The invocation of force majeure in international commercial contracts during the COVID-19 pandemic

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ABSTRACT

The emergence of the coronavirus at the end of 2019 has altered the way we live. As at 17 October 2021 the total number of COVID-19 infections and deaths worldwide stood at 241 318 300 and 4 912 575 respectively. The pandemic has spread to most countries worldwide, subsequently resulting in various countries implementing lockdowns and restrictions to curb the spread of the virus. This led to parties being unable to perform their contractual obligations. Under normal circumstances, in the event of a party failing to perform their contractual obligations, the "innocent party" would be able to rely on remedies, such as specific performance and/or damages. However, when the non-performance is caused by an event such as a pandemic, the party in breach could, under certain circumstances, invoke a special clause called *force majeure* to relieve it of its obligations.

This study establishes the circumstances under which a party to an international commercial contract is able to invoke *force majeure* when claiming impossibility of performance as a result of the COVID-19 pandemic. The importance of this study is evident to the current COVID-19 pandemic but also to possible future pandemics, epidemics, disasters and qualifiable *force majeure* events. In achieving the aforementioned, this study consists of a three folded study, which includes scrutinising the South African law of contract, the international law of contract as well as the legal principle of *force majeure*. The research method used is a literature study. Various primary and secondary sources are used, which includes legislation, case law, textbooks, journal articles and electronic sources.

For a party to rely on *force majeure* the starting point is to determine whether the contract includes such a clause, and thereafter interpret the clause and apply it to the factual circumstances of the case. As is evident from this study, a contractual party will be able to invoke *force majeure* when claiming impossibility of performance as a result of the COVID-19 pandemic. They must however prove that the contract includes a *force majeure* clause, that COVID-19 was unforeseeable and unavoidable, that COVID-19 was not the fault of any of the parties and that the

non-performance was not the fault of any of the parties. Furthermore, this study provides a recommendation for the drafting of *force majeure* clauses, which aims to assist parties in the event of future pandemics and/or when unforeseeable events hinder contractual performance impossible.

Keywords

Coronavirus

COVID-19

Force majeure

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LIST OF ABBREVIATIONS

CIF	Cost, insurance, and freight
CISG	Convention on Contracts for the International Sale of Goods
HIV	Human immunodeficiency virus
ICC	International Chamber of Commerce
SARS	Severe acute respiratory syndrome
ULFC	Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods
ULIS	Convention relating to a Uniform Law on the International Sale of Goods
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
USA	United States of America
WHO	World Health Organisation

Chapter 1: Introduction

Since the coronavirus (COVID-19) outbreak in 2019, more than four million people have lost their lives worldwide because of the virus. As at 17 October 2021 the total number of infections and deaths worldwide stood at 241 318 300 and 4 912 575 respectively.[1] This disease continues to threaten the lives and livelihood of people everywhere. In addition, the disease is negatively affecting the global economy. For example, businesses have stopped trading, imports and exports have halted, people are losing their jobs, economies are suffering, tourism has come to a standstill, and businesses are not functioning normally.[2] Furthermore, global stock markets have suffered since the outspread of COVID-19, and on 16 March 2020, the Dow Jones recorded its biggest point loss ever recorded in a day, which consisted of a fall of 2997 points.[3] In a nutshell, COVID-19 represents an unprecedented disruption to the global economy and international trade, as production and consumption are scaled back across the globe due to rapid transmission of the virus, which is causing havoc worldwide.

A starting point for the virus was 30 December 2019, when China reported the first coronavirus case to the World Health Organisation (WHO). A month later, the WHO declared the coronavirus as a Public Health Emergency of International Concern.[4] In response to the outburst of COVID-19, South Africa declared a national state of disaster on 15 March 2020 in terms of the *Disaster Management Act* 57 of 2002 (hereinafter the *Disaster Management Act*).[5] As part of South Africa's response, the government implemented a national lockdown on 26 March 2020 in an attempt to

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1 Worldometer 2021 https://www.worldometers.info/coronavirus/.

2 De Bruin *et al* 2020 https://www.pwc.co.za/en/publications/impact-of-trade-disrupting-covid-19-on-sa-business.html.

3 Duffin 2020 https://www.statista.com/topics/6139/covid-19-impact-on-the-global-economy/.

4 WHO 2020 https://www.who.int/emergencies/diseases/novel-coronavirus-2019/events-as-they-happen.

5 Section 27(1) of the *Disaster Management Act* 57 of 2002.

curb the spread of the virus and prepare health care institutions for the eventual spike in COVID-19 cases.[6]

The lockdown entailed that individuals were not allowed to leave their homes, except under strict conditions, which included medical care requirements, food shopping, and the collection of social grants.[7] People were obligated to work from home, except health care workers, "essential workers" and "emergency personnel", such as the police, military, and army.[8] Therefore, various businesses and individuals were unable to function and ultimately could not perform their contractual obligations.

On 23 April 2020, the President announced a phased reopening of the economy from 1 May 2020, as a result of the rate of the decreasing rate of infections. This reopening was going to be facilitated through five alert levels, each allowing specific sectors to reopen. The phased reopening of the economy allowed restrictions to be eased or reintroduced based on the spread and impact of COVID-19. Each level had its specific restrictions, with level five having the most restrictions and level one having the least restrictions. The consequence of the phased reopening of the economy is that certain businesses faced the challenge of being unable to perform their contractual duties due to regulations that restricted or prohibited them from operating. Some businesses could only resume their duties once a certain level was reached.

Eighteen months of life with COVID-19 and South Africa, as well as most other countries around the world, have been hit by a second and third wave of the pandemic, with a possible fourth wave in the foreseeable future. As the impact of COVID-19 continues, the disruption in international trade has suffered and

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6 Africanews 2020 https://www.africanews.com/2020/03/26/south-africa-lockdown-starts-as-coro navirus-tally-nears-1000//.

