

EFFECTS OF COVID-19 PANDEMIC ON CONTRACTUAL RELATIONS

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ABSTRACT

The COVID-19 is the contemporary element of worryment that has gripped the entire world since its emergence at the end of 2019 and it being declared a pandemic on 11 March 2020. As a means of protection, several countries around the world declared national lockdowns on every business and social activities; no one was allowed in or out of their country. Many businesses took a hit from the lockdown; contractual business or activities were the worst hit by this pandemic. Countries took several measures to help their people who had already be devoured by the economic and financial hardship. To many in the line of work associated with contract saw it prudent to enforce force majeure considering it as the only way of not fulfilling obligations addressed in the contract document on grounds of events that are beyond control (Private civil law). In many instances, the application of such a provision has always faced several obstacles since the interpretation of this clause by the courts is usually narrow. Many applications of force majeure get thrown out due to lack of compelling reason but today, that would be impossible. The research therefore will focus on the outbreak of COVID-19 as unforeseeable events that effected contractual relation thus the need for force majeure.

Keywords: Force Majeure, Contractual Relation Obligation, Coronavirus; COVID-19.

INTRODUCTION

On a daily basis, new active Coronavirus (COVID-19) cases are being reported with the pandemic continuing to wreak havoc and uproot the lives of people (Song et al., 2021). Businesses the world over have not been spared either as they continue to be ravaged by the unforeseen impacts of the Coronavirus pandemic (Schwartz, 2020). Declines in demand as well as disruption of supply chains have occurred as a result of the pandemic and its ensuing response. Different governments across the globe have responded to the pandemic by imposing a raft of measures aimed at arresting the spread of the disease (Kiraz and Üstün, 2020). These measures have included the closure of non-essential businesses, quarantines, air travel restrictions, border closings and dusk to dawn curfews of Private civil law. The world economy has been substantially disrupted by government-imposed restrictions and the pandemic itself. The transport, trade, hospitality and tourism industries have been particularly affected by the economic slump across different sectors of the world economy (Schwartz, 2020).

Under existing contracts, organizations are struggling to meet their obligations owing to the global effects of the pandemic. Swift and immediate action has had to be taken by companies who harbor concerns on how to meet their contractual obligations. Under existing contracts, organizations are struggling to meet their obligations owing to the global effects of the pandemic. Swift and immediate action has had to be taken by companies who harbor concerns on

how to meet their contractual obligations. Force majeure is term that has a lot of use in contractual relations whereby it seeks to govern the events, consequences and relationship of involved parties. As a provision, it serves as a risk distribution between parties in case of an event. Even though it is not vital, many cases force majeure clauses are not usually drafted well thereby constituting in conflicts and disputes. Besides, an epidemic is not included as a force majeure event on some force majeure clauses.

There were limited academic research that focused on discussing the epidemic outbreak as a force majeure based on the obvious reasons. It is probably over a century that world last witnessed such like epidemic that resulted in countries closing down their borders and businesses shutting down. The study aims to explore the possibility of COVID-19 being considered a force majeure event based on the effects it has had on contractual relation. The two study questions the research shall seek to answer are: What are the effects of COVID-19 on contractual relations (Private civil law)? And can these effects constitute to COVID-19 outbreak qualify as a majeure event (Private civil law)?

Integrated literature review was incorporated to achieve the study's objective. The review involved the investigation of various definitions, scopes and clauses that explain the force majeure and what constitutes to its application. The aspects that determine whether COVID-19 Outbreak should be considered a force majeure were then analyzed. Besides proving the pandemic is a force majeure event, it also provided a decision model that can assist in identifying such events.

