COVID-19 – A *Force Majeure* Event? – A Comparative Legal Analysis

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Introduction

On 30 January 2020 the World Health Organization (WHO) declared a public health emergency of international concern[1] in relation to the novel coronavirus SARS-CoV-2 and the outbreak of the coronavirus disease COVID-19, but did not yet classify it as a pandemic. At the same time, most countries around the world have issued warnings and restrictions regarding the travels to and from the most severely affected regions of the world. The steps taken to prevent the virus from spreading led to extensive quarantine measures, closings of production sites, cancellations of conferences, decline in global demand for oil, etc. Strong effects on the stock exchange/financial markets can already be felt and many economies expect a strong recession to ensue. Since the COVID-19 disease has spread throughout the globe and has crippled the economies of various countries, an increasing amount of business finds itself unable to fulfil their respective contractual obligations.

One particular legal concept is quickly becoming the trendy topic of discussion – the *force majeure*. Google has already recorded an all-time high interest in *force majeure* (ignoring for a moment Ruben Östlund's 2014 masterpiece which shares the same name). The primary question is whether such an event leads to the suspension or even termination of the obligation of delivery of goods and other contractual obligations. This article provides an analysis from a comparative legal perspective with practical considerations.

A Comparative Overview

Force majeure or *vis major* denotes a concept that frees the parties from obligations or liability which was originally developed in Roman law, especially in relation to natural phenomena. Even in ancient times, for example in connection with land lease contracts, lawyers dealt with the question of the obligation to pay the land lease despite the loss of harvest or, conversely, the expiry of this obligation, and denied it in the case of a force that could not be resisted[2] ("*vis, cui resisti non potest*"). These phenomena were defined on a case-by-case basis and illustratively included floods, earthquakes and landslides, war events, but also invading flocks of birds, as all-encompassing definitions were almost non-existent at the time.[3]

On the basis of *vis cui resisti non potest* the legal doctrine of continental Europe elaborated the legal concept of *force majeure*. In the course of the codifications of civil law in some legal systems, such as the French Code Civil,[4] legal definitions of the term have also been developed, while other jurisdictions, such as Austria, Germany or Slovenia, have no legal definition of the concept and the definition is based in particular on developments in jurisprudence and case law.

According to the Austrian understanding, "*force majeure is an elementary event that originates from the outside, which could not be prevented even with the most reasonable care, and is so extraordinary that it is not to be regarded as a*

typical operational risk".[5]

A comparative look at Germany, where the judiciary often deals with the concept of *force majeure* in travel law, shows that the Federal Court of Justice understands *force majeure* as an external event, exhibiting no functional connection, that cannot be avoided even with the utmost care that can reasonably be expected.[6] According to the German case-law (albeit regarding travel law), epidemics and pandemics are events of *force majeure*.[7]

The situation is different in common law – termination of contract as a result of impossibility of performance was initially not possible at all according to historical common law[8] and later only in a very narrow scope, essentially assuming the conclusion of the contract in the case of subsequent significant changes, (i) which were completely unpredictable and concerned the *essentialia negotii* of the legal transaction, (ii) for which neither of the contracting parties was at fault and (iii) which made further fulfilment of the contract impossible, or caused the illegality of the original performance or an entirely different performance from the original performance.[9] In such cases, the originally concluded contract was considered to be automatically terminated and none of the contracting parties was entitled to compensation,[10] the contract termination being effective *ex-nunc*.[11]

In the precedent case of *Taylor v. Caldwell*[12] the term "*Act of God*" was used for such unpredictable impossibility of performance where no party was at fault, and in another precedent[13] arising from the same period, this term was equated with "*damnum fatale*" (inevitable damage). However, according to the English case law,[14] the impossibility of performance as a result of an *Act of God* is to be interpreted more restrictively than *force majeure*.

The standard of proof for successfully invoking the frustration of contract concept is thus high in both English and American law.[15] Accordingly, the chances of success for the assertion of this concept without an appropriately precise contractual arrangement are low.

The civil law of the People's Republic of China, which is codified similarly to European legal systems, also knows the legal concept of *force majeure* and defines it as objective circumstances which are unforeseeable, unavoidable and insurmountable.[16] On the other hand, the civil law of Hong Kong, based on English common law, does not contain any statutory provisions.

The United Nations Convention on Contracts for the International Sale of Goods (CISG) contains its own *force majeure* provisions, which are specifically applicable to supply contracts. According to Article 79 of the CISG, the supplier under the international sale of goods contract is not liable for an impediment resulting from *force majeure*. If fulfilment is objectively impossible in the long term as well, the claim for performance ceases to exist.

Practical considerations

From the framework of statutory regulations and contract drafting in an international context the question of how to proceed in practice arises.

First of all, the applicable law must be determined. As an integral element of a contractual relationship, *force majeure* is governed by the law applicable to the contract[17] and is therefore in principle open to a choice of law. In other words, the contract law chosen by the parties or the law applicable to the contract according to the principles of private international law decides whether a *force majeure* circumstance may be exercised. In the absence of an appropriate *force majeure* clause, a codified legal system with correspondingly established doctrine and case-law relating to *force majeure* is advantageous.

Primarily, i.e. before referring to other legal sources, the contractual *force majeure* provisions should be taken into account.[18] Article 19 of the FIDIC Silver Book[19] contains a general definition of the term combined with a non-exhaustive list of example applications which can serve as template when drafting a *force majeure* clause. It is generally advisable to use a combination of (i) a non-exhaustive list of events which according to the parties amount to *force majeure* and (ii) a general clause which covers all similar but not specifically mentioned cases.[20] Such an approach if especially recommended if the contractual relationship is governed by a common law based legal system which usually lack sufficient *force majeure* provisions.

