerce and trade by removing legal barriers and providing uniform rules. It came into force on 1 January 1988 and as of 2020, it has been ratified by 94 countries across the globe. There are two articles in this convention that deal with exemption clauses and thus, are relevant for the discussion on determining if an event like Covid-19 is accommodated in this international convention or not. These are articles 79 and 80.

3.2.1 ARTICLE 79, CISG: EXEMPTION OF PERFORMANCE

"(1) A **party is not liable for a failure to perform** any of his obligations if he proves that the **failure was due to an impediment** beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it, or its consequences.

(2) 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, that **party is exempt from liability only if:**

a) **he is exempt** under the preceding paragraph; **and**
b) the **person** whom he has so **engaged** would be so **exempt** if the provisions of that paragraph were applied to him.

(3) The **exemption provided** by this article has **an effect on the period during which the impediment exists.**

(4) The party who **fails to perform must give notice to the other party of the impediment and its effect** on his 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, he is liable for damages resulting from such non-receipt.

(5) Nothing in this article prevents either party from exercising any right other than to claim damages under this Convention."

(Emphasis Supplied)

"A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided

or overcome it, or its consequences." [173] As provided by Article 79(5), the main effect of the application of article 79 is limited to an exemption from liability for damages. [174] This article seeks to protect the party from liability for those risks which were beyond his/her control and s/he could not avoid or overcome. Article 79 applies to every type of breach by the seller, even in cases of delivery of non-conforming goods. The parties can derogate from applying Article 79 or even modify it.[175]

ARTICLE 79(1) – BASIC RULE

This article can be invoked if three conditions are fulfilled:

Impediment must be beyond the control

The impediment must lie outside the sphere of control of the promisor. Only such objective circumstances that hinder the performance and are external to the promisor's sphere of control are considered impediments under this principle. Attention should be paid to any allocation of risk as is apparent from the contract and to any usages or practices[176] which may be of relevance. The sphere of control of the promisor is wide and there are a few impediments that will be beyond their control. The most important examples of such impediments include natural phenomena and catastrophes such as earthquakes, floods, epidemics, etc., state interventions by way of imposition of bans on exports or bans, quota limits, etc. However, the promisor should bear all the risks emanating from their business. If they suffer losses due to a drop in production because employees have left the business or due to breakdown in machines or technical systems, this is not "beyond their control".[177]

The exemption can be sought under Article 79 if the operational disruption was due to an external impediment such as natural catastrophe, epidemic, etc. In the context of the Covid-19 crisis, the contracts which have become impossible to perform can take the exemption of Article 79, provided other requirements are met. This is because a pandemic is a natural catastrophe and is beyond the control of the parties and outside their sphere of control.

Unforeseeability

The promisor will be liable to pay damages even for impediments which are outside their sphere of control if they could reasonably take them into account at the time when the contract was being concluded. Sometimes, it may happen that the impediment was already there, however, it was not recognizable to the non-performing party. In such a situation, this condition of unforeseeability will be met.

The outbreak of the pandemic was certainly not foreseeable by the parties. However, the date of the conclusion of the contract is of peculiar significance. For the contracts concluded before

[173] United Nations Convention on Contracts for the International Sale of Goods 1980, art 79(1).
[174] Ingeborg Schwenzer, *Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Good* (4th edn, Oxford University Publisher) art 79 [43].
[175] CISG, art 6.
[176] CISG, art 9.
[177] Peter Huber in Münchener Kommentar zum Bürgerlichen Gesetzbuch, art 79 [12].

the end of 2019, foreseeing an event as unpredictable as Covid-19 could not have been reasonably expected and thus, for those contracts exemption under Article 79 can be sought. For contracts after this point of time, even if the pandemic was there, it should be checked if the impediment was recognizable by the promisor or not. In any case, if it was not recognisable, this requirement will be met.

Unavoidability

It must be proved that the person could not reasonably be expected to have avoided or overcome the impediment or its consequences. The promisor cannot take the defense of an impediment and avail exemption from paying damages. It is expected to overcome an impediment, if possible, and perform the contractual obligation even if this means increased costs or losses. The extent and nature of efforts that are expected from the side of the promisor are determined by the contractual allocation of risks.[178]

The consequences of the Covid-19 pandemic have proved to be an impediment that is difficult to overcome or avoid. For contracts concluded before Covid-19, this requirement is met. However, for contracts concluded after Covid-19 became a pandemic, attention should be paid to specific circumstances and contractual allocation of risks. If the promisor was not infected and tight containment measures were not in place such that goods could be exported or imported albeit at a higher cost, the requirements of unavoidability are not met. However, if the situation was such that the concerned person tested positive or strict lockdown and export-import bans were put in place, the defence under Article 79 will be available.

LIABILITY FOR THIRD PARTIES

As per Article 79(2), if the party's non-performance was due to the failure of a third person who was engaged by the other party, such party will be exempt from liability. However, such an exemption can be sought only if (i) he is exempted under Article 79(1) and (ii) if the third party will also be exempted under Article 79(1). The promisor's staff is not covered under the scope of this provision; however, their conduct is covered under Article 79(1). It must be noted that the exemption given by this article has an effect on the period of existence of an impediment.[179] This means that as long as the conditions are not favourable to resume the performance of the contract, the exemption provided by this article will have an effect. In the case of Covid-19, since it is not certain as to how long the pandemic will last, the Article should have effect for as long as the pandemic or its consequences continue to impede the performance of the contract.

The party which invokes the exemption under Article 79 must give notice to the other party regarding the impediment and its effect on the performance of the contract. [180] This notice

[178] Alastair Mullis and Peter Huber, *The CISG: A new textbook for students and practitioners* (Sellier European Law Publishers 2007) 262.
[179] CISG, art. 79(3).
[180] CISG, art. 79(4).

should be provided within a reasonable time and inability to do so will attract liability for the party failing to perform the contract. The party affected by Covid-19 should provide the other party with a notice in case of non-performance. What qualifies as reasonable time could be determined by looking at the specific circumstances and the nature of contractual business.

3.2.2 ARTICLE 80, CISG: EXEMPTION CLAUSES

"A party may not rely on a failure of the other party to perform**, to the** extent that such failure was caused by the first party's act or omission**.**"

Article 80 deals with exemption from liability. Unlike article 79, article 80 causes the other party to lose all other remedies. This provision applies in situations when non-performance of the contract by the promisor was a result of the act or omission of the promisee. The fact that the promisee was at fault or not is irrelevant. It must be noted that the promisor will be exempted from liability to the extent the non-performance was caused by the promisee's act or omission. In cases of joint contribution to non-performance, the respective contribution will be considered. The legal consequences would be determined by the respective degree of each party's contribution to the causation.

