

Transport and trade in the age of pandemics

Contactless, seamless and collaborative UN solutions

Implications of the COVID-19 pandemic for commercial contracts covering the transportation of goods in the Asia-Pacific region and beyond



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Chapter 1. Background

1.COVID-19 and its legal implications

Unfortunately, epidemics of infectious diseases occur periodically, i.e., the Indian Plague in 1994, and more recently SARS in 2002, and Ebola in West Africa in 2014, so an epidemic event is not new. However, the scope and the level of disruption brought by the ongoing coronavirus disease pandemic (COVID-19) are unprecedented.

COVID-19 was first reported in Wuhan, China in December of 2019. It spread rapidly first around the Asia region and then around the globe. On January 30, 2020, the Director-General of the World Health Organization (WHO) announced that COVID-19 constitutes a "public health emergency of international concern."¹ On March 11, 2020 the WHO declared COVID-19 to be a pandemic. Several waves of the pandemic have been proclaimed since then. Besides causing the terrible loss of human lives, COVID-19 has affected most sectors of the economy worldwide by disrupting global manufacturing, trade, and supply chains and straining medical systems.

Immediately after the COVID-19 outbreak, most countries in the Asia-Pacific region implemented many restrictive measures to stop the virus's rapid spread. These measures included quarantine, declarations of a state of emergency, stay-at-home orders, lockdown and isolation of infected individuals or those at risk of infection, the closure of factories, retail establishments, ports, borders, and warehouses.

The impact of the various government responses on the transportation industry was unprecedented. Shipping lines and airlines drastically reduced international services, leading to a significant reduction in transport freight capacity, causing supply delays to and from almost all international destinations. The shipping rates in 2021 rose to historic heights due to the shortage of containers and lack of space onboard container ships.² Restrictions on international travel and travel bans led to the reduction of demand for air travel. Airlines grounded most of their fleets, which led to an increase in airfreight costs.³

In 2020, the pandemic and the consequent restrictive measures implemented by governments put a lot of pressure on businesses, making it difficult or even impossible for many companies to uphold their contracts. As a result, companies have started considering

¹"Public health emergency of international concern" is defined in the International Health Regulations (2005) as "an extraordinary event, which is determined to constitute a public health risk to other States through the international spread of disease; and to potentially require a coordinated international response". This definition implies a situation that: is serious, unusual or unexpected; carries implications for public health beyond the affected State's national border; and may require immediate international action. Source available at <https://www.who.int/ihr/procedures/pheic/en/>

²Available at <https://www.njordlaw.com/annual-report-2020-maritime-and-transport-law>

³Available at <https://lot.dhl.com/covid-19-pushes-multimodal-logistics-and-digitalization-for-manufacturers>

defenses that might excuse delays or non-performance. The implications of COVID-19 for the transportation industry across the globe were performance failure, delays in the delivery of goods, the deterioration and spoilage of cargo, and the abandonment of cargo. In addition, transportation businesses faced the threat of damages for breach of contract. Thus, they started exploring legal provisions and contractual clauses that could absolve them from contractual liability: *force majeure*, frustration, and hardship.

The COVID-19 pandemic affected contracts at the domestic (agreements between parties in the same jurisdiction) and the international (agreements between parties from different jurisdictions) levels.⁴ Domestically, jurisdictions have dealt with the situation by applying national law or passing COVID-19 emergency legislation. At the international level, international conventions and transnational law instruments are called for to address the contractual disruptions caused by the COVID-19 pandemic. This matter is covered in more detail below in Chapter 2, part 2, "Force Majeure Treatment under international Conventions and Trade Rules."

2. Government reaction: COVID-19 specific legislation

After multiple restrictive measures that stress-tested many businesses, at the beginning of 2020, governments were called upon to pass legislation to support the economy, save jobs, and alleviate the burden on the private and public sectors caused by the pandemic. Facing this new reality, governments around the globe reacted in a variety of ways. Some passed legislation that aimed to excuse the contractual breaches and relieve the burden looming over the court system. Others passed temporary legislation in an attempt to keep businesses operating. Australia,⁵ India,⁶ Singapore,⁷ and the United Kingdom announced changes to some aspects of existing bankruptcy and insolvency laws by raising the monetary threshold required to petition for insolvency and bankruptcy.

