COVID-19 and "Force Majeure" of contracts? – Not so Fast

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I have read with interest the various pronouncements by lawyers & others (in various countries) about the principle of 'force majeure' in connection with the COVID-19 pandemic.

It all seems so obvious, doesn't it?

But is it really?

What is 'force majeure'?

'Force majeure is a continental law (Civil Code) concept addressing, in very general terms, some event or circumstance that causes the inability to perform obligations under a contract.

It is distinct from the common law concept of frustration of contract. Sometimes significantly so – in concept and in operation.

The term can mean different things to different people, and in different contexts – so where is it used?

It appears in many international treaties, conventions, and other instruments, such as in Art 7.1.7 UNIDROIT Principles of International Commercial Contracts. These often reflect a compromise or hybrid approach, to accommodate both features of the common law and the Civil Code where there are supposed to interact.

The term often appears in commercial and construction contracts. Care should be given to those provisions that use the term – they can differ dramatically in the precision of the language as well as how closely the term reflects either, both, or neither of the Civil Code concept or the common law concept.

In such contracts, the term might not mean 'force majeure' (as it is used in the context of the Civil Code) at all. It might mean 'frustration; or something else!

If this is the case, then an analysis wrestling with the concept of 'force majeure' in any particular context may not be of any assistance at all. It might be the opposite.

How can the same term have different meanings when it is used in contracts?

One may be forgiven for wondering whether the term 'force majeure' is used in these contracts to give an air of sophistication and 'exotique'. And that the suave terminology gives those provisions a cachet over the more prosaic (barnyard) concept of 'frustration'. However, in vernacular terms, the sophisticated moniker does not change frustration from what it is. '(A) rose by another name smells as sweet'.

The term 'force majeure' often seems to appear in marketing and other publications and non-academic writings by lawyers, particularly, it seems from the United States.

The term seems to be used (both in the United States and elsewhere) in connection with the 'impossibility' of performance of contract. Publications even seem to apply it to the various US commercial and contract codes (even where the term does not appear in the text of the code or instrument itself, or where it is used but in a specific or specifically defined context).

Can it have different meanings and implications – even in the common law world?

The question becomes more interesting when one considers that specific aspects of the common law can differ between jurisdictions.

The common law concept of 'frustration of contract' as received and applied in the United States will not necessarily be the same as the concept of 'frustration' is recognised and applied in other common law countries, such as in England, Ireland, Australia, Singapore,

New Zealand. The concept of 'frustration', as recognised and applied, may not even be the same between the different states of the United States. Generalisation is a risky exercise.

It might be that the application of the term 'force majeure' in one of the United States or as it is used or borne out in a commercial contract may bear critical differences to the way the term is to be understood and applied in a Civil Code jurisdiction, or when used as an analogy to 'frustration of contract' in the United Kingdom or Australia.

What are the risks in too loose a use of the term 'force majeure'?

The term 'force majeure' is often applied to generic provisions in instruments, such as in Article 79 of the UN *Convention for the International Sale of Goods (**CISG**)*, but again, this application also reflects the character of the convention – involving acknowledgement of both common law and Civil Code concepts. It is significant that article 79 does not use either the terms 'force majeure' or 'frustration'.

The issues to which the term 'force majeure' is too easily attached, may very quickly., becomes nuanced, qualified, and difficult (perhaps faster than the spread of a pandemic virus).

This will arise particularly when the term 'force majeure' is used in the context of international transactions, international contracts, or parties (and authors or readers) from different legal traditions.

It means that there is danger in too simple an application of the term 'force majeure' to the COVID-19 pandemic. It also means that too blithe an embrace of the concept as an easy solution to the myriad of commercial problems that have emerged from both the COVID-19 pandemic and the various government responses to it may well contain hidden risks and hidden dangers.

I do not say, however, that 'force majeure' or even the old fashioned 'frustration of contract' does not apply to a party's circumstances as they are affected by COVID-19 and the various legislative and practical effects of the response to the pandemic. I merely say that it might not. Or, rather, it might not be the best analysis to apply to that particular party.