This provision will be applicable when the promisor's failure to perform the contract was caused by the promisee's act or omission and this act or omission of the promisee was due to Covid-19. For instance, if the government of Australia has promised to supply oil to the Chinese government in exchange for money but owing to the outbreak of Covid-19 in China, their government imposes a complete shut-down of all activities along with an export-import ban. The Australian government (promisor) cannot perform the contract since its oil ships are unable to dock at the Chinese ports. Here, the promisor's failure to perform the contract was caused by the act of imposing an import ban on the promisee. The Chinese government cannot claim any remedy against the Australian government by the application of this article.

3.3. Principles Of European Contract Law

PECL is a collection of model principles drawn up by the leading law academicians of Europe. It tries to explain the basic rules of contract law and promote its development, especially dealing with the law of obligations which is used by legal systems of most member-states of the European Union. There are some provisions of this instrument that deal with non-performance and change of circumstances. This section shall examine whether the relevant provisions accommodate Covid-19.

3.3.1 ARTICLE 6:111, PECL: CHANGE OF CIRCUMSTANCES

"(1) A **party is bound to fulfill its obligations even if performance has become more onerous**, whether because the cost of performance has increased or because the value of the performance it receives has diminished.

(2) **If**, however, the **performance** of the contract **becomes excessively onerous** because of a **change of circumstances**, the parties are bound to **enter into negotiations** to adapt the contract or terminate **it**, provided that:

(a) the **change of circumstances occurred after** the time of **conclusion of the contract,**

(b) the **possibility of a change** of circumstances could not **reasonably** have been **taken into account** at the time of conclusion of the contract, and

(c) the **risk** of the change of circumstances **is not one which**, according to the contract, the **party affected should be required to bear**.

(3) If the parties **fail to reach an agreement** within a reasonable period, the **court may:**

(a) **terminate the contract** at a date and on terms to be determined by the court; **or**

(b) **adapt the contract** to distribute between the parties in a just and equitable manner the losses and gains resulting from the change of circumstances.

In either case, the court may award damages for the loss suffered through a party refusing to negotiate or breaking off negotiations contrary to good faith and fair dealing."

(Emphasis Supplied)

This principle states that a party should perform the contract even if the change of circumstances has made the performance onerous.[181] However, if the performance has become substantially onerous, parties should renegotiate the contract to adapt or terminate it subject to certain conditions.[182] This provision is similar to the provisions dealing with hardship in UPICC, namely Articles 6.2.1, 6.2.2, 6.2.3.

The outbreak of Covid-19 and its containment measures has led to a change of circumstances. With the containment measures in place, it has become excessively onerous for some parties to perform their contractual obligations. The cost of performance has increased for such parties and the value of performance received by them has diminished.

The conditions for invoking this article and seeking renegotiation are met by the pandemic. Firstly, for the contracts signed before the end of 2019, the change of circumstances was caused by the pandemic. Secondly, at that time no one could have reasonably foreseen the possibility of such an outbreak at the time of conclusion of a contract. Thirdly, no party could have envisaged the risks associated with Covid-19, let alone bearing the consequences arising from performing the contract.

As all the conditions are met, the parties are bound to renegotiate the contract to adapt or terminate it. If the parties are unable to reach a consensus within a reasonable time, the court may intervene and terminate the contract or adapt it.[183] This may not necessarily apply to contracts negotiated post-Covid-19.

[181] Principles on European Contract Law ('PECL') art 6:111(1).
[182] PECL, art 6:111(2).
[183] PECL, art 6:111(3).

3.3.2 ARTICLE 8:108, PECL: EXCUSES DUE TO IMPEDIMENTS

"(1) A party's **non-performance is excused if it proves that it is due to an impediment** beyond its control and that it could not reasonably have been expected to take the impediment into account at the time of the conclusion of the contract, or to have avoided or overcome the impediment or its consequences.

(2) Where the **impediment is only temporary the excuse provided by this article has an effect on the period during which the impediment exists.** However, if the delay amounts to a fundamental non-performance, the obligee may treat it as such.

(3) The **non-performing party must ensure that notice of the impediment and of its effect on its ability to perform is received by the other party within a reasonable time** after the non-performing party knew or ought to have known of these circumstances. The other party is entitled to damages for any loss resulting from the non-receipt of such notice."

(Emphasis Supplied)