7 Ramaphosa 2020 https://www.sanews.gov.za/south-africa/president-ramaphosa-announces-nationwide-lockdown.

8 Ramaphosa 2020 https://www.sanews.gov.za/south-africa/president-ramaphosa-announces-nationwide-lockdown.

continues to suffer, causing businesses and individuals to be unable to perform their contractual obligations.

Taking the above into consideration, it is clear that business entities and individuals have suffered a great deal and were not able to perform their contractual obligations due to COVID-19 and all its consequential restrictions and prohibitions.

Under normal circumstances, in the event of businesses and individuals failing to perform their contractual obligations, the innocent party would be able to rely on remedies, such as specific performance and/or damages. However, when the breach of contract is caused by an event such as a pandemic, the party in breach could, under certain circumstances, invoke a special clause called *force majeure* to relieve it of its obligations.[9] "*Force majeure*" (a French term meaning "superior force"), which in general refers to an unforeseeable event or circumstance which is beyond the control of a party, such as a war, strike, riot, crime, plague, or an event described by the legal term as an act of God (hurricane, flood, earthquake, volcanic eruption), which renders the performance of that party's obligations under a contract wholly or partially impossible.[10] This term is often used interchangeably with terms such as "*vis major*" or "*casus fortuitus*".[11] The French term, *"force majeure*" is commonly used in an international commercial contract, whereas "*vis major*" is used in South African contracts due to its common law origins.

If a contract does not contain a *force majeure* clause, or if the clause is drafted without capturing the impact of the COVID-19 pandemic, the parties can rely on relief provided by the common law. In instances where the South African common law applies, the supervening impossibility of performance may be claimed as a result of a "*force majeure*" event. As a general rule, if the performance becomes impossible after the conclusion of the contract, without the party causing the

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9 Hutchison, Pretorius and Du Plessis *The Law of Contract* 410.

10 Hutchison, Pretorius and Du Plessis *The Law of Contract* 410-411.

11 Although *force majeure* is used interchangeably with terms such as "*vis major*" or "*casus fortuitus*" depending on the legal background of a region, it is internationally recognised as *force majeure* and this study will refer to *force majeure* for ease of refence.

unavoidable and unforeseen event, the contractual obligation would be extinguished in terms of the principle of supervening impossibility of performance.

According to Le Roux "a party can be excused from its contractual obligations under the contract as long as the *force majeure* event continues, there is usually an obligation to use all reasonable efforts to alleviate and mitigate the cause and effect of the *force majeure* event and resume performance of its contractual obligations once it is able to do so".[12] Furthermore, Le Roux confirms that "the general effect of *force majeure* is to absolve parties of their obligations. This means that a party which validly fails to perform as a result of *force majeure* cannot be sued for any damages suffered by the other party because of the non-performance of the other".[13]

There may be straight forward cases with a relatively easy outcome. For example, if the contract specifies *force majeure* events such as "pandemic", "disease", "natural disaster" or even "government acts" (in the case of a lockdown), and should the contracting party not oppose to the invocation of the said clause, then the parties would be able to rely on *force majeure* when seeking relief. However, some cases will most definitely differ and cause confusion. For example, the wording of the contract can fail to define a *force majeure* event, thus ultimately leading to the question of whether the specific event can qualify as a *force majeure* event or not.

The research question of this study is to establish the circumstances under which a party to an international commercial contract can be able to invoke *force majeure* when claiming impossibility of performance as a result of the COVID-19 pandemic. The aim of this study is to establish whether COVID-19 can indeed qualify as *force majeure*, and the limits of *force majeure*, which includes, when *force majeure* can be relied on and what the outcome of triggering such a clause entail. To achieve

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12 Le Roux 2020 https://www.lexisnexis.co.za/news-and-insights/covid-19-resource-centre/practice-areas/contract-law/force-majeure-an-analysis-of-what-force-majeure-is.

13 Le Roux 2020 https://www.lexisnexis.co.za/news-and-insights/covid-19-resource-centre/practice-areas/contract-law/force-majeure-an-analysis-of-what-force-majeure-is.

the aforementioned, the objectives of this study are divided into three parts. Firstly, this study scrutinises the South African law of contract, which essentially aims to provide the reader with background into the law of contract. Furthermore, the South African law of contract is relevant as parties to international commercial contracts are free to choose that a specific law ought to govern their contract, such as the South African law. If contractual parties fail to choose (alternatively agree on) a governing law, the international law of contract becomes applicable. This leads to the second part of the study, the international law of contract, which consists of a study of the international laws and instruments to essentially determine the international *force majeure* position. Thirdly, a comprehensive study into the legal principle of *force majeure* follows, which essentially enables the contractual party to answer under which circumstances he/she/it will be able to invoke *force majeure* when claiming impossibility of performance during the COVID-19 pandemic.

Chapter two on the South African law of contract provides background for the reader into the introductory principles of the law of contract. This chapter deals with the requirements for a contract to be regarded as lawful and legally binding, how a contract is drafted (the drafting of a contract together with the inclusion and exclusion of certain clauses), what a breach of contract together with its consequences entails and the remedies available to contracting parties when a breach occurs. The aforementioned provides insight into the law of contract to enable this study to proceed to investigate the international law of contract.

As stated above, when business entities/parties from different countries enter into a contract, their contractual relationship is governed by international contract law, unless they agree to abide by the laws of one of the countries involved.[14] Therefore, in chapter three, the international law of contract is scrutinised to determine which law should be applied when parties disagree on the law governing their contract, establish which circumstances will qualify as a *force majeure* event, and what the

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[14] Hutchison, Pretorius and Du Plessis *The Law of Contract* 410.

potential implications could be when claiming *force majeure* in international commercial contracts.