Notification obligations are also common – the party invoking *force majeure* must formally notify the other party about the existence of such an event and its anticipated consequences. By making the *force majeure* declaration, the party relying on it is initially temporarily released from its obligation to perform (suspension of contract). If the *force majeure*

circumstances last longer than the contractually defined period, the suspension of contract transforms into a mutual right of termination. This combination of suspension and termination of the contract is typical for contractual *force majeure* clauses.

However, even with very detailed and technically flawless contractual arrangements, application problems arise at times. While the beginning of a *force majeure* event is usually determined by mutual agreement, disputes can arise over the cessation of such circumstances. Disputes may also arise in relation to notifications of the *force majeure* event which may not be compliant with the contractual provisions. Therefore it is crucial to observe the relevant notification deadlines. Moreover, *force majeure* events are often not sufficiently verified which may give rise to objections from the opposite party. Therefore, compiling precise documentation of the underlying facts is always advised. Ideally, the other side should be persuaded to make a joint and consensual statement which declares the *force majeure* event. Objective and neutral assessment of the facts is also important.

Conclusion

As a result, it should be noted that a classification of the COVID-19 disease as a *force majeure* event will not be too controversial, but the deriving legal consequences will vary depending on the contractual arrangements and the applicable law. Therefore, it seems reasonable to develop an adequate awareness for the formulation of *force majeure* clauses in the international context.

Invoking *force majeure* should be strategically well considered. The costs of lengthy proceedings as well as the immediate consequences must be taken into account – especially in case of long-term (profitable) continuous obligations. As the responses of various governments aimed at containing the COVID-19 disease are quite extensive, comparably extensive measures for mitigating the economic loss are expected. For example, China has already announced a series of emergency policies of tax and fiscal nature for companies and groups operating in China.[21] Therefore, termination due to *force majeure* should only be used as a last resort.

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[1] https://www.who.int/news-room/detail/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-(2019-ncov).
[2] *Ulpian in D. 19,2,15,2 Ulpianos libro 32 ad edictum, quoting Servius Sulpicius Rufus*.
[3] See footnote 2.
[4] Originally Article 1148 CC, since the Code Civil Reform of 2016, article 1218 CC.
[5] Koziol, Haftpflichtrecht II, 2. Auflage, 421; OGH 1 Ob 41/80 SZ 54/64.
[6] E.g among other things BGH 12.3.1987 – VII ZR 37/86.
[7] AG Augsburg, 9 November 2004 – 14 C 4608/03 in view of the SARS virus outbreak, and AG Homburg, 2 September 1992 – 2 C 1451/92-18, concerning an outbreak of cholera.
[8] Paradine v Jane (1647), also known as the *Doctrine of absolute contracts*.
[9] Taylor v. Caldwell (1863), https://uk.practicallaw.thomsonreuters.com/Document /IF3A55290BB5311DCB80092A59D721F81/View/FullText.html?comp=pluk&transitionType=Default& contextData=%28sc.Default%29; Anderson, *Frustration of Contract - A Rejected Doctrine*, 3 DePaul L. Rev. 1 (1953).

[10] See for example precedent, *Appleby v Myers* [1867] LR 2 CP 651, (*loss lies where it falls*).
[11] According to the *Law Reform (Frustrated) Contracts Act 1943*, in such a case, English law provides for the recovery of any consideration already paid, but this is a non-compulsory right and, if the relevant clause in the contract is waived, according to the relevant common law principle, recovery is only possible in the event of complete lack of payment (*Chandler v Webster [1904] 1 K.B. 493*).
[12] See footnote 9.
[13] https://www.casemine.com/judgement/uk/5a8ff8c760d03e7f57ecd345.
[14] *Matsoukis v. Priestman*, https://uk.practicallaw.thomsonreuters.com/Document /IEFDD82E0E42711DA8FC2A0F0355337E9/View/FullText.html?comp=wluk&transitionType=Default& contextData=%28sc.Default%29, see also *Lebeaupin v Richard Crispin* (1920), https://uk.practicallaw.thomsonreuters.com/Document/IDF6AD930E42711DA8FC2A0F0355337E9 /View/FullText.html?comp=wluk&transitionType=Default&contextData=%28sc.Default%29.
[15] *Schwartz*, A "standard clause analysis" of the frustration doctrine and the material change clause, 57 UCLA LAW REVIEW 789 (2010), S. 802-806.
[16] Articles 117, 153, 180 of the Contract Law of The People's Republic of China.
[17] *The law applicable to the contract governs the performance of the obligations arising from the contract. Excuses for Non-performance such as the* ***doctrines of force majeure or hardship*** *are also matters for the proper law under paragraph 1(b) (of Article 12), as well as rights to refuse the performance (right of retention, plea of non-performance).”* (Rome Regulations, Commentary, Second Edition, https://www.uni-potsdam.de /fileadmin01/projects/lsgschulze/Publikationen/Seiten_aus_Callies_RRC_Art_12_Rom_I__Schulze.pdf, paras. 21-23.
[18] *Force majeure* legal provisions are part of non-compulsory law, i.e. contracting parties can deviate from them by appropriate contract drafting.
[19] The standard contract for the construction of a turnkey plant.
[20] Berg, A. in McKendrick, E. et al.: Force Majeure and Frustration of Contract, second edition, Informa Law, Abingdon 2013, p. 59.
[21] https://www.dlapiper.com/en/china/insights/publications/2020/02/china-offers-tax-and-financial-incentives-over-coronavirus/?linkId=83083658.

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