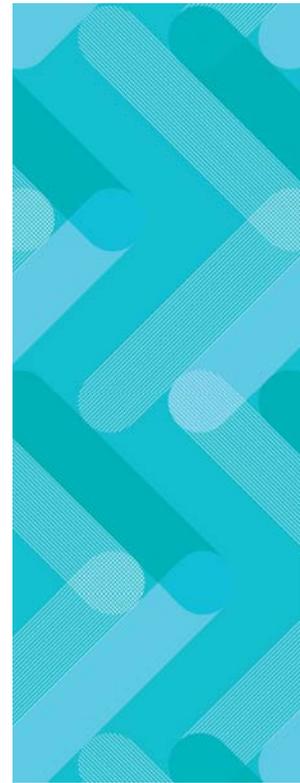


# Webinar: Legal implications when COVID-19 impacts performance of a contract

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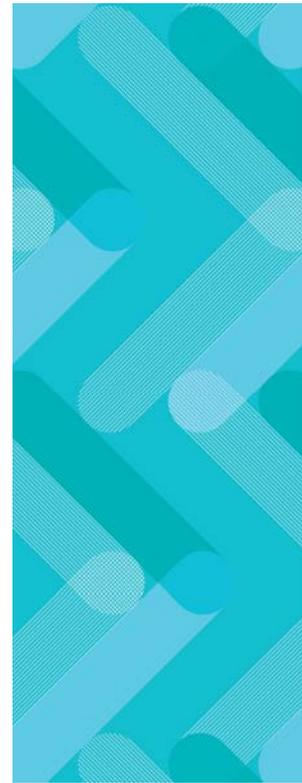
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## Agenda

1. Force Majeure
2. Material Adverse Change
3. Hardship
4. Frustration
5. Takeaways

## Force Majeure



## What is Force Majeure?

### The Basics

- Force majeure means “a superior force”
- What it does depends on **the law of your contract**

### Common Law

- Force majeure is a creature of contract – no legal definition
- Each force majeure clause operates differently. Typically, has 3 components:
  - definition of force majeure events
  - procedural requirements
  - consequences
- Ordinary principles of contractual interpretation apply

## How it normally works

### A force majeure event often:

- is not within the reasonable control of either party (yes)
- unforeseen or unforeseeable (yes, pre-2020)
- more than mere inconvenience or impracticality but requires the event to have caused non-performance (depends...)
- requires notice (depends...)
- obliges mitigation (depends...)

## What is Force Majeure?

### The Effects

- Depends on the clause
- Typically:
  - suspends performance
  - failure to perform not a breach
  - extends time
  - contract term
  - possibly termination
- So, it is a defence, not a claim

## Example 1 – FIDIC 1999 Silver Book

“In this Clause, “Force Majeure” means an exceptional event or circumstance:

- a. which is beyond a Party’s control, (yes)
- b. which such Party could not reasonably have provided against before entering into the Contract, (yes)
- c. which, having arisen, such Party could not reasonably have avoided or overcome, and (depends...)
- d. which is not substantially attributable to the other Party (yes)

Force Majeure may include, but is not limited to, exceptional events or circumstances of the kind listed below, so long as conditions “a” to “d” above are satisfied:

- (i) war, hostilities ...

## Example 1 – FIDIC 1999 Silver Book

- If a Party is or will be prevented from performing any of its obligations under the Contract by Force Majeure, then it shall give notice to the other Party of the event or circumstances constituting the Force Majeure and shall specify the obligations, the performance of which is or will be prevented. The notice shall be given within 14 days after the Party became aware, or should have become aware, of the relevant event or circumstance constituting Force Majeure
- The Party shall, having given notice, be excused performance of such obligations for so long as such Force Majeure prevents it from performing them
- Notwithstanding any other provision of this Clause, Force Majeure shall not apply to obligations of either Party to make payments to the other Party under the Contract
- Each Party shall at all times use all reasonable endeavours to minimise any delay in the performance of the Contract as a result of Force Majeure”

## Example 2 – Crude Oil Supply

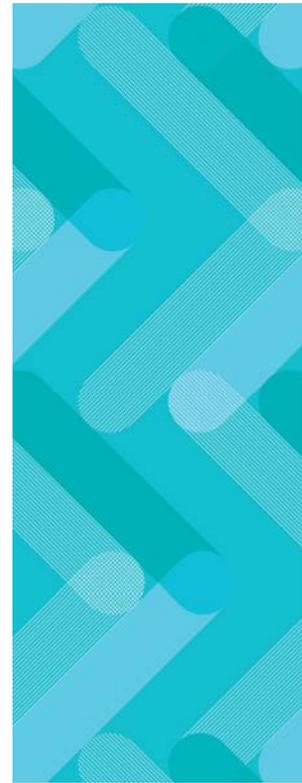
- "Force Majeure" shall mean acts of God, strikes, lockouts, or other industrial disturbances, **epidemics**, landslides, ... which are not anticipated (yes) at the time of execution hereof, which are not within the control of the Party (yes) claiming suspension and which by the exercise of due diligence such Party could not have prevented or is unable to overcome (depends...)

