



COVID-19 PANDEMIC AS AN EXCUSE OF NON-PERFORMANCE OF CONTRACTUAL OBLIGATIONS FROM TRANSNATIONAL LAW PERSPECTIVE

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ABSTRACT

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Background: The outbreak of COVID-19 has greatly influenced the world's economic situation. Its lethal potential as well as its drastic effects on international contracts, would lead to the post-pandemic litigation and arbitration questioning the applicability of the doctrines of force majeure, frustration, and hardship as an excuse of non-performances of several contractual obligations amidst the COVID-19 pandemic. **Purpose:** This research will discuss on the matter of the applicability of the aforementioned doctrines and its subsequent effects to excuse a non-performing party. **Methods:** This research uses normative juridical method with descriptive analytical approach by researching library materials and secondary data. **Results:** Invoking the force majeure clause requires the event to occur externally beyond the obligor's control; the event and its consequences could not reasonably avoided or overcome by the obligor based on an external event not by their own fault. On the other hand, contracts can be frustrated under several bases, such as changes in the law, supervening illegality, outbreak of war, cancellation of an expected event, and abnormal delay outside what the parties could have reasonably contemplated at the time of contracting. While the requirements of hardship encompass the occurrence of an event for which the obligor has not assumed the risk, non-foreseeability, unavailability and the causing by the event of a fundamental economic disequilibrium in the contract. **Conclusion:** To apply the doctrines of force majeure, frustration, and hardship as an excuse of non-performance of contractual obligations during an unprecedented event such as the COVID-19 outbreak, it must be assessed on a case-by-case basis of the language of the contract in light of the governing law and the circumstances of the parties' commercial relationship.

INTRODUCTION

On January 30, 2020, the Director-General of the World Health Organization (WHO) announced that the outbreak of COVID-19 constitutes a Public Health Emergency of International Concern (PHEIC). The COVID-19 then continues to spread

rapidly around the world and almost every country has reported cases. As the infection has sickened more than 3.2 million people, more than 80 countries have closed their borders to arrivals from countries with infections, instructed their populations to self-quarantine, ordered businesses to close, and closed schools to an estimated 1.5 billion children. Although these measures were taken in order to suppress the transmission of the COVID-19, on the other side it indicates seriousness of the impacts on global economic activity (Hansen, 2020).

The COVID-19 outbreak is negatively influencing the global economic growth on a scale that has not been experienced since at least the global financial crisis of 2008-2009 as shown by the growing list of economic indicators (Jackson et al., 2020). For instance, foreign investors in Asia have pulled an estimated \$26 billion out of developing Asian economies and more than \$16 billion out of India, increasing concerns of a major economic recession (Abiad et al., 2018). On the other hand, in Europe, the first quarter 2020 data shows that the Eurozone economy contracted by 3.8% at an annual rate, the largest quarterly decline since the series started in 1995 (Alesina, Favero, & Giavazzi, 2020).

In light of its major impact on the global economy, there are three doctrines in international contract that which lately often associated with the COVID-19 outbreak, which are *force majeure*, frustration, and hardship. These three doctrines are essentially dealing with the concept of unexpected future events and unforeseen changes in circumstances and its effects particularly towards international contracts (Harmathy, 2016). The outbreak of COVID-19 seems to be a classic example for such an event covered under the aforementioned doctrines. However, it remains a questionable legal issue of whether a *force majeure*, frustration, and hardship events do exist in the COVID-19 circumstances. Based on the previous background explanation, this research is undertaken in order to clarify the the impact of COVID-19 on sales of goods contracts in relation to the doctrines of *force majeure*, hardship, and frustration. This research will discuss on the matter of the applicability of the aforementioned doctrines and its subsequent effects to excuse a non-performing party.

RESEARCH METHODS

The method used in this research is normative juridical with descriptive analytical approach. By implementing such method and approach, this research focuses on legal rules, such as principles, rules, or legal doctrines in order to answer the legal issue by researching library materials and secondary data (Hutchinson & Duncan, 2012). The data are obtained through documentary study by reviewing secondary materials from online database sources which consist of primary, secondary, and tertiary legal materials.

The primary legal materials are the authoritative legal materials that are used in this research which are the United Nations Convention on Contracts for the International Sale of Goods (CISG) and the UNIDROIT Principles of International Commercial Contracts 2016 (Janssen & Chau, 2017). The secondary materials are supporting sources that are essentially analyzed and evaluate the information from primary materials (Glöser, Soulier, & Tercero Espinoza, 2013). These materials include books, journals, papers, and other documents in relation to the COVID-19 pandemic situation and the doctrines of *force majeure*, frustration, and hardship that are obtained through electronic sources. Lastly, the tertiary legal materials used in this research include dictionaries and other supporting documents that complement both primary and secondary legal materials.