The parties to an international contract should clearly understand which law is to be applied to the contract. Failure to do so will lead to the application of the private international law. The private international law or "the conflict of laws", assists individuals and/or entities in determining which law should be applied to the contract and what jurisdiction is applicable to the contract. The United Nations Convention on Contracts for the International Sale of Goods (CISG) is insightful, as it outlines the concept of *force majeure* in article 79.[15] The UNIDROIT principles of International Commercial Contracts (UNIDROIT principles) provides contractual parties with a non-binding "model *force majeure* clause", which essentially provides parties with a practical example of a *force majeure* clause and assists them when drafting their contracts. Further reference is made to the Incoterms, which are rules applied to most international commercial contracts. These rules regulate and governs most international commercial contracts. Therefore, they must be considered when parties conclude international commercial contracts.

Chapter four provides an in-depth analysis of *force majeure*. Reference is made to the origin and development of *force majeure*, by scrutinising previous pandemics, such as the Spanish flu. A thorough study of *force majeure* follows, which includes a comprehensive evaluation of the requirements to successfully trigger a *force majeure* clause and the application of such a clause. Furthermore, the chapter deals with the consequences and challenges in triggering the *force majeure* clause, and the drafting of contracts to include a *force majeure* clause, which includes examples of *force majeure* clauses in contracts.

This study is significant in that it establishes whether COVID-19 can indeed qualify as *force majeure*, and the limits of *force majeure*, which includes, when *force majeure* can be relied on and what the outcome of triggering such a clause entail.

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15 Article 79 of the CISG.

Furthermore, it is not only important and applicable to the COVID-19 pandemic, but also to future pandemics, epidemics and national states of disasters. These unprecedented times provides for new opinions and interpretations, which could ultimately evolve in the precedents of the future. The law of contract is not static, and that new and/or changing circumstances often challenge the existing legal rules and laws. This study establishes if the law of contract as it currently stands, can be applied to the COVID-19 pandemic and essentially provide a fair outcome, or alternatively, whether the law should be developed in order to be resolve new and challenging disputes.

Chapter 2: South African law of contract

2.1 Introduction

As stated above, when individuals/parties from different countries conclude a contract, their contract is governed by international contract law, unless they agree to abide by the laws of one of the countries involved. Therefore, the South African law of contract is not only relevant to contracts concluded between South African individuals/entities, but also to contractual parties to international commercial contracts (in the event of the parties agreeing that the South African law of contract will govern the said contract). Subsequently, the South African law of contract should be scrutinised to establish under which circumstances a party to an international commercial contract can invoke *force majeure* when claiming impossibility of performance as a result of the COVID-19 pandemic.

This chapter provides a brief introduction into the South African law of contract, starting with South Africa's uncodified legal system and how it influences the law of contract in South Africa. A brief overview of South Africa's Roman-Dutch background is explained to fully understand the interpretation of the basic principles of the law of contract.

As a contract ultimately regulates the legal obligation (or alternatively, obligations) between two or more parties, the law of obligations is explained in order to understand that a contract essentially binds obligations. Thereafter, a brief, yet thorough study regarding the procedure of concluding a contract follows, starting with the requirements for a contract to be valid and binding, and the effect of contractual terms and clauses. The *force majeure* clause will be discussed briefly in this chapter, as *force majeure* is dealt with in full detail in chapter 4.

In addition to the above mentioned, the different types of breach of contract are explained, to determine some (if any) contractual remedies that are available at the disposal of the contractual party, as well as how these remedies function. Lastly, a conclusion of the aforementioned findings is provided.

Although this chapter provides an introduction into the law of contract, it is of significant importance to understand these basic principles, as this enables a party to determine whether or not COVID-19 together with its restrictions can qualify as a breach of contract, what remedies or relief are available to the contractual parties, and what procedure to follow in order to determine the aforesaid.

2.2 Background

The South African law of contract can be described as a legal system consisting of a modernised version of the Roman-Dutch law, together with a strong influence of the English law.[16] Judgements by the South African courts suggests that our approach to contracts is fundamentally subjective but still influenced by objective considerations in cases of dissensus.[17] The original Roman-Dutch writers adopted a more subjective approach to the formation of contracts, whereas the English law preferred a more objective approach.[18]

A subjective approach to the law of contract can briefly be explained as an approach with a subjective meeting of minds between the contractual parties.[19] When using this approach, the subjective expectations and anticipations of the contractual parties outweigh the objective language of the contract. The subjective approach can influence courts to give unnecessary focus to sources and data that could be inaccurate and unreliable. On the contrary, the objective approach relies more on the objective language of the contract, not on subjective factors such as the contractual parties' expectations and anticipations.[20]

The law of contract forms part of the private law, particularly, the law of obligations.[21] The concept of the law of obligations is that an obligation entails a

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16 Hutchison, Pretorius and Du Plessis *The Law of Contract* 17.
17 See *Steyn v LSA Motors Ltd* 1994 1 SA 49 (A) as well as the discussion in Hutchison, Pretorius and Du Plessis *The Law of Contract* 17-20.
18 Hutchison, Pretorius and Du Plessis *The Law of Contract* 17.
19 Mirić 2016 *Baltic Journal of Law & Politics* 17.
20 Mirić *2016 Baltic Journal of Law & Politics* 7.
21 Hutchison, Pretorius and Du Plessis *The Law of Contract* 7.

legal bond between two or more parties, which obliges one party to give, do or refrain from doing something to or for the other party or in other cases, parties.[22] Thus, an obligation subsequently consists of a right as well as a corresponding duty (the right from the creditor to demand performance by the debtor and the duty of the debtor to perform the said performance).[23] There is a legal relationship created by an obligation, being a personal legal relationship, which is only binding to the contractual parties. The right created by the obligation is a personal right (*ius in personam*) instead of a real right (*ius in rem*).[24] The contract itself is the instrument which reflects the agreement between the contractual parties. It ought to be the primary evidence relied on by the contractual parties to enforce the rights of the contract.[25]