Most governments implemented measures to extend deadlines for filing tax returns, accelerated tax refunds, suspended tax audits, and provided other forms of tax relief measures. KPMG's "COVID-19 Global Tax Developments Summary", updated as of May 16, 2021, can be referred to for a country by country overview of the tax measures implemented by individual governments.⁸

⁴UNODROIT Secretariat Note on "THE UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS AND THE COVID-19 HEALTH CRISIS", Introduction (2) Available at <https://www.unidroit.org/covid-19/586-covid-19/2891-covid-19-secretariat-notes>

⁵Available at <https://www.klgates.com/COVID-19-Australia-Temporary-Changes-to-Insolvency-Laws-to-Support-Businesses-During-Coronavirus-Crisis-03-23-2020>

⁶Available at <https://www.financialexpress.com/industry/ibbi-excludes-lockdown-from-resolution-time-frame/1939728/>

⁷Available at <https://www.clydeco.com/en/insights/2020/07/commencement-of-the-insolvency.-restructuring-and>

⁸The report is available at <https://assets.kpmg/content/dam/kpmg/us/pdf/2020/03/covid-19-tax-developments-summary.pdf>

It is impossible to analyze the whole body of specific legislation related to COVID-19 passed in all jurisdictions; moreover, this goal falls outside the scope of this research. However, below are a few examples of laws passed in the Asia-Pacific region that have alleviated contractual default on the domestic level and are relevant to the transportation industry:

A.China

In China, the Commission of Legal Affairs of the Standing Committee of People's Congress decided on February 10, 2020 that COVID-19 constitutes *force majeure* under China's Contract Law. To protect Chinese companies from failing to perform their contractual obligations, the China Council for the Promotion of International Trade started issuing *force majeure* Certificates (FMC). As of March 25 2020, 6,454 FMCs have been given.⁹ However, these certificates had a limited legal effect, as contracts between China and international parties are often governed by English law, which only allows parties to claim *force majeure* in specific circumstances if provided by the contract.

Counterparties often viewed FMCs not as evidence of a contractual default but as a tool to renegotiate better deals. As commodity prices dropped, Chinese buyers tried to get out of the long-term contracts and buy at spot prices. The media called this "Price Majeure"¹⁰ many years before the coronavirus pandemic. 2020 was not an exception. One of the examples was the liquefied natural gas market. Total was the first global energy supplier to reject the FMC from a liquefied natural gas buyer in China, trying not to accept delivery of the gas and backing out of a long-term contract.¹¹

National legislative and administrative acts declaring COVID-19 as a *force majeure* event cannot establish the *force majeure* event in a particular contractual situation and absolve parties from liability for failure to perform their obligations. Whether a contractual *force majeure* event took place is still to be decided on a case-by-case basis, taking into account the wording of the contract and the circumstances in each particular case. It is only the legal determination of the events as a *force majeure* event, which may absolve a party from its contractual liability.

On June 16, the Supreme People's Court announced that it had issued the "Guiding Opinion on the Proper Handling of Civil Cases Involving the Novel Coronavirus Outbreak in accordance with the Law." It is a judicial policy document, guidance to the lower courts and other related authorities. Articles 11-17 of the Document are explicitly devoted to

⁹ As quoted on <https://www.twobirds.com/en/news/articles/2020/global/hong-kong-and-mainland-china-force-majeure-and-covid-19-and-you#section8>

¹⁰ Available at <https://www.ft.com/content/e6df73b0-f5aa-11e1-bf76-00144feabdc0>

¹¹ Available at <https://www.cnbc.com/2020/03/06/coronavirus-impact-china-invokes-force-majeure-to-protect-businesses.html>

transportation issues. However, the implication of the Guidelines is limited as it applies only to the contracts governed by Chinese law.

B.India

On March 24, 2020, the Ministry of Shipping of India issued an advisory to all the 11 major port trusts for invoking a *force majeure* clause on port activities and port operations.¹² Most of the private ports and terminals operating in the country invoked *force majeure*.¹³ As a result, specific penalties and charges (berth charge and demurrage) were waived by private ports between the end of March and the beginning of April 2020.