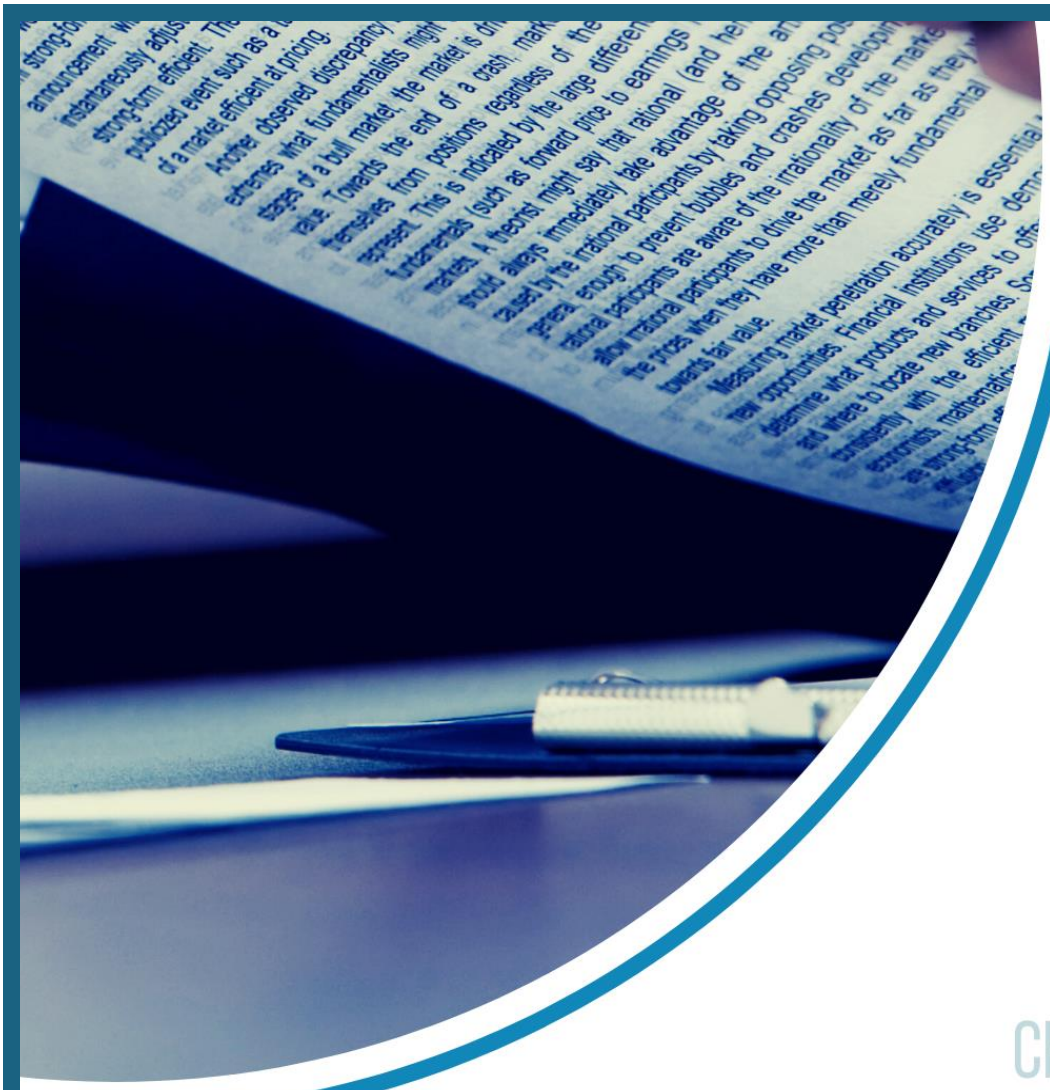
This provision provides for rules which govern exemption from liability for non-performance of the contract. The non-performance is excused if the impediment was beyond the party's control, it was not reasonable to expect to consider impediment during the time of conclusion of the contract, or to avoid or overcome it or its consequences.[184] Contracts concluded before 31 December 2019 were not affected by the Covid-19 pandemic as such events are beyond the control of parties involved in the contracts. Neither was it reasonable to expect the parties to overcome the impediment nor its consequences at that time. This article will have an effect on the period during which the impediment exists but if delay leads to fundamental non-performance[185], the promisee should treat it as such.[186] The party which invokes the exemption should give notice to the other party regarding the impediment and its effect on the performance of the contract.[187] This notice should be provided within a reasonable time and inability to do so will attract liability for the party failing to perform the contract. Commercial contracts in post-pandemic times should include clauses obligating timely notice requirements on the parties.

This section of the paper analysed how international sale conventions accommodate an event like Covid-19 and how is the performance of the contractual obligations affected by the application of these conventions in case of such an event taking place. The first part of this section deals with the application of UNIDROIT Principles of International Commercial Contracts (UPICC) on the contracts affected by the ongoing pandemic. The section part goes on to deal with the United Nations Convention on Contracts for the International Sale of Goods, also known as the CISG. The third and last part of this section

[184] PECL, art 8:108(1).
[185] PECL, art 8:103.
[186] PECL, art 8:108(2).
[187] PECL, art 8:108(3).

discusses the application of Principles of European Contract Law on the contracts concluded during the present times. This section tries to analyze how an exemption for non-performance of contractual obligations can be sought under these conventions.

The next section of the research paper focuses on how the contracts can be drafted to accommodate events like Covid-19 in their wording and provide for the necessary legal remedies in case of such an event taking place. The section mostly deals with legal solutions for the contracts affected by the pandemic and the way forward to avoid any legal risks in the future.



CHAPTER 4

Dealing with the Devil: Pre-empting situations and carefully drafting contracts

CENTRE FOR TRANSNATIONAL COMMERCIAL LAW

4. 1 Reviewing the contract and examining the Force Majeure Clause

Faced with the serious issue posed by the COVID-19, businesses are reviewing and analysing their contracts to determine their rights and obligations, including whether the clauses in their contract or the remedy available under law, could potentially excuse their obligation of performance. This section will particularly focus on this issue.

THOROUGHLY EXAMINING THE FORCE MAJEURE CLAUSE AND THE FACTOR OF FORESEEABILITY

The aforementioned consideration of instances in which a party is prevented from executing their end of the bargain should begin with a thorough examination of the contract's force majeure provision, if there exists. A force majeure clause, as a general rule and practice, provides relief to the party by providing an excuse in the event of an unanticipated incident which was beyond their control. These clauses also list or define the events that may result in an excused performance; they specify the standard that must be established in order to excuse that performance, while also specifying and setting forth additional requirements such as giving the other party notice and the consequences of invoking such clause, which may result in termination.

The force majeure clause is construed narrowly by the courts in some jurisdictions, which means that the grounds for relief in the event of force majeure are limited. In some jurisdictions, such as New York,[188] a party can only be excused from executing their obligation if a force majeure provision expressly identifies the circumstances [189] that are covered by such provision. [190] A force majeure clause is a contractual term "excusing nonperformance owing to events beyond the control of the parties."[191] Courts in New York interpret these force majeure provisions narrowly "due in part to judicial recognition that the purpose of contract law is to allocate the risks that might affect performance and that performance should be excused only in extreme circumstances."[192] With these limits in mind, a party should construct the force majeure clause in such a way that it covers pandemics like COVID-19 by including explicit references like "pandemics", "epidemics" or "diseases" in the list of covered occurrences in force majeure events. In light of the current COVID-19 pandemic, or any future recurrence of the pandemic, it will be more likely that such a force majeure clause that mentions these terms will result in the performance being excused. The specific framing of the clause, on the other hand, should be carefully worded to account for the

[188] *Phibro Energy, Inc. v. Empresa De Polimeros De Sines Sarl* (1989) 720 F. Supp. 312, 318 (S.D.N.Y. 1989)
[189] *Kel Kim Corp. v. Central Markets, Inc.* (1987) 131 A.D.2d 947 (N.Y. App. Div. 1987)
[190] *Ibid*
[191] Patrick J. O'Sullivan, 'Force Majeure Clause and the Coronavirus' (*Keane & Beane P.C.*, 17 March 2020) <https://www.kblaw.com/2020/03/17/force-majeure-clauses-and-the-coronavirus-by-patrick-j-osullivan/> accessed 19 September 2021
[192] *Ibid.*

potential consequences of widening the scope in the event of future unanticipated events.[193]

DRAFTING FOR FUTURE EVENTS

As the pandemic has continued for a considerable period, adding terms like pandemic and epidemic to the force majeure clause in a contract is gaining traction. [194] From a legal perspective, it is evident to add pandemics to business clauses. However, it comes with a price; *ceterus paribus* the other contracting party is likely to pay a lesser price as the insertion of pandemics to the force majeure clause exposes it to the risk in case of non-performance.[195]

Some parties are likely to get rid of the force majeure clauses in their entirety and fall back on the impossibility doctrine for the protection from pandemics. The reason being, the more the insertion of conditions, the more difficult it makes to bring a force majeure clause into effect. This also makes it likely that the courts/governing bodies shall strictly interpret these clauses. For example, in a case where there is a waterborne virus outbreak causing disruption and the contractual clause contains a force majeure provision concerning airborne viruses, the court shall then exclude the situation to be ultra vires of the force majeure clause and deem it to be inapplicable. [196] The strict interpretation of a force majeure clause intended to apply to an impediment caused by an airborne virus cannot be made available for a viral outbreak from non potable/contaminated water.