LITERATURE REVIEW

The Impact of Coronavirus Pandemic on Contractual Agreements

Given that COVID-19 is a new virus, the existing literature presents few information about its impact on contractual obligations. Many contracts never stated whether a case like COVID-19 would be listed as one of the factors that may force parties to terminate their contracts. For instance, a research conducted by Akbulaev et al., (2020), businesses across all industry sectors have been affected by the Coronavirus. The study posits that organizations listed on various Securities Exchange across the world have reported sudden losses of value in billions of dollars in market capitalization which is marked as an indicator of the economic effect of the pandemic on world economy (Akbulaev et al., 2020). Airline companies have also recorded massive losses in billions of dollars following the grounding of flights and air travel shutdown. There has been a significant decline in consumer spending as people restrict their movements to maintain social distance through avoiding recreational facilities, shopping malls, restaurants, and offices. Additionally, people are saving money more due to the unpredictability of the current situation. Moreover, companies' contractual obligations and cash-flow are being placed under additional stress owing to delays in their supply chains (Torsello & Winkler, 2020).

In a study conducted by Ogwu (2020), it was concluded that in an event where contractual obligations are not performed by a party, a breach of contract occurs which inherently favors the counterparty as it gives rise to liabilities according to contract law general rule (Private civil law). Therefore, mitigation against losses and liability in the course of the Coronavirus pandemic should be prioritized by parties affected by the same (Ogwu, 2020). However, the question remained whether COVID-19 which affected many businesses would be

listed as a natural factor like earthquakes or hurricanes. In an economic downturn, contractual obligation non-performance has legal reliefs or defenses. The principle of material adverse change, the doctrine of frustration of contract and the doctrine of force majeure are some of the legal defenses available for a company that has failed to meet its contractual obligations (Clark, 2020).

Contract Frustration, Impossibility and Impracticability

The doctrine of impossibility or impracticability of performance and the common law principles of frustration can be relied upon by an affected party in case a *force majeure* clause does not exist in a contract. The contract has been suspended by the courts based on the reliance of the doctrines in some narrow instances (Jayasekera & Wijerathna, 2020). The doctrines also have an in effect in the transformation of contractual obligations from original ones to radically new ones. Obligations and rights that accrued before the frustrating event are not affected doctrine of frustration (Jayabalan, 2020). Goods and services being rendered illegal due to changes in law (Private civil law), factory shutdowns leading to failure to obtain goods, cargo restrictions leading to failure to get supplies, the unavailability of products, and Coronavirus-induced delays are some of the instances when impossibility of frustration could be sought (Cheng & Perez, 2020; Zaheeruddin, 2020). A contract may be discharged for frustration if the current situation is vitally different from the one that was originally envisaged leading to non-performance of the contract. When contractual performance becomes merely difficult or expensive, the contract cannot be termed as frustrated (Beale & Twigg-Flesner, 2020). Rights and obligations accrued before contract termination are not affected by the automatic termination of a frustrated contract under common law. Nonetheless, legislation in several States in addition to Common law governs the discharge for frustration (Giancaspro, 2017).

Force Majeure

This concept denotes anthropological acts and acts of nature such as hurricanes and drought that can neither be controlled nor anticipated. Simply put, force majeure is a situation whereby a contract's obligations are not met by a party due to the party encountering situations beyond their control and which prevent them from fulfilling the terms of the contract. Force majeure was initially found in the French Civil Code as a civil law concept Private civil law. In 1863, contractual obligations were not met by the owners of Surrey Gardens and Music Hall when a fire torched the entire complex and force majeure found its way into English Common Law (Trenor & Lim, 2020). The English courts were of the opinion that a contractual obligation to which there was an express or implied condition should not hold any individual or entity liable in the event of breach of contract while in those contractual obligations which were definitive, liability should be absolute. When an extraordinary event occurs which can be controlled by a party and which makes the party unable to meet its contractual obligations, the doctrine has been used to alleviate liability or delay performance of obligation by the aggrieved party (Israhadi, 2020). Every contract is unique and employs force majeure differently.

