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Force Majeure and Supervening Impossibility in Contracts

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Force Majeure and Supervening Impossibility in Contracts

Sri Lanka has received little to no reprieve over the past eighteen months. Since October of 2018, the country and its citizens have had to deal with back-to-back incidents of political instability, terrorism and religious violence. Sri Lankan businesses now face the daunting task of overcoming the consequences of a global pandemic in the form of the novel *corona virus* known as "*COVID-19*". With a negative impact on everything from labour to supply chain management, these kinds of *unforeseeable* events are fast becoming too common and too disruptive to ignore or address in *boilerplate* clauses included as an afterthought. The purpose of this article, therefore, is to briefly reconsider the laws surrounding such *force majeure* events, particularly in the context of a public health crisis, in an effort to assist Sri Lankan businesses moving forward.

What are my options?

When faced with an unforeseeable event that disrupts operations in a manner that prevents a business from performing its obligations under a contract, managers must act quickly to evaluate their options and mitigate the fall-out. This article focuses on two possible avenues of redress (or, more aptly, of relief), namely - reliance on a *force majeure* clause or on the doctrine of supervening impossibility. Although both remedies may be triggered by the same event, it is important not to conflate the two and to understand their respective benefits and disadvantages.

In doing so, however, it is essential that clients (and their lawyers) first determine which jurisdiction's law will govern the contract in question - as this will fundamentally alter what remedies are recognized and available to you, as the contractual party. More often than not, contracts entered into by Sri Lankan businesses will be governed by the laws of the Democratic Socialistc Republic of Sri Lanka. In such circumstances, as explained by C. G. Weeramantry in his seminal text entitled "The Law of Contracts" - "*... unless it can be shown that either English law, or statute law, or one of the systems of personal law governs the matter at hand, the law to be applied in matters of contract would be the Roman Dutch Law*" - which represents the general law of contract in Sri Lanka.

Force Majeure Clauses

Force majeure clauses are provisions which, when incorporated into a contract, entitle a party to terminate or temporarily suspend all or part of the contract upon the occurrence of one or more triggering events, commonly referred to as *force majeure* events. Such *force majeure* events are customarily occurrences which are unforeseeable by nature, are beyond the control of the parties and which delay or prevent performance of the underlying contract. The clause therefore excuses a party from performing all or part of its contractual obligations on the basis that one or more designated *force majeure* events can render performance, as otherwise contemplated under the contract, *impracticable* (meaning either impossible or, at the very least, unreasonably expensive or burdensome to carry out).

Accordingly, where the contract in question contains such a clause, it may be triggered in one of three ways. First, the clause may explicitly list a *pandemic* as one of the triggering events. Such clauses also typically contain a catch-all item (for example, "… *due to any other Act of God*", meaning, an event that is beyond the reasonable control of the contractual parties), which may fairly include and cover a pandemic. Finally, certain consequences of the pandemic may themselves constitute a *force majeure* event (for example, an embargo or enforced curfew) and, as such, independently trigger the *force majeure* clause.

The Doctrine of Supervening Impossibility

The general law of contract in Sri Lanka, being Roman Dutch Law, recognizes the *doctrine of supervening impossibility*, whereby, if the performance of a contract subsequently becomes *impossible*, the law shall regard the whole of the contract as having been terminated - unless the parties have expressly agreed otherwise (for example, where performance has been guaranteed *in any event* or come what may).

Note, however, that there are certain conditions that must be satisfied in order for the doctrine to apply. First, the event or circumstances rendering performance impossible must typically constitute a physical or legal restraint rather than merely an economic one. For example, a business

could argue impossibility on the basis of some form of legislative or administrative interference, whereas it would be hard-pressed to argue impossibility merely on the basis that the supervening event has rendered performance inconvenient or more expensive. Second, a contracting party may not invoke and rely upon the *doctrine* to excuse itself from performance where the supervening event being relied upon was, in fact, caused by such party.

Accordingly, where invoked, a court will consider "*the nature of the contract, the relation of the parties, the circumstances of the case, and the nature of the impossibility invoked*" in making a determination on whether or not the underlying contract should be discharged on the basis of a supervening impossibility (*Hersman v Shapiro & Co 1926 TPD 367*).

Benefits and Disadvantages

By inserting a *force majeure* clause into a contract, parties are afforded the freedom and flexibility to determine, structure and specify, amongst other things, what events will trigger the operation of the clause, what procedures should be adhered to in reporting and validating the occurrence of a triggering event and what remedies it will afford the parties (such as termination, the suspension of obligations or the varying of obligations). Conversely, the applicability of the doctrine of supervening impossibility as a defence to an action for breach of contract will be determined entirely by and at the discretion of the court before which it is invoked. It also lacks the flexibility and customization of a *force majeure* clause and, as such, may not be a suitable remedy in the context of certain types of agreements - for example, where termination of the whole agreement is not the objective. The doctrine of supervening impossibility is, however, invocable by operation of law - whereas a *force majeure* clause, as entirely a creature of contract, may, necessarily, only be relied upon where one has already been incorporated into the relevant contract.

Conclusion

Accordingly, where a disruptive event, such as the *Corona* pandemic, has prevented, or will likely prevent you from performing your obligations under an existing agreement, such that your business is now exposed to a potential action for breach of contract, it may be prudent to consider adopting the following course of action:

Review

Review any existing contracts that your business has breached or may breach in order to determine whether, and how, they make provision for *Force Majeure* events.

Comply

Where the contract contains an *FM* clause which covers the event at hand, ensure that you comply with any procedural requirements and other pre-conditions stipulated therein.

Consider

Consider whether or not the relevant circumstances entitle you to rely upon the doctrine of supervening impossibility in order to exempt yourself from performance and discharge the contract.

Prepare

When entering into contracts in the future, be mindful of such *Force Majeure* events. Consider how they could affect your ability to perform and, where appropriate, customize and include a suitable *FM* clause.

Review

Where a contract contains an *FM* clause: (1) establish the law governing such contract to determine what remedies will be available to you; and (2) ascertain whether the supervening event in question is covered by such FM clause, either specifically or under a catch-all item (for e.g. "... or due to any other Act of God").

Comply

This may include a requirement to give notice of the triggering event as soon as reasonably possible or to take reasonable steps to mitigate the damage(s) caused by such event. It is also prudent to collect and preserve evidence of the event and of the negative impact it has had on your business.

Consider

There may also be other remedies available to you based on the law governing the contract in question. For example, where the relevant contract is governed by English Law, you may be entitled to rely upon the *Doctrine of Frustration* in order to avoid liability for non-performance of any future obligations owed under the contract (i.e. those arising after the frustrating event).

Other

Be practical! It is to important consider the commercial implications of any decision you make, including - for example, of immediately resorting to termination under an *FM* clause rather than amicably re-negotiating the contract, where possible. Such decisions can have long term implications, including reputational damage.