2.3 Requirements for a valid and binding contract

A contract in South Africa should meet the following requirements for it to be valid and lawfully binding. These requirements include, consensus between the parties, capacity to contract, compliance with the formalities of the certain contract (should the specific contract require any additional formalities), the agreement must be legal, the performance should be possible at the time of concluding the contract, and the agreement should be clear and have determinable content, in order to be enforced at a later stage. Once these requirements for validity has been met, the contract is formed and the parties essentially reach an agreement on all of the contract's material terms.[26]

The requirement of consensus between the contractual parties is a good starting point to determine whether the contract is valid or not. Consensus can take on two forms, namely real consensus and presumed consensus.[27] Real consensus can be

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22 Hutchison, Pretorius and Du Plessis *The Law of Contract* 7.
23 Hutchison, Pretorius and Du Plessis *The Law of Contract* 7.
24 Hutchison, Pretorius and Du Plessis *The Law of Contract* 8.
25 Hutchison, Pretorius and Du Plessis *The Law of Contract* 394.
26 Hutchison, Pretorius and Du Plessis *The Law of Contract* 46.
27 Nagel C*ommercial Law* 61.

described as the consensus reached through the conduct of the parties, whereas presumed consensus is the consensus reached presumably in instances such as tacit terms and ticket cases.[28] To determine whether or not consensus has been reached between the parties, the mechanism of offer and acceptance is used.

An offer can be defined as the following:

> [A] declaration of intention by one party (the offeror) to another (the offeree), indicating the performance that he or she is prepared to make, and the terms on which he or she will make it. An offer is usually addressed to a specific person, but it may also be addressed to a group of people, or even to the general public.[29]

In more simple terms, an offer can be described as a proposal of a contract. The legal effect of an offer is that the offer in itself cannot give rise to binding obligations, this is due to the fact that a contract is a bilateral juristic act that is founded on an agreement, and an offer is a unilateral declaration of will by a person or entity.[30] However, the offer is important, as it places the offeree in a position where it can accept the proposed offer. By this unilateral act of acceptance, the contract is deemed to be concluded. The requirements for a valid offer are the following; firstly, the offer must be firm. This entails that the offer should be made *animo contrahendi*, which means the intention to form or create a binding contract should be present.[31] Secondly, the offer must be complete. For the offer to be complete it must contain all the material terms and conditions of the proposed agreement.[32] Thirdly, the offer must be clear and certain. Thus, the offer cannot be vague, and there should not be any uncertainties regarding the offer.[33] Lastly, in the event of the *Consumer Protection Act* 68 of 2008 being applicable to the specific contract, cognisance should be taken of the provisions of the Act (the offer should meet the additional requirements as set out by the Act). The provisions

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28 Nagel C*ommercial Law* 62-63.
29 Hutchison, Pretorius and Du Plessis *The Law of Contract* 47.
30 Hutchison, Pretorius and Du Plessis *The Law of Contract* 47.
31 *Efroiken v Simon* 1921 CPD 367 – An offer must definite and complete, without the aforementioned the offer will not constitute *animo contrahendi*.
32 *OK Bazaars v Bloch* 1929 WLD 37.
33 Hutchison, Pretorius and Du Plessis *The Law of Contract* 48.

include the fact that the offer should be in plain and understandable language, it must disclose whether the goods are reconditioned or grey-market goods,[34] and it cannot consist of negative option marketing.[35]

The acceptance of the offer can be described as:

> [A] clear and unambiguous declaration of intention by the offeree, unequivocally assenting to all the terms of the proposal embodied in the offer.[36]

The acceptance gives rise to the formation of the contract between the parties, provided that the following four requirements are fulfilled.[37] Firstly, the acceptance must be unqualified, which entails that the offer as a whole ought to be accepted, and not only partial terms of the offer.[38] Secondly, the acceptance must be made by the offeree, thus, the person to whom the offer was made.[39] Thirdly, the acceptance should be a conscious response to the offer made, which is a matter of logic, as a person cannot accept an offer if that person is unaware of the offer.[40] Lastly, the acceptance must be in the prescribed form if requested by the offeror.

The last focal point pertaining to the offer and acceptance is where and when the act of acceptance occurs. This is relevant as the contract is formed once the offer is accepted. There are two general viewpoints as to how acceptance takes place. Firstly, the *inter praesentes* form of acceptance, when the offeror and offeree contract in each other's presence.[41] This form of acceptance is easy to determine as there is no delay in time between the declaration and ascertainment of acceptance, and the relevant place and time are of common knowledge. Secondly, the *inter absentes* form of acceptance, when the offeror and offeree contract at a

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34 Section 25 of the *Consumer Protection Act* 68 of 2008.
35 Section 31 of the *Consumer Protection Act* 68 of 2008.
36 Hutchison, Pretorius and Du Plessis *The Law of Contract* 55.
37 Hutchison, Pretorius and Du Plessis *The Law of Contract* 55.
38 *Boerne v Harris* 1949 1 SA 793 (A), *van Jaarsveld v Ackerman* 1975 2 SA 753 (A) and Hutchison, Pretorius and Du Plessis *The Law of Contract* 55.
39 *Bird v Summerville* 1961 3 SA 194 (A).
40 Hutchison, Pretorius and Du Plessis *The Law of Contract* 56.
41 Hutchison, Pretorius and Du Plessis *The Law of Contract* 56.

distance.[42] The challenge of determining where and when this form of acceptance took place is quite daunting in some instances, as a delay in time could occur between the declaration of acceptance and the offeror's learning that the said offer has been accepted. The exact time and place of accepting holds substantial importance, as these provide answers to questions such as; did the offeree accept the offer in time, when did prescription commence, and in some cases which court has jurisdiction over the matter.[43]

For a party to enforce a contract, the contract must be valid and legally binding. A party cannot rely on contractual relief if the contract is unlawful and fails to meet a valid contract's requirements. Therefore, step one is to ascertain whether or not the contract is valid and binding, and should this be the case, the party needs to scrutinise the contract to determine what the contract states and whether the contract in itself regulates certain positions and provides a general "guideline" for the parties to follow.