Therefore, a force majeure clause in a contract has to be properly defined for it work. As a rule, a list of events is provided for a force majeure clause (Velez-Calle et al., 2020). Performance being prevented, delayed and hindered will be stipulated by force majeure clauses

in addition to the clauses dictating what makes the cut as a force majeure event (Twigg-Flesner, 2020). It is mandatory for the aggrieved party to inform the other party of its plan to invoke force majeure. Consequently, the aggrieved party should confirm whether the force majeure clause obligates it to give notice to the other party and before suspension of performance, the affected party should check the requirements of the notice. Since a lot of contracts have very particular time-bar and notice related clauses, issuance of notices and set timelines should be adhered to by the affected party if such a requirement exists (Darabpour & Darabpour, 2020; Nwedu & Alo, 2020). However, the courts might be reluctant to expand the meaning of certain words as in the contract thereby making the inclusion of “*act of God*” and “*action by government*” in the clauses not bears any fruits (Smith & Jung, 2020). Nevertheless, the affected party should demonstrate that the consequences of the pandemic have not only created an economic hardship but they have also led to the inability of the party to fulfill its obligations under the contract (Strugała, 2020). Moreover, the inability to fulfill obligations could be caused or exacerbated by the alleged affected party through its omissions or acts and therefore should be careful when trying to use the force majeure clause. The onus of demonstrating the mitigation of effects falls on the party trying to invoke force majeure (Nita, 2020). Hence, new precedents will be set by the novel issues and the courts will have to grapple with the situations as they come. The fact remains that it will be highly contextual to apply force majeure clause (Traison et al., 2020).

METHODOLOGY

The normative juridical research design has been employed in this research paper. The method uses secondary data in the subject of Private civil law, employing tertiary legal materials and as well as primary and secondary legal resources. Regulations relating to legal risk management, contracts, Coronavirus, and force majeure constitute the primary legal resources. Legal experts’ discussions on contracts and seminar materials constitute secondary legal resources. Electronically provided documentations were used in the study since COVID-19-related information in connection to force majeure was limited in books and journal papers. Legal ramifications of including force majeure clause are mapped out by the research design employed by this study. Application of the same problem in different nations of the world is also examined through a comparative method. Data was collected using a two-step interdependent design including two major steps. At first, the author highlighted the basic elements that entails some of the major impacts caused by COVID-19 on contractual relations. It involved describing and assessing the various definitions, scopes, and issues relating to the impact of COVID-19 on contractual relations. Secondly, data was compared in an attempt to determine how the COVID-19 pandemic impacted contractual relations. The first step was an integrative literature that reviewed and critiques various sources that highlights contractual obligations.

RESULTS AND DISCUSSION

Force majeure clauses are construed according to their plain language by a majority of courts in the United States. For example, there are narrow interpretations of force majeure provisions in New York courts. In these courts, performance can only be excused for only the specifically listed force majeure events in the contract (Hennekam & Shymko, 2020). Under US Private civil law, Coronavirus being regarded as a force majeure event would depend on the

steps the party invoking force majeure took to avoid COVID-19 negative consequences, the nature and scope of the effect on a party's ability to meet its contractual obligations and language of the applicable contract (GCR staff, 2020). Construction companies were not to face contractual claims after closing their sites since Coronavirus pandemic was declared a force majeure event by the European Construction Industry Federation (GCR staff, 2020). The Coronavirus has not been explicitly declared a force majeure event in the Netherlands. Nevertheless, it has been argued by legal experts that commercial contracts need a thorough review to reflect the implications of the COVID-19 pandemic. Thus, non-performance by parties cannot be justified by the Coronavirus effect (Figure 1). Affected parties are assisted in taxes and bankruptcy, employment relations and commercial contracts under the Dutch statutory Private civil law. Therefore, a case-by-case basis is the way to handle different situations (GCR staff, 2020).