Experience suggests that great care should be taken to these issues, particularly when considering what might be proposed or considered as a simple, quick, and decisive solution that has the advantage of the cache of using an exotic term – such as 'force majeure'.

Why is this important? How can things go wrong?

The proliferation of the commentaries discussing 'force majeure' can tend to encourage an impression that force majeure is the 'go to' answer to the problems posed by the COVID-19 pandemic. This can be concerning where, in many cases, force majeure may not be the applicable or the appropriate concept.

The principles of 'force majeure' or even of 'frustration' may not apply. Or they may not be the appropriate frame of analysis for a particular client or in a particular circumstance.

This is usually managed by a thoughtful, carefully drawn legal advice. However, applying the phenomenon of 'anchoring' (taken from psychology), the first impression, 'go-to' answer, particularly when explored too early, can influence or even bias the framework of the analysis thereafter.

Asserting 'force majeure' or 'frustration' will, in most cases, lead to the consequence of the contract coming to an end.

The termination of a contractual relationship (a generic description of contractual relationships coming to an end) is a tricky affair. A mistake in recognising the availability of a 'right' or an 'opportunity' to terminate a contract can have very serious consequences.

Mistakenly asserting 'frustration' or 'force majeure' of a contract might well amount to a wrongful termination or a repudiation of the contract by the asserting party. That asserting party may end up being exposed to claims of breach of the contract, or may miss out on commercial opportunities that might be available (see *Taylor v Chapman* [2004] NSWCA 456 and the cases leading up to it).

Even if asserting that a contract is affected by a 'force majeure' or a frustration can be justified, that may not be the right course for a party to take. There may be alternatives that do not involve throwing away commercial opportunities.

Asserting that principle in one contract may limit the party's options when dealing with other contracts and other contractors – up or down-stream from the contract first considered.

Just as a high-diver goes to the end of the board, but before jumping, relaxes and takes a deep, centring breath, so too should the commercial party and the advisor when considering whether to assert that the contract has come to an end.

After leaving the board, the diver cannot have a change of mind on the way to the water. The same applies after sending the letter or the email terminating a contract.

To use another, and perhaps more 'impactful' analogy: 'make sure to check and pack the parachute before you leave the aeroplane' because they are difficult to change or to re-pack on the way down. And to that, might be added: 'and before leaving the aircraft, it helps to make sure that it is the right parachute for you.

So in summary …

I do not say that everything that is being said about COVID-19 and 'force majeure' is wrong – or that there is anything wrong in what is being said.

The take-away from this note is simply that the issue is not straight forward, and should be treated with great care with every angle being thoroughly considered before taking the step of calling 'force majeure' on a contract.

So, when everyone around you is getting excited about 'force majeure', the easiest and best advice is for you to say: 'Not so fast …'

And a final thought. In 1920, the American humourist, Henry Mencken, said in an essay: '… *there is always a well-known solution to every human problem—neat, plausible, and wrong….*'

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Philip Bambagiotti has a truly international practice, operating from both Australia and the United Kingdom, and has a profile as an experienced advocate, representative, and advisor at all points in-between.

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Philip has often spoken and presented to various bodies in relation to building & construction matters in Australia and Internationally. Internationally, he has spoken in Hong Kong on: the NEC3 Contract and its use in Hong Kong, Adjudication under the proposed Hong Kong Security of Payments regime, and The Use and Presentation of Evidence in Commercial Disputes including BIM, and the SoCL *Delay & Disruption Protocol* and its use in East Asia, and the convergence of the different schools of substantive law (common law and civil law) in international arbitrations.

He is a registered foreign lawyer with the Singapore International Commercial Court (**SICC**), he is an arbitrator with the Asia International Arbitration Centre (**AIAC**)(formerly KLRCA), and with the Thailand Arbitration Center (**THAC**) and is In the Hong Kong Government's Civil List for external counsel. He is also the Chairman of the NSW Construction & Infrastructure Law Committee of the Law Council of Australia – Business Law Section; as well as a Member of the Commercial Litigation Advisory Committee for the NSW College of Law (Masters of Applied Law (Commercial Litigation) Advisory Committee).

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