2.3.1 Contractual terms and clauses

The terms of a contract set out the nature, duties, and details of the performances required by the contractual parties.[44] Specific details can be found in the terms, such as the manner, time, and place of performance together with any other stipulations which the contractual parties have agreed upon.[45] The terms of a contract can be categorised in three different groups, namely *essentialia, naturalia, and incidentalia*.

Firstly, *essentialia* can be described as "… those terms which are essential for the existence of a particular type of contract".[46] These terms are the specific terms used to identify the particular contract.[47] For example, a sale contract consists of goods

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42 Hutchison, Pretorius and Du Plessis *The Law of Contract* 56.
43 Hutchison, Pretorius and Du Plessis *The Law of Contract* 57.
44 Van Rensburg *et al* LAWSA *Contract Terms volume 9-third edition*.
45 Van Rensburg *et al* LAWSA *Contract Terms volume 9-third edition*.
46 Van Rensburg *et al* LAWSA *Contract Terms volume 9-third edition*.
47 Hutchison, Pretorius and Du Plessis *The Law of Contract* 235.

being sold from one contractual party to the other. Therefore, the goods are delivered in exchange for money. The *essentialia* of such a contract include the terms regulating the delivery/transfer of the goods and the purchase price to be paid.[48]

Secondly, *naturalia* can be described as the set of unexpressed standard terms which automatically applies to a particular contract.[49] These terms are included into a specific contract, as they are traditionally recognised in the South African law.[50] The parties don't have to agree upon such terms, and the same will automatically be applied to the contract.

Lastly, the *incidentalia* of a contract is the specific terms which the contractual parties choose to incorporate into their contract.[51] These terms are not included in the *essentialia* and *naturalia*. They are additional terms to which the contractual parties agree upon to supplement or modify the rights and duties of the parties as well as regulate the contract in certain events. An example of such a clause is *force majeure*.

Certain contractual clauses essentially assist contractual parties by offering relief and providing simplified consequences if the parties fail to deliver and perform in terms of the contract. When parties include such *incidentalia* clauses, it enables them to resolve potential disputes faster. It tends to be more cost effective, as the parties would have already agreed upon certain consequences should a particular event arise.

2.3.1.1 *Force Majeure*

As stated above, contractual parties can include *Force majeure* into their contract (which makes part of the *incidentalia* of the contract). The below merely introduce

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48 Hutchison, Pretorius and Du Plessis *The Law of Contract* 235.
49 Van Rensburg *et al* LAWSA *Contract Terms volume 9-third edition*.
50 Hutchison, Pretorius and Du Plessis *The Law of Contract* 235.
51 Van Rensburg *et al* LAWSA *Contract Terms volume 9-third edition*.

this legal principle as *force majeure* as a whole be discussed in full detail in chapter four of this study. *Force majeure* can be defined as the following:

> … an act of God or man that is unforeseen and unforeseeable and out of the reasonable control of one or both of the parties to a contract, and which makes it objectively impossible for one or both of the parties to perform their obligations under the contract.[52]

Force majeure essentially means "superior force". This legal principle developed over the years as a common contractual clause that essentially frees the contractual parties from their liabilities or contractual obligations when an extraordinary event, which is beyond the control of the parties, occurs. Such events include a "… war, strike, riot, crime, epidemic or an event described by the legal term *act of God*…",[53] that ultimately prevents a party or both parties from fulfilling their contractual obligations.[54]

Essentially, *force majeure* provides relief to contractual parties when an unforeseen event takes place. The common law principle of supervening impossibility can be applied when the contract does not contain a *force majeure* clause. First and foremost, in order to rely on the principle the contract should be valid and the performance of the contractual obligations should be objectively possible.[55] As a general rule, if the performance becomes impossible after the conclusion of the contract, without the party causing the unavoidable and unforeseen event, the contractual obligation would be extinguished (the principle of supervening impossibility of performance).[56] To succeed in using the aforesaid principle, the party unable to perform their contractual obligations should prove two requirements. Firstly, that the performance is objectively impossible, and secondly, the impossibility is unavoidable by a reasonable person.[57]

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52 Harms *Covid-19 and Force Majeure* 1.
53 Harms *Covid-19 and Force Majeure* 1.
54 Harms *Covid-19 and Force Majeure* 1.
55 Hutchison, Pretorius and Du Plessis *The Law of Contract* 71.
56 Hutchison, Pretorius and Du Plessis *The Law of Contract* 381.
57 Hutchison, Pretorius and Du Plessis *The Law of Contract* 381.

The difference between *force majeure* and supervening impossibility is that *force majeure* (depending on the wording of the clause in the contract) does not excuse a party's non-performance, but instead suspends the performance for the duration of the *force majeure* event, or until performance is possible again.[58] Whereas with supervening impossibility, the parties' performance or contractual obligations is extinguished.

The contract in itself together with its clauses must be interpreted and scrutinised to determine the legal outcomes and consequences deprived from the contract. Specific contracts automatically include certain provisions, while parties have the freedom to include additional terms to regulate possible outcomes, such as the non-performance of contractual obligations by a party.

2.3.2 Breach of contract

The law of contract ultimately creates an obligation on the contractual parties to perform their contractual obligations. Due to events and circumstances, contractual parties cannot always perform their contractual obligations, and once they fail to perform in terms of the contract they are in breach of the contract. There are quite a few recognised contractual breaches, and it is important to understand the different forms of contractual breaches and distinguish them from one another. The correct breach of contract should be applied to each case, to provide the contractual party with the applicable remedy in each specific case. The recognised types of breach of contract are the following: positive malperformance, *mora creditoris*, *mora debitoris*, repudiation, and prevention of performance. Each of the aforementioned breaches are discussed briefly below, in order to determine and establish what remedy is at the affected party's disposal when such a breach occurs.

Positive malperformance occurs when the debtor performs, "… in a defective or incomplete manner".[59] Positive malperformance can take either of two forms, being

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58 Le Roux 2020 https://www.lexisnexis.co.za/news-and-insights/covid-19-resource-centre/practice-areas/contract-law/force-majeure-an-analysis-of-what-force-majeure-is.