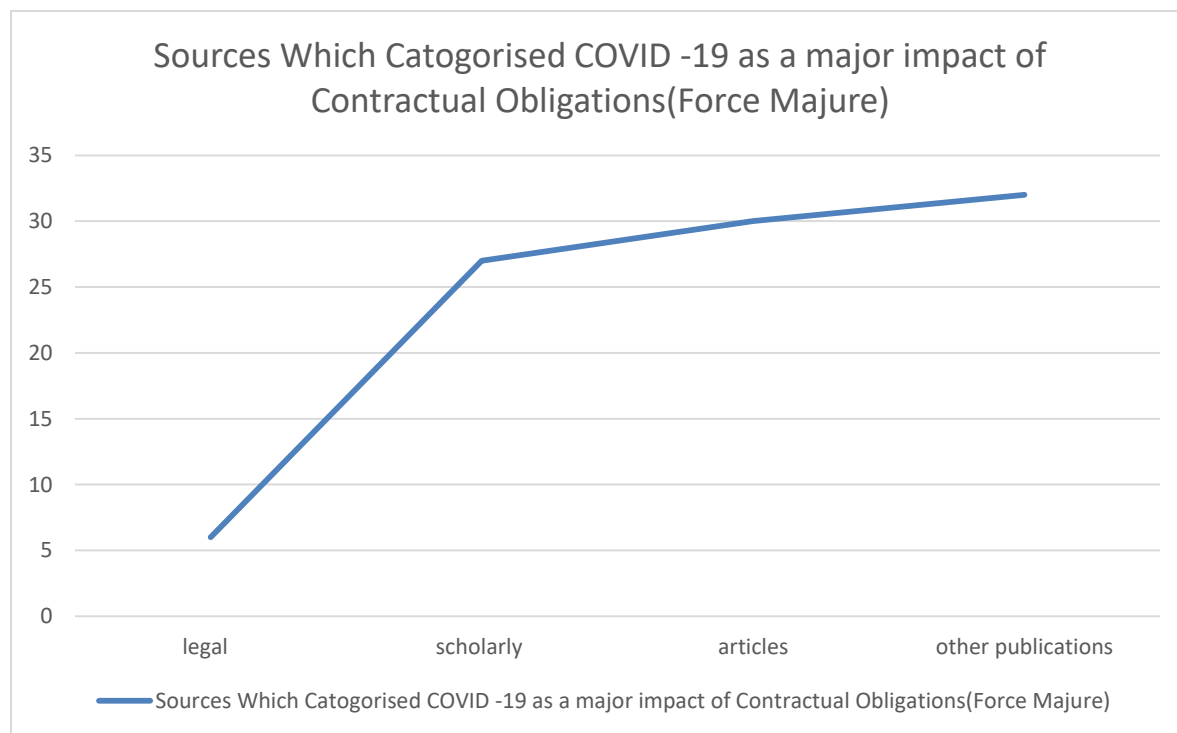


FIGURE 1
SOURCES WHICH CATEGORIZED COVID-19 AS A MAJOR IMPACT OF CONTRACTUAL OBLIGATIONS

Special aspects and general aspects are the two aspects on which implementation of force majeure in contract is based. The commitment of the parties to the contract in relation to COVID-19 should be strengthened by three principles: Principle of consensual. Dictates that the parties that made an agreement can withdraw the agreement through a mutual agreement. Principle of pacta sunt servanda stipulates that the contract made between the parties should be complied with. Principle of freedom of contract. Means that legal contracts are apply law to the parties involved.

According to Khairandy (2003), aspects of the function of limiting and eliminating and contract interpretation should be included in the application of good faith. Hence, the good faith principle should be the basis for the determination of whether the COVID-19 pandemic is a force majeure event. This concept stipulates that according to the involved parties' proportions, rights and obligations are exchanged. The principle of proportionality should be the basis for measurement of the level of error of a party if there is failure in meeting the demands of a contract owing to, for example, Coronavirus. Thus, imposition of compensation to other parties and termination of contracts cannot result directly from small mistakes (Januarita & Sumiyati 2020). This aspect involves concepts and policies that are associated with sectoral factors. Basic matters will be used just like in the general aspects when issues concerning force majeure in relation to COVID-19 are not specifically accommodated or regulated by sectoral principles and regulations. Vice versa, these provisions can be referred to when they are accommodated by sectoral principles and regulations (Table 1). Nevertheless, COVID-19, force majeure, and contracts have not been specifically linked by any regulations in a series of positive relationships during this Coronavirus pandemic period (Douglas, 2020).