Nevertheless, in circumstances where such a detailed force majeure clause is excluded the courts would treat both situations on the same pedestal. But, the exclusion of such exception clauses makes the contracting parties vulnerable to accepting the risks associated with non-performance.[197] However, a possible solution in such a scenario is to draft the clauses in the widest possible terms. Instead of including terms such as “epidemics” or “pandemics” in the clause, one may include terms such as ‘pathogen outbreaks’. Furthermore, the parties should also give considerable thought to deciding the available remedies if and when the force majeure clause is triggered.

Standard for Relief

The next stage for a new contracting party is to analyse and consider the established standard of relief to be excused from contractual liability under the force majeure clause. Such aforementioned clauses employ multiple standards for relief, such as “preventing” performance and, in some situations, “delaying” or “hindering” the obligation. These standards of relief clauses become relevant for a party

[193] Robert M. Finkel, ‘COVID-19: Drafting Force Majeure Clauses in the Light of the COVID-19 Pandemic’ (*Wilmer Hale*, 14 April 2020) <https://www.wilmerhale.com/en/insicghts/client-alerts/20200413-drafting-force-majeure-clauses-in-light-of-the-covid-19-pandemic> accessed 19 September 2021.
[194] David B. Saxe, ‘Contractual Force Majeure Provisions and the Spreading Coronavirus’ (*New York Law Journal*, 9 March 2020) < https://perma.cc/77D4-XJ53> accessed 2 September 2021.
[195] Andrew A Schwartz, 'Contracts and COVID-19' (2020) 73 Stan L Rev Online 48.
[196] P.J.M. Declercq, ‘Modern Analysis of the Legal Effect of Force Majeure Clauses in Situations of Commercial Impracticability’, (1995) 15J.L. & CoM. 213, 234-35.
[197] Ibid.

entering into a contract, and it is recommended that these clauses should be thoroughly examined before consenting to the contract's terms.

Clauses pertaining to Mitigation Efforts in case of a force majeure event

Such clauses require the party who invokes the force majeure clause to make a particular level of effort to mitigate the effect of the force majeure event and necessitate consideration on the part of the contractual parties. These clauses set the bar for such efforts, and contractual parties should carefully consider whether they are willing to commit to such high levels of obligation.

OTHER FACTORS TO KEEP IN MIND WHILE EXAMINING THE FORCE MAJEURE CLAUSE

The parties should keep in mind how these force majeure clauses are interacting with other provisions of the contract. This evaluation should include factors such as the provisions of dispute resolution and the law of the land. The choice of governing law can have a significant impact on how a force majeure provision is interpreted, and hence on the scope and operation of the clause. For example, even though the contract does not include these areas, some jurisdictions may read additional factors into force majeure clauses, such as foreseeability, control, and culpability. To the extent that the force majeure clause is not applicable, the parties' choice of governing law will have a significant impact on the extent to which they may be excused from performing their contractual obligations based on related concepts—under certain statutory provisions or common law—to the extent that the force majeure clause is not applicable.[198] The doctrines of impossibility, impracticability, and frustration of purpose, which apply in some common law jurisdictions, as well as other comparable doctrines that apply in civil law jurisdictions, are examples of these concepts.[199]

Another important contractual provision to assess when examining force majeure in a contract is the requirement of notifying the other party in the event of a mishap. This will be addressed in the next section.

4.2 Imposing Timely notification requirements in case of a mishap

When businesses across the world are dealing with uncertainties, carefully examining contractual terms might help bring some order to the chaos. A clause requiring prompt notification in the event of a mishap may particularly be of use. These clauses typically require the other party to provide notice within a specified number of days of the event that may trigger force majeure, or the clause can demand a minimum

[198] John A. Treno, 'Revisiting Force Majeure and Dispute Resolution Clauses in the Light of the Recent Outbreak of the Coronavirus' (*Wilmer Hale*, 27 February 2020) <https://www.wilmerhale.com/en/insights/client-alerts/~/link.aspx?_id=9C6CA11BE0394C46AC74CCF81350225A&_z=z> accessed 19 September 2021.

[199] *Ibid.*

threshold of notification in the future if the event is reasonably anticipated by the other party. If any of these conditions are included in the contract, it may result in the inability of the defaulting party to successfully invoke a force majeure clause if, in the first place, they are unable to timely notify the other party about the incident.[200]

These clauses usually stipulate a certain form of notice, as well as how the notices must be issued and to whom they must be sent. They may also compel the opposing party to specify the triggering event that leads to the non-performance of the contractual duties in a clear and unambiguous manner. Some contracts may include a pre-designed form of notice that must be followed if the other party wishes to notify the party in question. At times the method of delivery is mentioned, and it may require the notice to be transmitted via a specific mode of delivery, such as email or priority mail.

In some situations, the imposition of the timely notification may work against the party asserting force majeure by preventing them from effectively claiming immunity from performing their share of the deal. On the other hand, these clauses can be beneficial in preserving the interests of the other party who is not in default but must nonetheless bear the damages caused by the force majeure occurrence. As a result, it is in the parties' best interests to thoroughly study such clauses before entering into a contract, as they may prove to be beneficial or detrimental to the parties involved.

4.3 Identification of clauses mentioning COVID-19 pandemic under 'Force Majeure'

In case of a failure to perform contractual obligations in lieu of the problems created by the pandemic, the party at default has one of the two options mentioned below to get some relief from performing those obligations. The first is that the pandemic has triggered the force majeure clause mentioned under the contract, and; the second is that the contract in question is 'frustrated' due to the pandemic.