59 Hutchison, Pretorius and Du Plessis *The Law of Contract* 292.

positive malperformance, when the debtor performs but to an incomplete or defective degree, or an *obligatio non faciendi* positive malperformance, when the debtor acts in a manner that he or she refrains from doing.[60]

Mora creditoris is when the creditor "… culpably fails to cooperate timeously with the debtor so that the latter may perform his or her obligations".[61] The role of a creditor in terms of contractual obligations can be explained as a passive role, namely "… to receive rather than to make the performance that is due in terms of the obligation".[62] However, in many cases the creditor has to provide positive cooperation to enable the debtor to perform his/her/its contractual obligations.

Mora debitoris occurs when the debtor "… culpably fails to make timeous performance of his or her obligations".[63] The debtor ultimately fails to perform their contractual obligations within the prescribed period, without a lawful excuse.

Repudiation is when either one of the contractual parties indicates "… an unequivocal intention not to honour the agreement".[64] Furthermore, repudiation is committed when the contractual party by way of words or conduct, and without any lawful excuse, manifests an "… unequivocal intention no longer to be bound by the contract or by any obligation forming part of the contract".[65]

Prevention of performance is when either one of the contractual parties "... renders performance of the contract impossible".[66] This breach is applicable when performance for either one of the contractual parties becomes impossible after the conclusion of the contract because of the fault of either party, or alternatively if

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60 Hutchison, Pretorius and Du Plessis *The Law of Contract* 292.
61 Hutchison, Pretorius and Du Plessis *The Law of Contract* 287.
62 *Ranch International Pipelines (Transvaal) (Pty) Ltd v LMG Construction (City) (Pty) Ltd* 1984 3 SA 861 (W).
63 Hutchison, Pretorius and Du Plessis *The Law of Contract* 278.
64 Hutchison, Pretorius and Du Plessis *The Law of Contract* 295.
65 *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd* 2001 2 SA 284 (SCA).
66 Hutchison, Pretorius and Du Plessis *The Law of Contract* 301.

performance became impossible through an act of nature or an independent third person.[67]

When parties fail to perform their contractual obligations, the non-performance must be categorised into a certain breach, as this enables the opposing party to proceed and seek the applicable relief. Considering the above mentioned and applying it to the COVID-19 pandemic,[68] it is apparent that non-performance due to the COVID-19 pandemic can qualify as "prevention of performance" breach of contract, should the performance become impossible after the conclusion of the contract. As non-performance due to COVID-19 related restrictions can qualify as a breach of contract, the next step is to determine what options are available to remedy the breach.

2.3.3 Contractual remedies

Although a contract ultimately aims for contractual parties to fulfil their contractual performances and consequently comply with the obligations and expectations of the contractual terms, this is not always the case due to the breach of contracts. As determined in paragraph 2.3.2 above, non-performance due to the COVID-19 pandemic can qualify as a breach of contract. This leads to the innocent party seeking relief through contractual remedies.

The available relief to contractual parties is as follows: Firstly, the contract provides a regulatory framework on how to deal with certain predicaments. The specific clauses and terms provide further security and regulate the legal outcomes of certain events. For instance, if a contract includes a *force majeure* clause, and the non-performance is due to an unforeseen event, then such a clause will be triggered, and the same would regulate the position. Secondly, in the absence of such a clause, the common law would be applied (supervening impossibility of

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67 Van Rensburg *et al* LAWSA *breach of contract: prevention of performance volume 9-third edition*.

68 The application of COVID-19 as a *force majeure* event will be discussed in full detail in chapter 4 below.

performance), and should the requirements be met, the common law will regulate the outcome of the non-performance. Thirdly, the innocent party can refer to the law of contract together with its different types of remedies available after a breach has taken place. These remedies are discussed briefly below.

There are a few standard remedies at the innocent party's disposal, such as the claim for performance, which ultimately aims at the fulfilment of the contract, and cancellation, which has a contradicting aim, namely to undo the whole transaction. Where the contractual breach is serious or intricate, the innocent party is faced with a choice to either cancel the contract or proceed with it. The choice will be final and binding (unless the opposing party agrees that it may be reversed in the foreseeable future). In order to regulate the consequences of a potential breach of contract, contractual parties often insert specific clauses into the contract, such as a cancellation clause, penalty clause, an acceleration clause, an interest clause, and a restitution clause. In accordance with the principle of party autonomy, these additional provisions and clauses generally take precedence over the common-law rules which normally regulate the consequences of breach of contract.

As mentioned above, a remedy can be categorised as either fulfilling contractual performance or rescinding the contract. Even though the contract is upheld or rescinded, the innocent party always have the right to claim damages or compensation in respect of any foreseeable loss or damage that was suffered as a result of the breach of contract. Performance of the contract can either be effected in *forma specifica*, which means that the performance should proceed precisely as was agreed upon at the conclusion of the contract, or by damages in lieu of performance, which means that an additional payment of a sum of money should be made (this will essentially serve as a substitution for the failure to perform).

When an innocent party rescinds the contract, they can no longer enforce the contract or perform their contractual obligations. There can either be primary or secondary losses suffered by the innocent party. A primary loss is the value of the performance that the innocent party was promised by the party in breach, less the

value of the performance the innocent party actually received or has been excused from rendering (on account of the rescission of the contract). On the other hand, a secondary loss "… is the loss suffered over and above the value of performance not received …, an example of a secondary loss is interest or profit that the innocent party would have earned if the breach did not occur. Damages for secondary loss is referred to as "additional damages".

In the normal course of events, when a party breaches its contract, it is liable for damages and the innocent party is entitled to enforce further remedies. However, the remedies discussed above are not the only relief and "security" available to the contractual parties. As stated above, parties can include contractual terms and clauses into their contract, which regulate certain positions (such as *force majeure*). This provides a justifiable relief to the non-performing party, and where the latter would have been liable for damages, it will not be should *force majeure* be successfully triggered.