Table 1
MECHANISM OF PREVENTION OF THE CORONAVIRUS OUTBREAK

No	Stage	Responsibility	Key Points
1	A task force for COVID-19 prevention is established	Contractor and employer	<ul style="list-style-type: none"> • At least 5 staff • Tasks include monitoring worker's health conditions, education and promotion of COVID-19 prevention, and socialization
2	Potential outbreak of COVID-19 is identified	Contractor and employer	Tasks include identification of highly prone areas and ensuring compatibility of health facilities with government-issued COVID-19 protocols
3	Provision of health facilities	Contractor	Tasks include provision of health facilities, providing nutrients, vitamins, and vaccines to workers to improve their immunity
4	COVID-19 prevention	Employer and contractor	Tasks include provision of flyers for COVID-19 prevention, measurements of body temperature, spraying of disinfectants

DISCUSSION

Force majeure is a concept that denotes anthropological acts and acts of nature such as hurricanes and drought that can neither be controlled nor anticipated. Under Federal laws in the United States, force majeure is accommodated in the following articles:

1. Article 1553: The lease contract is annulled if the leased goods have been destroyed.
2. Article 1472: The purchase is voided if the goods are destroyed at the time of sale.
3. Article 1445: Due to the destruction of an item owed, an agreement is abolished.

4. Article 1245: If because of forced circumstances, no interest, loss or cost must be substituted.
5. Article 1244: If a debtor cannot prove that the matter was not carried out at the right time, then he should be sentenced to compensate interest, losses, and fees.

The study's findings suggest without a doubt that COVID-19 has impacted contractual relation negatively as far as honoring obligation is concerned. Inasmuch as that is the case, the fact that the negative impacts can be seen do not qualify the pandemic as a force majeure event as depicted in the clause that seeks not to bypass any pandemic. The clause locks out the COVID-19 pandemic based on the fact that it could have been controlled and furthermore it is not an act of nature such drought, earthquakes, volcano eruption, and hurricanes among other calamities that happen spontaneously. Based on this fact, the aggrieved party must always prove that the pandemic or the resultant government lockdown and the preventive directives obstructed or delayed them from fulfilling contractual obligation. Furthermore, difficulty to perform, higher cost of performance, that performance would make the contract less profitable are not enough to declare a force majeure.

RECOMMENDATIONS AND FUTURE RESEARCH

With due regard to the five principles discussed above, the opportunities for the parties to renegotiate the contract is not closed by the legal ramifications of including *force majeure* clauses in a contract. Parties in an agreement affected by Coronavirus outbreak are set to benefit from the results of this study. COVID-19 is a global pandemic, and the constraints it has put on businesses around the world are arguably undeniable. Consequently, based on the nature of human beings, the preferable option would be for parties in a contract to forebear one another, keep their contract alive and avoid bring claims against each other. The circumstance that the pandemic has foisted on people are difficult and thus following them to honor their contractual obligation does not seem right in every level. As such, the study recommends that parties should consider varying or renegotiating the terms of their contract. By agreeing to do so, the parties need to comply with every requirement of the contract, such as reducing any variation into writing, and carefully consideration of the long-term effect of any changes proposed. The varying terms of the contract, how they will affect the aspect of contract completion and implications for other contractual obligations owed to other persons should also be considered. Future research should therefore include investigation that relate to the impact of a pandemic to the performance of a contract, the consequences of the pandemic on the implementation of work on project sites. A quantitative research also needs to be done on the pandemic's impact on project overhead costs and cash flow.

CONCLUSION

The COVID-19 pandemic has highlighted the significance of a comprehensive and a well drafted force majeure clause. The presence of force majeure clause is imperative to avoid conflicts and disputes that might be triggered from non-performance due to force majeure events. The effort to reduce further losses due to exceptional circumstances even if all the reasonable precautions and due care to avoid or reduce the impacts are taken is what force majeure clause enforces. This study has investigated the effects that COVID-19 pandemic on contractual

relation and why it is a force majeure event. In addition, it does propose a force majeure decision model that might be of assistance to parties looking to exercise their force majeure provision.

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