TWO WAYS TO COVER THE ISSUE OF PANDEMIC

There are two ways in which a force majeure clause covers the issue of a pandemic. It might 'expressly' mention the term pandemic. In this case, the parties entering into a contract explicitly mention the term pandemic and adding that to the list ensures that in the case of COVID-19, there is no question that whether a force majeure event has occurred or not. The second way in which a force majeure clause covers situations such as COVID-19 is by covering events that are extraordinary in nature and were beyond the reasonable control of the party at

[200] Shireen A. Barday, 'An Updated Checklist & Flowchart for Analyzing Force Majeure Clauses During the COVID-19 Crisis' (*Gibson Dunn*, 4 August 2021) <https://www.gibsondunn.com/an-updated-checklist-and-flowchart-for-analyzing-force-majeure-clauses-during-the-covid-19-crisis/> accessed 21 August 2021.

default. In these types of cases, such 'general' and 'catch-all' wording may prove to be sufficient to invoke force majeure.201 It further depends on whether the fact and circumstances caused by the pandemic were beyond the reasonable control of the parties invoking such clauses.

CLOSELY ANALYSING SUCH CLAUSES

The wording of such clauses takes primacy in these situations. Identifying them before entering into a contract is a good decision because they will decide how much and up to what extent will the party be excused from performing their obligations. For example, a force majeure clause might provide that the triggering event must cause the "prevention" of the performance of the obligations enumerated in the contract. In this case, the party relying on this clause would need to prove that the performance was either physically or legally impossible to perform. In those cases where the performance was difficult to perform but not impossible; or in cases of economic hardship, it won't be enough to meet the threshold of force majeure.[202]

On the other end of the spectrum, the clause might provide that it is enough to show that the performance was "delayed" or "hindered" by the unforeseen event to invoke the force majeure. In such cases, the likelihood of demonstrating that the performance is more onerous to perform substantially will be adequate to trigger force majeure.

It is recommended that businesses should identify such key contractual clauses in order to assess the risk involved in the case of breach by their counterparts or by themselves due to countless difficulties posed by the COVID-19 pandemic.[203] It is in their best interest to first analyse these clauses and then devise some pre-emptive measures, such as identifying alternative sources of key materials, in order to reasonably minimize the impact of the pandemic on their businesses.[204]

Businesses should consider the ramifications of non-performance clauses within contracts where there is a risk of contract failure, such as liquidated damages clauses, in which the amount of compensation for non-performance has been predetermined and agreed upon by the parties when entering into a contract. If a liquidated damages clause is deemed enforceable, actions should be done to reduce the likelihood of the clause being triggered, or parties should be prepared to bear their costs of enforcement.[205]

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[201] *Tandrin Aviation Holdings Limited v Aero You Store LLC., Insured Aircraft Title Service, Inc.* [2010] EWHC 40 (Comm) (in *obiter*) a flu pandemic is "*some form of force majeure*"; *Clifford Gardner v Clydesdale Bank Limited* [2013] EWHC 4356.

[202] Denis Brock, 'Possible Impact of a Coronavirus Disease (COVID-19) Pandemic on Contractual Obligations' (*O'Melveny,* 6 March 2020) <https://www.omm.com/resources/alerts-and-publications/alerts/possible-impact-of-covid-19-pandemic-on-contractual-obligations/> accessed 22 August 2021.

[203] *Ibid.*

[204] *Ibid.*

[205] Bhumesh Verma, 'India: Importance of Liquidated Damages Clause in a Contract' (*Mondaq*, 31 July 2017) <mondaq.com/india/contracts-and-commercial-law/615382/importance-of-liquidated-damages-clause-in-a-contract> accessed 19 September 2021.

4.4 Re-negotiating terms and conditions

Understanding the issues that drive a given industry is critical, and these must be taken into account when formulating and negotiating agreements. These are also used to settle disputes when and if they emerge as a result of a contract breach.

LIMITATION OF LIABILITY AND INDEMNITY CLAUSES

There are various types of clauses that can be found in a contract, and it's critical to recognise them ahead of time. When writing a contract, businesses utilise clauses like the 'Limitation of Liability' clause to protect their financial interests and limit risk while protecting themselves from any damages or obligations.[206] To build a safety net, these clauses are meticulously drafted. It establishes the parties' obligations and safeguards them in the event that things do not go as anticipated. [207] Typically, commercial contracts have a language that limits responsibility to a specific amount, and the contractual parties should examine those sections before signing the contract, keeping their best interests in mind.

When creating a contract, 'indemnity' clauses are frequently employed. The indemnity clause is one of the most contentious elements in any contract discussion, for better or worse. Indemnity clauses are complicated but highly useful contractual terms that allow the parties to manage the risks associated with a contract by requiring one party to compensate the other for any losses incurred. The scope of indemnification is largely determined by the parties' intentions and the manner it is drafted. [208] The way the contracting parties allocate risk is sometimes an issue that necessitates lengthy discussions. It's critical to break down the sections of the indemnity clause requirements early on in the process to comprehend and communicate the obligations and rewards. Due to ambiguity in the design of an indemnity provision, the indemnifying party may not be held liable for losses that the indemnitee believed it to cover. Ambiguity also exposes the indemnifier to the possibility of being held liable for losses that were not anticipated.[209]

Indemnity clauses can be divided into three categories. You have a broad form indemnity, to begin with. This type of provision holds the Indemnitor liable for both their negligence and any negligence committed by a third party. This could make them accountable for the negligence of the indemnitee.

Then there's the intermediate form indemnity. Unless they were entirely at fault, this compensates a party for their negligence. The term "... caused in part" is nearly typically included in this sort of indemnity. It is no longer

[206] *Moore & Associates, Inc. v. Jones & Carter, Inc.*(2005) Case No. 3:05-0167, U.S. Dist. Ct. Middle Dist. Nashville, Tennessee.
[207] *Moss v. Fortune* (1960) 340 S.W.2d 902.
[208] Piper Alderman, 'Indemnity clauses in commercial contracts: how to achieve desired contractual risk allocation' (*Lexology*, 07 June 2011) <https://www.lexology.com/library/detail.aspx?g=db38e8d6-7451-49e1-9e74-531bf32e0d10> accessed 19 September 2021.
[209] *Ibid.*

a ‘broad form indemnity’ because the term “whole” is not included. Partially negligent conduct on the side of the party seeking indemnification is covered here.

The comparative form clause is the third sort of indemnity. It necessitates one to compare negligence. The Indemnitor will be held liable for any losses incurred as a result of their proper conduct under this clause. In this, the Indemnitor is not responsible for the indemnitee's direct negligence.

The terms of a commercial contract will decide how much indemnification one party must bear on behalf of the other. Based on the nature of the transaction, a suitable contract will specify the sorts of indemnification that are required. Hence, such provisions should be drafted with utmost care and precision.