## Force Majeure in Civil Law

### In many jurisdictions force majeure is NOT a creature of contract

- Article 273 of the UAE Civil Code provides as follows:
  - *In contracts binding on both parties, if force majeure supervenes which makes the performance of the contract impossible, the corresponding obligation shall cease, and the contract shall be automatically cancelled*
  - *In the case of partial impossibility, that part of the contract which is impossible shall be extinguished, and the same shall apply to temporary impossibility in continuing contracts, and in those two cases it shall be permissible for the obligee to cancel the contract provided that the obligor is made aware*
- Similar provisions are set out in Article 188 of Qatar Civil Code and Article 172 of Omani Civil Code

## Material Adverse Change



### What is Material Adverse Change?

#### The Basics

- Creation of contract
- ‘Something has changed’ (usually invoked by an investor or lender)

Event occurs  
after contract date

Falls within  
contract definition  
of MAC

Definition may  
be wide / narrow

## How it normally works

### Example

*...any fact, matter, event, circumstance, condition or change which materially and adversely affects, or could reasonably be expected to materially and adversely affect, the business, operations, assets, liabilities or condition of the Company but excluding:*

- (i) Changes in stock markets, commodity prices or other general economic conditions; or*
- (ii) Changes in conditions generally affecting the industries in which the Company operates*

## How it normally works

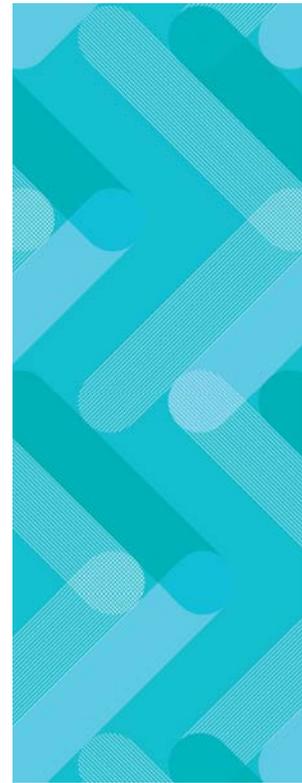
### Operation

- May require notice by the party alleging MAC
- Could include a cure period

### Effect

- Usually a condition precedent to investment/financing
- Ultimately entitles an investor/lender not to invest/lend

## | Hardship



### What is Hardship?

#### The Basics

- Legal remedy available in civil jurisdictions
- 'It's too expensive for us to do it'

## Hardship in Civil Law

*If exceptional circumstances of a public nature which could not have been foreseen occur as a result of which the performance of the contractual obligation, even if not impossible, becomes oppressive for the obligor so as to threaten him with grave loss, it shall be permissible for the judge, in accordance with the circumstances and after weighing up the interests of each party, to reduce the oppressive obligation to a reasonable level if justice so requires, and any agreement to the contrary shall be void. UAE, Article 249 of the Civil Code*

- Where circumstances do not render performance of a contract impossible, a court may still adjust the terms of the contract
- This discretion arises where there have been exceptional and unforeseeable events of a public nature

## Frustration



# What is Frustration?

## The Basics

- Common law remedy
- 'It's impossible for us to perform'
- Brings the contract to an end (automatically discharged)



## How it normally works

### Available where

- Impossible to perform (time is of the essence/cancellation of an event)
- Illegal to perform
- Radically different

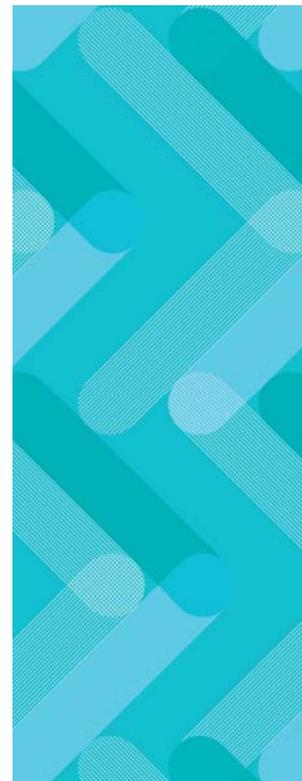
### Not available where

- Parties expressly provide for the event (e.g. force majeure)
- The event was foreseeable
- Performance is still possible (albeit difficult/expensive)

## Consequences

- Contract ends automatically
- Parties are discharged from future obligations
- Money paid/expenses *may* be recovered
- Repudiation risk

## Takeaways



## Takeaways

1. Different laws approach these events very differently
2. Key law is likely to be the law of your contract
3. If you might have a contractual remedy
  - Give the notice
  - On time
  - In the right way
4. Keep records – you will need to prove that you were prevented from working and that you tried to mitigate
5. Rights might be triggered by other things than the virus e.g. oil price
6. There could be rights outside the contract
7. Keep safe

## Thank you



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