By applying the normative legal research method, the present research attempts to describe, analyze, and contextualize certain rules of law applicable towards the issue of

the applicability of the doctrines of *force majeure*, frustration, and hardship during the COVID-19 pandemic (Diantha & SH, 2017).

RESULTS AND DISCUSSION

1. The Concept of *Force majeure*

The *force majeure* doctrine is originally derived from a civil law concept, specifically from the French Code Civil (Ezeldin & Abu Helw, 2018), which sometimes also known as “Act of God” in English translation (Berger & Behn, 2019). This doctrine is commonly included in commercial contracts in a form of a *force majeure* clause, which associates with supervening unforeseen events that would hinder the performance of some obligations under a contract (Ezeldin & Abu Helw, 2018). The situations that can be considered as supervening unforeseen events are include fires, floods, droughts, earthquakes, civil riots, terrorist attacks, etc.

It can then be inferred that such an event must be external, unexpected, and avoidable in order to be qualified as *force majeure* (Azfar, 2012). In sum, the existence of a *force majeure* clause is essentially to excuse a party from performing its contractual obligation based on an unforeseen event occurred beyond its control, whether on a temporary or permanent basis (Thames Valley Power Ltd v Total Gas & Power Ltd).

2. The Concept of Frustration

The concept of frustration was originally recognized in Roman contract law, first gained traction in English Law, and until now it is validated in American Law (Jayabalan, 2020). In Taylor v. Caldwell, the court held that a frustration excuse not only required the destruction of the implied condition, but also the impossibility of performance (). However, the frustration doctrine today has developed into a narrower version of a doctrine that requires the existence of circumstances that could modify or destroy the parties’ “common purpose” within their contract that would create a radically different obligation rendering any performances are nearly impossible (Canary Wharf (BP4) T1 Ltd v European Medicines Agency).

3. The Concept of Hardship

The characteristic of the hardship doctrine is that this requires a possibility the continuance of a specific performance although there exists an excessive impact because of a change of circumstances (Tedim et al., 2018). It can be inferred that hardship relates with a difficult situation where the aggrieved party is still able to perform some contractual obligations, where such a situation is not anticipated at the time the contract was concluded.

4. The Applicability of the Doctrines of *Force majeure*, Frustration, and Hardship amidst the COVID-19 Pandemic as an Excuse of Non-Performance of Contractual Obligations

Under the transnational contract law, the doctrine of *force majeure* can be considered as part of the “New Lex Mercatoria”, or the new law of merchant. The reasons behind this are because most international contracts contain *force majeure* clauses, this doctrine was explicitly recognized as a general principle of law by the Iran-United States Claims Tribunal, and it is also reflected in Art. 79 of the CISG and Art. 7.1.7 of the UPICC 2016.

Based on the developing practice of international contracts and the transnational contract law itself, there are four cumulative requirements in order for the *force majeure* clause to be effective, which are :

- Externality
the event must occur externally where the risk is not assumed by the obligor;
- Unavoidability or Irresistibility
the event must be beyond the obligor's control;
- Unforeseeability
the event and its consequences could not reasonably have been avoided or overcome by the obligor;
- Causation
the obligor's non-performance was based on an external event not by their own fault.

If a non-performing party invoked a *force majeure* excuse that has met the above requirements, their contractual performance could be partially, totally, temporarily, or permanently suspended, whereby termination is only an "ultima ratio" remedy. In the context of COVID-19 outbreak, courts and arbitral tribunals have held that such an event has met the four-pronged test since the situation caused by the effects of or by measures taken to combat the COVID-19 pandemic constitutes a *force majeure* event. As a result, the aggrieved party being under an obligation to continue to perform only insofar as this is reasonable under the circumstances (McMahon, Buyx, & Prainsack, 2020).

On the other hand, in regard to the doctrine of frustration, the court in Metropolitan Water Board v Dick Kerr held that contracts can be frustrated under several bases, such as changes in the law, supervening illegality, outbreak of war, cancellation of an expected event, and abnormal delay outside what the parties could have reasonably contemplated at the time of contracting. In relation to the COVID-19 situations, governmental restrictions may render the performance of certain obligations illegal. This may potentially give rise to a claim of supervening illegality and is therefore suffice as a basis for a contract to be frustrated.