4.5 Other ways to mitigate the risk of delay and non-performance

If there is no force majeure clause in a contract, the affected parties may still have recourse to common law contracts —like ‘impossibility’ or ‘frustration of purpose’. There also exist other ways through which one can transfer, mitigate or reduce the risk by unforeseeable situations such as COVID-19. As the pandemic has had a different impact on different contractual obligations and transactions worldwide, providing a straightjacket solution is not feasible. The primary reason being the legal consequences of the pandemic would be subjected to the law in a particular jurisdiction, facts of the case, and the agreement between the parties. However, this subsection broadly explores such ways.

IMPOSSIBILITY

The notion of the impossibility of performance might assist a party in averting liability for a contractual breach. When unforeseen circumstances render it impossible or impracticable to perform under the contract, the term ‘impossibility of performance’ can be used.[210]

The party affected by the unforeseen event must show they suffered unreasonable and unforeseen hardship. Sometimes the ‘foreseeability’ test is applied differently by different jurisdictions owing to their interpretation of the foreseeability test.[211] In the context of the COVID-19 pandemic, the different standards can lead to different results. For example, given previous outbreaks and the development of COVID-19 in China, Italy, and Iran, a court could determine that shutting enterprises in the United States was foreseeable under the foreseeability standard. [212] The fact that an event has happened in the past doesn’t necessarily obscure its application in the future. However, the possibilities and subjective matter of the event play a significant role. Perhaps one

[210] *Martin v. Star Pub. Co.* (1956) 126 A.2d 238, 242.
[211] *Opera Co. v. Wolf Trap Found*. (1987) 817 F.2d 1094, 1102-1103 (pertaining to why foreseeability should not be the standard).
[212] Desmond D. Connall, Jr. and others, ‘Force Majeure and COVID-19’ (*Ballard Spahr LLP*, 23 March 2020) <ballardspahr.com/-/media/files/alerts/force-majeure-and-covid-19---03-20.pdf> accessed 01 September 2021.

of the better ways of comprehending the role of foreseeability in the impossibility analysis is that it is "a relevant, but not dispositive, factor."[213]

For invoking the impossibility defence, fulfilling the contract must be so impractical that it would be unreasonably difficult for a party to perform and not just consider the increased cost the party has to pay.

FRUSTRATION OF PURPOSE CLAUSE

The frustration of purpose can occur when an unforeseen incident causes any contractual obligations to change significantly or totally from those initially agreed upon by all parties due to changes in circumstances beyond their control. Even if the party is capable of acting under the contract, the party may be excused from doing so as the contract's purpose is no longer valid. In the COVID-19 pandemic, many claims have the potential to fall under this heading as the cancellations of sporting events, concerts, and other gatherings due to health restrictions are always probable. For example, stadiums and teams whose events have been cancelled may have a defence to breach contracts with their vendors for services such as printing posters or promoting the events.

ESCALATION AND NON-PERFORMANCE CLAUSE

An escalation clause is a provision in a contract that calls for adjustments in the original contracted price or scope of work to account for fluctuations in the costs of raw materials or labor. [214] Including such a clause allows notifying all the parties that contract costs may vary if material prices change due to supply restrictions outside the contractor's control. It also identifies who is liable for the price escalation. Having such a clause in contracts in situations like COVID-19 can prove to be vital as the supply chain during such unforeseeable events is disrupted which may lead to delays and price changes.

A non-performance clause can be used in order to excuse the contractor from performing when availability or cost makes it impracticable, unfeasible, or impossible to meet the decision criteria.

The following is a common example of a non-performance clause:

"Performance will be excused, and the parties will not be liable for any failure to perform under this Agreement, when Contractor is unable, despite diligent efforts to do so, to obtain raw materials and supplies on terms Contractor deems commercially acceptable."

[213] *United States v. Winstar Corp*. (1996) 518 U.S. 839, 906.
[214] Sakshi Shairwal and Sampoorna Chatterjee, 'Fundamentals of Price Variation Clause & Change in Law Clause' (*Lexology*, 22 December 2020) <https://www.lexology.com/library/detail.aspx?g=9342660b-f982-4a13-9791-6de020de1551> accessed 2 September 2021.

Non-performance clauses can be used in consonance or place of escalation clauses.[215] An excuse under a non-performance clause is considered after determining whether the shift in the conditions was so grave that it prevented a party from honouring their promise. Moreover, the situation arising from the change in circumstances must not have been reasonably foreseeable and the one that could have been avoided with reasonable efforts. Since COVID-19 was a virus which was initially localized to China and then had spread throughout the world, it could have been foreseeable that the virus has the potential to spread to different parts of the world. The reason being, other coronaviruses like the MERS and SARS have had similar modes of spreading and had spread to different parts of the world. Though COVID-19 is a comparatively virulent virus the basic mode of transmission remains the same. However, this shouldn't become the sole reason for defenestrating a claim under the non-performance clause as the strict health measures resorted by Governments across the globe were exceptional. But at the same time COVID-19 was a novel coronavirus about which we knew a lot less. So placing it on an equal pedestal with SARS/MERS can seem counterintuitive. Hence, the authors believe, each case should be considered subjectively as a straitjacket method of assessment can lead to injustice in some cases.

TIME/DELAY TERM

Many contracts include completion clauses that impose obligations to perform according to specific timelines or deadlines and may also state that "time is of the essence."[216] In cases where time plays a quintessential role, contracts require strict compliance since not honouring them is likely to attract penalties through payment reductions, non-payments, contract termination, and extra fines, such as liquidated damages. Time and delay terms are becoming ubiquitous with globalization and increasing demand which necessitates one to review provisions in a contract.

During COVID-19 lockdowns, parties all across the globe faced roadblocks in meeting deadlines or faced a significant increase in honouring them. Thus drafting clauses that protect oneself from interruptions and delays beyond control becomes important. Parties may add to their contracts excusable time delay clauses which minimize their risk of some missed delays or other delays because of unforeseen conditions such as pandemics. For example, languages such as the following can be used in such conditions.

"Where there is a delay outside the control of the parties due to unavailability of goods, delay in delivery, or other unforeseen or remote contingencies, the parties agree such a delay is not considered a breach under this section. The parties agree to use commercially reasonable

[215] Heather Kaiser, 'Mitigate your risks in a volatile supply chain market with contractual management'(*USI*, 17 June 2021) <https://mnwi.usi.com/Resources/Resource-Library/Resource-Library-Article/ArtMID/666/ArticleID/1163/Legal-Update-Mitigate-your-risks-in-a-volatile-supply-chain-market-with-contractual-management> accessed 18 September 2021.