C.Singapore

Aimed to restore fairness and establish justice,¹⁴ on April 7, 2020, the Singapore Parliament passed the COVID-19 (Temporary Measures) Bill, which provided temporary relief from some contractual obligations for the parties unable to perform.¹⁵ The Bill was aimed at a broad class of financially distressed individuals and companies setting up new dispute resolution mechanisms.¹⁶ It covered specified contracts, including transport, and applied to the agreements entered into or renewed before March 25, 2020, and obligations to be performed on or after February 1, 2020. The relief was temporary as the commitments had to be performed at the end of the suspension period.

D.United Kingdom

One month later, and in the same spirit of equity versus contractual enforcement, on May 7, 2020, the United Kingdom Cabinet Office made an unusual “legislative intervention” by issuing Guidance on Responsible Contractual Behavior in the Performance and Enforcement of Contracts impacted by COVID-19 emergency.¹⁷ The Guidance was deemed unique as “freedom of contract” and “contractual certainty” have been building blocks of English law.¹⁸ The UK government encouraged parties to act “fairly” and “in the spirit of

¹²Available at <https://pib.gov.in/PressReleasePage.aspx?PRID=1609718>

¹³Available at <https://www.hellenicshippingnews.com/kolkata-port-trust-becomes-first-state-run-port-trust-to-invoke-force-majeure/>.

¹⁴On April 7, 2020, Mr. K. Shanmugam, Singapore's Minister for Law and Minister for Home Affairs, said in an interview with CNBS: "You're looking at economic devastation. Businesses destroyed, people's lives ruined, and in such a situation, you don't talk contract. You talk equity, you talk justice, you talk about what is the right thing to do". The video of the interview is available at <https://www.cnbc.com/video/2020/04/08/singapore-government-to-protect-firms-from-broken-contracts-amid-virus-crisis-says-minister.html>

¹⁵Available at <https://sso.agc.gov.sg/Act/COVID19TMA2020>

¹⁶Available at <https://www.bakermckenzie.com/en/insight/publications/2020/04/singapore-covid19-temporary-measures-act-2020>

¹⁷Available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/899175/Update_-_Covid-19_and_Responsible_Contractual_Behaviour_-_30_June_final_for_web_.pdf

¹⁸Available at <https://www.nortonrosefulbright.com/ja-jp/knowledge/publications/0a264bcc/uk-government-publishes-guidance-on-responsible-contractual-behaviour-applicable>

cooperation” and called for “negotiation or mediation” before disputes “escalate into formal intractable disputes.” The update listed fast-track dispute resolution procedures that have been developed in response to the COVID-19 emergency. The Guidance and the update are non-statutory and therefore have no force of law. The Guide was not very clear on the entities it applied to. There was a split of opinions on whether the Guidance covers the contracts where none of the parties are a UK entity, and the only nexus to the United Kingdom is English law as the governing law of the contract.

Chapter 2. *Force majeure*

The dire economic circumstances made companies revisit their contracts, analyzing provisions that could excuse performance obligations (such as *force majeure*, hardship, or material adverse event clauses). Parties also looked at common law doctrines of impossibility or frustration of purpose. The *force majeure* clause, that before the COVID-19 pandemic was often considered a boilerplate contractual provision, and overlooked by contract parties, suddenly obtained great importance. Some businesses assumed that a *force majeure* clause, if present in a given contract, may be a savior for companies grappling with the effects of the coronavirus outbreak.¹⁹

1. *Force majeure* treatment in Civil and Common law

The term *force majeure* comes from French “*superior force*” associated with cataclysmic events such as natural disasters, wars, diseases, new government regulation, or other situations beyond either party’s control. Other names used to denote the same meaning are “Act of God,” “*vis Majeure*,” or “fortuitous event.”

According to the Black’s Law Dictionary, *force majeure* is “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.”²⁰ Thus, the purpose of the *force majeure* clause is to limit a party’s exposure to damages for non-performance. Also, *force majeure* provisions allow parties to agree on the terms under which the contract can be

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