2.4 Conclusion

Should a party fail to perform their contractual obligations, the innocent party must determine the following before taking further steps. Firstly, whether or not the contract is lawful and valid. This includes, amongst others, whether:

1. there was consensus between the parties or not;
2. the parties have the necessary legal capacity to enter such an agreement or not;
3. any additional formalities were complied with or not;
4. the contract is lawful or not;
5. there is a possibility to perform the obligations or not; and
6. the agreement has definitive or determinable content to enforce the obligations or not.

Also, there should be a clear offer and acceptance, and when such acceptance occurs it is important, as this will give rise to the formation of the contract. After

determining that the contract is lawful, valid and legally binding, the second step is to scrutinise the contents of the contract. The contract, together with its terms stipulate and regulate the outcome of certain events. It is important to establish what the position is and what the parties already agreed upon. An example of a clause regulating an outcome is *force majeure*, which, if included by the parties, provides relief when certain unforeseen events cause non-performance.

Thirdly, the party must determine what type of breach occurred. This is of substantial importance as it subsequently regulates what relief and remedies are at the contractual party's disposal. Relief does not only include remedies in terms of the law of contract, as the contract also provides security to parties in the form of terms and clauses, such as *force majeure* (which affirms the importance of scrutinising the contract after determining that the contract is valid and enforceable).

As established throughout this chapter, non-performance due to the COVID-19 pandemic, together with its restrictions would qualify as a breach of contract. This entails that the law of contract remedies will be at the innocent party's disposal, and the latter will be able to invoke such relief and institute action against the non-performing party. Therefore, the non-performing party must establish whether the contract includes a *force majeure* clause, and if so, whether COVID-19 qualifies as a *force majeure* event. If this cannot be proven, then the non-performing party has to rely on the common law principle of supervening impossibility. In the event of failing to rely on the aforementioned principle, the non-performing party will be liable for the beach and consequential damages.

Now that it has been established what the legal position under the South African law of contract is, it is necessary to determine how contractual relationships are regulated under international contract law.

Chapter 3: International commercial contracts

3.1 Introduction

With reference to chapter one, the WHO declared COVID-19 as Public Health Emergency of International Concern. This entails that COVID-19 could "require an international response" and can potentially impact countries all over the world. Based on the last eighteen months, the impact of COVID-19 has been enormous, and the virus has impacted (and continues to impact) most countries. Essentially, it is well established that COVID-19 did not only affect individual countries but has had (and continues to have) a global impact. Therefore, the importance of establishing an international position of *force majeure* is fundamental in determining the limits of *force majeure*. Parties to international commercial contracts also disagree on a governing law, which leads to the application of the international law.

This chapter provides insight into the international law of contract, specifically commercial contracts. Reference is made to international contracts as a whole and whether such contracts differ from South African contracts or not as discussed in chapter two. Thereafter, a brief study of the private international law follows. The private international law is important when international contracts are concluded, as, in some instances, parties fail to agree on which jurisdiction regulates the contract. The private international law is then applied in order to resolve the disputes and determine which jurisdiction is applicable.

An important part of the international law is the instruments and conventions that regulate and govern certain positions. These instruments and conventions are binding when contracts are concluded with countries which are contracting/member states to the conventions. Therefore, these international instruments and conventions could become applicable and binding when contracting with certain foreign parties. Reference is made to various conventions that led to the development of the CISG. The study of the CISG includes scrutinising the impossibility of performance in terms of the CISG, and what this position entails for

international commercial contracts. Reference is also made to the UNIDROIT principles of International Commercial Contracts and the Incoterms, to finally stipulate the international position of the recognition of *force majeure*.

3.2 International contracts

An international contract can be defined as a contract that binds more than one State or a contract where the contractual parties are from different States.[69] When contractual parties enter into an international agreement, it is of substantial importance that the parties reach a consensus on which law is to be applied to their agreement.[70] Failure to disclose the aforementioned (should be noted that this happens very seldom) can lead to various disputes arising due to the national and municipal laws being different from State to State. This could cause confusion between the contractual parties. Such potential conflicts consequently lead to the introduction of the private international law.[71]

Parties who conclude international contracts frequently assume that they can operate in terms of their own domestic laws and regulations. This assumption causes great misunderstandings between parties as trading internationally subsequently entails that contractual parties are subject to not only their own municipal laws but also the laws of the other States.[72] A party is not required to enter the country to become subject to its laws. It is sufficient to merely sell goods and courier it to the said country in order to establish a sufficient nexus to enable the contractual party to be within the country's jurisdiction.[73]

Contractual parties can agree on the application of the laws that they wish to bind their contract. However, this is only to a certain extent. Most countries have laws that mandate domestic jurisdiction over international and particular contracts, as

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69 Cavalieri and Salvatore *An introduction to international contract law* 2.
70 Cavalieri and Salvatore *An introduction to international contract law* 3.
71 Which is dealt with in more detail in para 3.2.1 below.
72 Shippey *A short course in international contracts* 13.
73 Shippey *A short course in international contracts* 13-14.

well as certain requirements that international contracts should meet in order to be binding and enforceable in that country.[74] Therefore, contractual parties have discretion to a certain extent, but complete freedom of contract is not available to contractual parties when concluding international contracts.

When dealing with international contracts, the enforcement can be quite complex. With this being said, the scope and practice of the private international law becomes an undisputed important factor when disputes between contractual parties from different States occur, and enforcement of the law is required.