[216] Indian Contract Act, s 55.

efforts to perform the contract under the deadlines allowable by the market." [217]

Material Adverse Change (MAC) Clause

Typically, in acquisition and finance agreements, a party is entitled to withdraw from the contract on the occurrence of circumstances that lead to a material change post the signing of the contract. This is another way to allocate risks between the contracting parties. The legal implications of a broad and a narrow MAC clause is dependent on the approach that courts take. Even in situations of a broad MAC clause, the lender/buyer may not be able to invoke it owing to a strict interpretation by the courts. In any case, if a party intends to give effect to a MAC clause in the context of COVID-19, it must ensure a relatively broader wording and at the same time be able to prove that change in circumstance brought on account of COVID-19 was material and that the party was not expecting the same.

4.6 What to do to reduce legal risks under changed circumstances?

REVIEWING CONTRACTS FOR PROVISIONS OF FORCE MAJEURE/HARDSHIP/RENEGOTIATION/MAC (MATERIAL ADVERSE CHANGE)

One can review the contracts in cases where the particular circumstances have changed which may lead to any potential issues. The parties to an agreement should also check whether the clauses in the contract cover particular impediments such as the COVID-19 pandemic, health emergencies, or government measures. One must ideally check carefully for all the potential issues at the horizon, including 'boilerplate clauses' prior to any actual issues of contractual performance arises. This gives the parties a head start and time to prepare for lawsuits.

Reviewing provisions also help guarantee a party that it fulfils its due diligence to take appropriate safeguards and is prepared to search for alternative performance if it inevitably experiences non-performance issues.

The parties after evaluating the relevant contractual provisions can consider how the courts have dealt with similar conditions. Their area of research can be focused on how similar contractual terms were interpreted before. Analyzing these precedents shall provide an overview of the conditions/circumstances where the performance was excused or not, by relying on whether a party fulfilled the requisites for waiving the contractual obligations. This can give the parties an edge in preparing for any breach(es) committed by them or their contractual counterparty. Analysing the situation and applying legal acumen to it can excuse the

[217] Heather Kaiser (n 215).

parties of their non-performance (both potential and actual).[218]

DETERMINING THE LAW APPLICABLE TO THE CONTRACT

Deciding the law governing the contract has a significant impact on understanding the legal remedies available. In a common law system, if a contract is without express contract provisions it puts a party on the back foot as compared to civil law systems. The reason is under the common law the provisions of a contract are seldom implied. [219] This necessitates having all the provisions to be written down in a contract especially in countries that are not a part of the CISG.[220] In cases where the contracting parties are not members of the CISG, the contract between the parties is vulnerable to uncertainties. Firstly, there may be differences in the sales law of the contracting parties' nations and secondly, a doubt arises about the applicable law governing the dispute. However, if the parties are conducting their business from a CISG signatory nation, then the CISG provides the rules for interpreting the international contracts and also becomes applicable to contracts of sale of goods vide Article 1(1)(b). It also lays down the obligations and remedies available for a party in case of a dispute which becomes vital in unforeseeable circumstances like COVID-19. Generally, the applicable law in such cases is the CISG unless the parties agree otherwise.

Nevertheless, in case of an absence of an appropriate national instrument or a contractual clause governing the claim, one may as a last resort rely on the principle of good faith to understand the governing law. [221] The applicability of this principle depends much on the court and the peculiar circumstances of the case.

ANALYZING AND ADAPTING ACCORDING TO THE SITUATION

In unpredictable situations like Covid 19, a party needs to assess the situation and plan for the future. The parties need to consider their position; both legally and commercially as subsequent COVID waves may potentially disrupt global trade. Consider the following questions:

- Whether the situation classifies as a hardship, impossibility, or neither?
- What is the cause for an impediment that has arisen? (Epidemic, pandemic, government orders, etc.)
- Was the impediment reasonably foreseeable? If yes, what could have been done to avoid it?

[218] Adam Hakki and others, 'Analysis of Non-Performance of Contractual Obligations in Light of the Covid-19 Pandemic' (*Shearman & Sterling*, 20 April 2020) <https://www.shearman.com/Perspectives/2020/04/Analysis-of-Non-Performance-of-Contractual-Obligations-in-Light-of-the--COVID-19-Pandemic> accessed 19 September 2021.

[219] The World Bank, 'Public Private Partnership Legal Resource Center' (*The World Bank*, 2020) <https://ppp.worldbank.org/public-private-partnership/legislation-regulation/framework-assessment/legal-systems/common-vs-civil-law > accessed 20 September, 2021.

[220] CISG, Art.1(1)(b).

[221] B J Reiter, 'Good Faith in Contracts' (1983) 17 Val U L Rev 705, 709.

- Was it impossible to foresee it at the time of the conclusion of the contract?

Estimating the duration of the impediment and getting an approximate understanding in this regard can help businesses to prepare for the future.

Figuring out an amicable solution for preserving the commercial interest of both parties and maintaining trade relations through alternate forms of dispute resolution.

In an uncertain event, where the impact of non-performance is unclear, an amicable negotiation on the contract terms is legally safe and a desirable choice for parties since it allows the concerned party to honour their contracts in a way without facing legal repercussions arising from termination or breach.

Hence, negotiations can be another way to look at the problems posed by COVID-19 post conducting an analysis. Parties through negotiations may have an option to reschedule the delivery date, provide extensions, or recalibrate the parties' interest in the changes that ensue.[222]

4.7 Preparing for covid-19 lawsuits

As risks related to litigation arising from COVID-19 increase, companies need to decide whether they are obliged to perform what is stated in the contracts or whether they have recourse to a defence like force majeure or statutory provisions like Article 79 of the CISG or the common law principles such as the impossibility of performance, the frustration of contract, etc. Although no cure exists to completely avoid lawsuits, practical actions may be taken to reduce the potential risk of litigation.

DOCUMENTING THE RECORDS

Disputes often pit one witness' word against another. By documenting the records one can keep track of all events and agreements the parties have entered into. Since the agreements are acknowledged by both parties it becomes unlikely for one to go back on the decided terms. Therefore, contemporaneous documents are the key in deciding disputes, as they may be sufficient to substantiate or disprove a claim. Companies making decisions that may negatively affect others should document decisions surrounding them.[223]

If a party in the case has to depart from the Standard Operating Procedure (SOP) for COVID-19 management, presenting proof for the same assists the litigating parties in making a stronger claim. Accounting the reasons and conditions in which an act or omission was undertaken becomes sacrosanct as claims against corporations involve making the decision-maker a party to the dispute.