As to the hardship doctrine, Art. 6.2.2 UPICC shall be referred to in determining its requirements. Under said regulation, the requirements of hardship encompass the occurrence of an event for which the obligor has not assumed the risk, non-foreseeability, unavoidability and the causing by the event of a fundamental economic disequilibrium in the contract. The outbreak of COVID-19 has met those criteria, which cause fundamental economic disequilibrium such that placed an excessive burden on the aggrieved party due to a fundamental increase in costs and a diminished value of the performance of the other side. Therefore, Art. 6.2.3 UPICC gives the aggrieved party the right to request for a contract renegotiation.

CONCLUSION

The applicability of the doctrines of *force majeure*, frustration, and hardship require an analysis on a case-by-case basis of the language of the contract in light of the governing law and the circumstances of the parties' commercial relationship. The strict requirements for these doctrines further emphasize the accountability of parties to commercial contracts for their own business affairs as other side of party autonomy.

REFERENCES

- Abiad, Abdul, Baris, Kristina, Bernabe, John Arvin, Bertulfo, Donald Jay, Camingue, Sheila, Feliciano, Paul Neilmer, Mariasingham, Mahinthan, & Mercer-Blackman, Valerie. (2018). The impact of trade conflict on developing Asia. *Asian Development Bank Economics Working Paper Series*, (566).
- Alesina, Alberto, Favero, Carlo, & Giavazzi, Francesco. (2020). *Austerity: When it Works and when it Doesn't*. Princeton University Press.
- Azfar, Fareya. (2012). The Force Majeure 'Excuse.' *Arab Law Quarterly*, 26(2), 249–253.
- Berger, Klaus Peter, & Behn, Daniel. (2019). Force Majeure and Hardship in the Age of Corona: A Historical and Comparative Study. *McGill J. Disp. Resol.*, 6, 76.
- Diantha, I. Made Pasek, & SH, M. S. (2017). *Hukum Pidana Internasional: dalam dinamika pengadilan pidana internasional*. Prenada Media.
- Ezeldin, A. Samer, & Abu Helw, Amr. (2018). Proposed force majeure clause for construction contracts under civil and common laws. *Journal of Legal Affairs and Dispute Resolution in Engineering and Construction*, 10(3), 4518005.
- Glöser, Simon, Soulier, Marcel, & Tercero Espinoza, Luis A. (2013). Dynamic analysis of global copper flows. Global stocks, postconsumer material flows, recycling indicators, and uncertainty evaluation. *Environmental Science & Technology*, 47(12), 6564–6572.
- Hansen, Seng. (2020). Does the COVID-19 outbreak constitute a force majeure event? A pandemic impact on construction contracts. *Journal of the Civil Engineering Forum*, 6(1), 201–214.
- Harmathy, Attila. (2016). *Customary law in Hungary: courts, texts, and the Tripartitum*. Francis: Taylor & Francis.
- Hutchinson, Terry, & Duncan, Nigel. (2012). Defining and describing what we do: Doctrinal legal research. *Deakin L. Rev.*, 17, 83.
- Jackson, James, Weiss, Martin A., Schwarzenberg, Andreas, Nelson, Rebecca, Sutter, Karen, & Sutherland, Michael. (2020). Global Economic Effects of COVID-19, Congressional Research Service, Report No. R46270, Updated, 21.
- Janssen, André, & Chau, Samuel C. K. (2017). The impact of the unidroit principles of international commercial contracts on Chinese contract law: Past, present and future. In *Chinese Contract Law: Civil and Common Law Perspectives* (pp. 447–465). Cambridge University Press.
- Jayabalan, Sheela. (2020). The legality of doctrine of frustration in the realm of Covid-19 pandemic. *Sociological Jurisprudence Journal*, 3(2), 84–90.
- McMahon, Aisling, Buyx, Alena, & Prainsack, Barbara. (2020). Big data governance needs more collective responsibility: the role of harm mitigation in the governance of data use in medicine and beyond. *Medical Law Review*, 28(1), 155–182.
- Tedim, Fantina, Leone, Vittorio, Amraoui, Malik, Bouillon, Christophe, Coughlan, Michael R., Delogu, Giuseppe M., Fernandes, Paulo M., Ferreira, Carmen, McCaffrey, Sarah, & McGee, Tara K. (2018). Defining extreme wildfire events: difficulties, challenges, and impacts. *Fire*, 1(1), 9.



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