This may put the company in a difficult position as the promoter or CEOs are generally the

[222] Sofia Havulinna, 'Exemptions of Non-Performance in the Times of COVID-19' (2020) Tampere University of Applied Sciences 54, 56.
[223] Anke C. Sessler and Max D. Stein, 'COVID-19: How To Prepare for Potential Future Disputes' (*SKADDEN*, 15 April 2020) <https://www.skadden.com/insights/publications/2020/04/Covid19-how-to-prepare-for-potential-future> accessed 02 September 2021.

persons in charge. Therefore, the legal advice taken or relied on in decision-making may assist in explaining these judgment calls at a later date. They help in establishing that the facilitator acted in good faith and was within the power vested in them.[224]

PREPARING FOR THE LONG-TERM

Being prepared for litigation necessitates examining a dispute through all possible angles. The successful attainment of a favourable award or settlement may not be the end of all issues.

Preparing for litigation entails properly contextualizing the consequences of a lawsuit, allowing for proactive management of any crises, and determining the dangers posed by litigation. This can assist in guaranteeing that the ensuing investigation procedures are more proportionate, targeted, and cause less disturbance. The proactive approach allows one to think more broadly about the case from the outset and ensure that the litigation aligns with the party's business plans.[225] Parties can protect their interest by preparing watertight documents accounting for reasonably foreseeable circumstances by inserting proper clauses.

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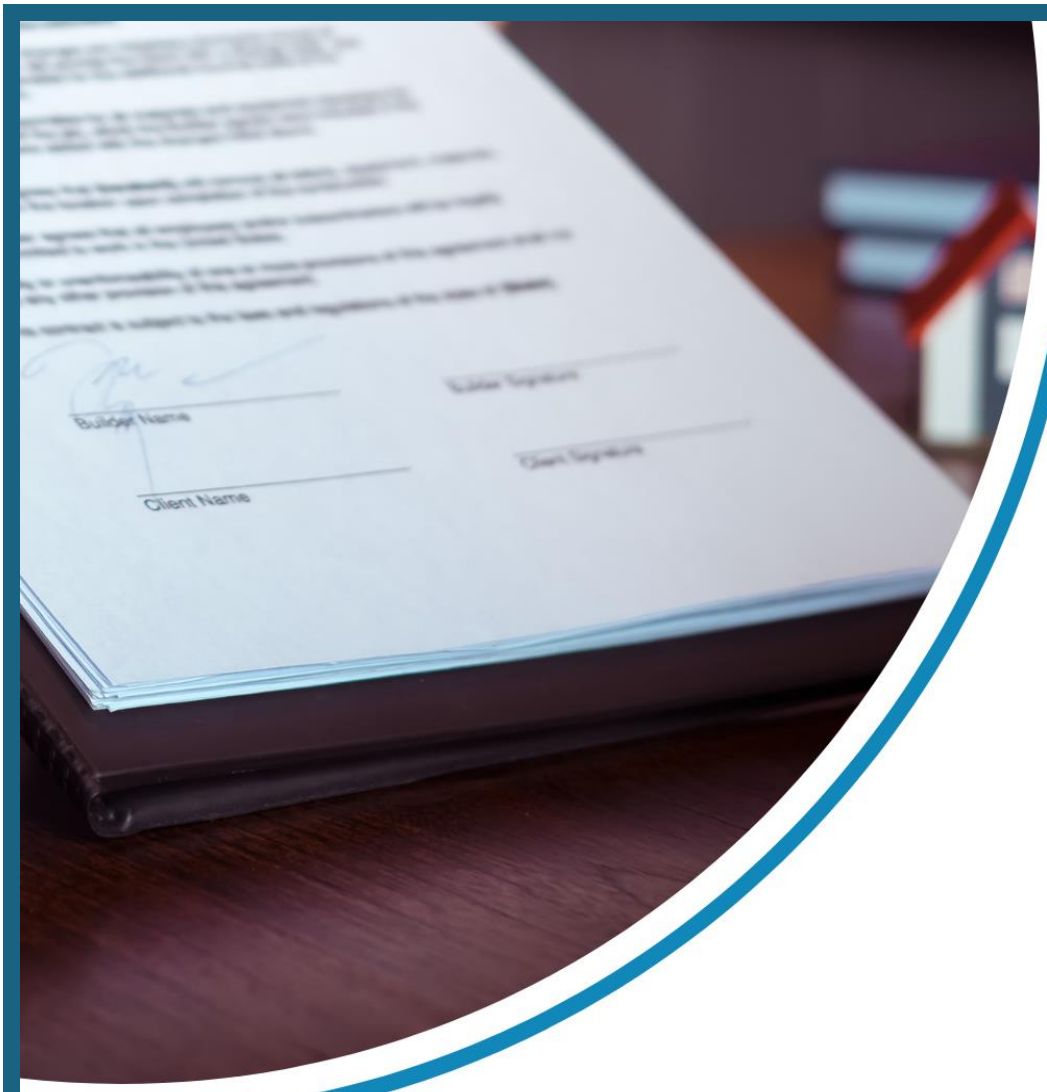
[224] Rebecca A. Brommel and Andrew Brantingham 'Preparing for litigation after COVID-19' (*Mcknights*, 9 November, 2020) <https://www.mcknights.com/author/andrew-brantingham/> accessed 02 September 2021.

[225] Jessica Pyman and Mavis Tan, 'Litigation Readiness: Preparing for dynamic disputes' (*CONTROLRISKS*, 2020) <https://www.controlrisks.com/-/media/corporate/files/campaigns/litigation-readiness-preparing-for-dynamic-disputes/2020-06-08-litigation-readiness-spread.pdf?la=en&hash=1C68403668E631C087E31ABABA77CEE199031F44> accessed 20 August 2021.



FINAL

Conclusion

CENTRE FOR TRANSNATIONAL COMMERCIAL LAW

The last section of this research paper provided ways for dealing with cases or scenarios where the contractual parties are faced with situations like Covid 19. It proffered suggestions with respect to the making of a contract, inserting appropriate clauses, and examining principles for safeguarding a party's interest. The measures suggested in this chapter are non-exhaustive however, they can give a headstart to prepare for lawsuits or claims arising from Covid 19 itself or through other force majeure events.

A legal impediment has the ability to seriously affect a business's functioning and hence, understanding the contractual nuances like determining the applicable law and adapting to what the situation demands are of vital importance. The parties must take utmost care in conducting their legal affairs like research and documentation, right from the outset. In case the parties are facing any form of impediment, they should examine it from an objective standard.

Force majeure clauses have become the need of the hour in tough or unprecedented scenarios. The pros and cons for including a broad as well as a strictly defined force majeure clause has been elucidated before. In sum, it is the parties' discretion to choose wording that suits it the most. Moreover, since party autonomy lies at the heart of contractual dealings,[226] parties have the liberty to adopt clauses that they think would not place them at a disadvantage. In case the parties face a dead end they can explore the path of renegotiating, so long as both parties agree to it.

[226] CISG, Art 6 read with Art 12.

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