3.2.1 Private international law

Private international law or "the conflict of laws", as referred to by some of the Western countries, can be described as the following:

> … the branch of law dealing with the determination of the law applicable to a private-law matter, of the legal order having jurisdiction to adjudicate such a matter, and of the extent to which an adjudication in such a matter by another legal order is to be recognized and enforced locally…[75]

The private international law ultimately aims to assist companies and/or individuals with a conflict of law in order to determine the following: what law should be applied in each specific case, what jurisdiction would apply, and in some cases whether or not a foreign judgment can be recognised or enforced.[76] To fully understand the private international law, a conflict of law must be understood. A conflict of law can be defined as the following:

> … dissimilarity or discrepancy between the laws of different legal orders, such as states or nations, with regard to the applicable legal rules and principles in a matter that each legal order wishes to regulate…[77]

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74 Shippey *A short course in international contracts* 14.

75 Collins English Dictionary 2019 https://www.collinsdictionary.com/dictionary/english/conflict-of-laws.

76 Beckett 1926 *British Yearbook of International Law* 74.

77 Collins English Dictionary 2019 https://www.collinsdictionary.com/dictionary/english/conflict-of-laws.

The requirement for the private international law to be applied is that the case should contain a foreign element. A practical example is two South African businessmen who conclude a sale agreement in which one party will deliver goods to the other in exchange for payment upon delivery. The purchasing party fails to perform in terms of the contract by failing to make payment of the purchase amount upon delivery. No foreign element is applicable in this scenario, therefore the private international or conflict of laws cannot be applied to this case. Thus, if a case contains no foreign elements, the private international law or conflict of laws is irrelevant and not applicable.

3.2.1.1 Application of the private international law

There are certain theories that need to be considered before determining whether the private international law is applicable. The application of the private international law, together with the familiarised theories which regulate its function is discussed briefly below. Firstly, in terms of the proximity rule, an international contract is governed by the legal system with which it has the "closest connection".[78] The "closest connection" is generally determined by considering certain factual elements of each case based on an *ad hoc* analysis.[79]

The *lex fori* theory was proposed by the German and French writers, to wit Mr. F. Kahn and Mr. F. Bartin, who "discovered" the problem of the conflict of laws in the 1890's.[80] In terms of this theory, the court should "… characterise the issue in accordance with the categories of its own domestic law…",[81] as well as foreign rules of law in accordance with their nearest analogy in the same "category" of law.[82] This theory has been adopted in practice by the English courts and is in essence the prevailing theory for dealing with similar matters. There are objections against this theory, such as the application of the theory, that in some events could result

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78 Cavalieri and Salvatore *An Introduction to international contract law* 4.
79 Cavalieri and Salvatore *An Introduction to international contract law* 4.
80 Collier *Conflict of Laws* 16.
81 Collier *Conflict of Laws* 17.
82 Collier *Conflict of Laws* 17.

in a distortion of the foreign rule and consequently render it inapplicable in certain cases where the foreign rule would apply, and vice versa.[83] Further to the aforementioned, if no close analogy in domestic law exists, the theory will not work.[84]

The *lex causae* theory essentially has the purpose that the "… 'classification' should be effected by adopting the categories of the governing law".[85] There are two serious problems when it comes to the application of this theory. Firstly, the purpose of "characterisation" is to discover what law regulates or governs the applicable problem. Therefore, the whole function of discovering an alternative manner to deal with the conflict cannot happen because the governing law should dictate the process of characterisation in terms of the *lex causae* theory. Secondly, in the event of two alternative foreign laws governing the problem, and each foreign law deals with the problem in a different manner, subsequently resulting in different conclusions, making it difficult to decide which one of the said laws should be adopted.[86]

Private international law has a dualistic character, which essentially has to balance international consensus with certain domestic recognition and implantation,[87] as well as to balance the sovereign actions with those of the private sector.[88] Private international law is fundamental in resolving disputes where international commercial contracts are involved, and when impossibility of performance occurs, which is dealt with in detail below.

3.2.1.2 Private international law and the impossibility of performance

One of the earliest private international law encounters with the impossibility of performance, or *force majeure* was the case of *Jacobs, Marcus & Co v The Crédit*

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83 Collier *Conflict of Laws* 17.
84 Collier *Conflict of Laws* 17.
85 Collier *Conflict of Laws* 17.
86 Collier *Conflict of Laws* 17.
87 UMKC date unknown https://libguides.library.umkc.edu/FCIL/fcil/private.
88 UMKC date unknown https://libguides.library.umkc.edu/FCIL/fcil/private.

Lyonnais. This case presented the English Court of Appeal with two contradicting and competing laws, being *force majeure* under the French Civil Code, which essentially discharges the contract, and *force majeure* under the English law of frustration, which on the other hand would not discharge the contract.[89]

The court dealt with this matter by deciding if the specific contract is construed by the English or French law.[90] The court then applied the English choice of law contract rule, which "… assumed the law of the place of execution to be the proper law of contract…",[91] and with this taken into consideration the court was of the opinion that the English law (where the contract was entered into) was applicable to these facts and therefore the English law was to apply.[92] This decision was made in 1884, and if this case was to be considered again today, the verdict would most likely change, as the private international laws have evolved and progressed with time. In the case of *Jacobs, Marcus & Co v The Crédit Lyonnais*, the seller resided in France, and this would normally be deemed to be the "closest connection", which would consequently mean that the French law would apply to the case. Subsequently, the contract would have been discharged.

The case of *Jacobs, Marcus & Co v The Crédit Lyonnais* and the progression of the private international law, show the importance of the private international law when dealing with *force majeure* incidents, and the impact of applying different laws to a dispute. The consequence of applying different laws to a contract can be immense in certain cases, as one law would discharge the contract and the other law would not discharge the contract. Therefore, the private international law is instrumental in settling contractual disputes, especially when impossibility of performance occurs. With the impact of COVID-19 and its subsequent effects, such as a lockdown, the private international law will be tested, as a lockdown could cause non-performance for certain contractual parties, and an international contract with

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89 Tsang 2020 *Fordham International Law Journal* 207-208.
90 Tsang 2020 *Fordham International Law Journal* 208.
91 Tsang 2020 *Fordham International Law Journal* 208.
92 Tsang 2020 *Fordham International Law Journal* 208.

contradicting municipal laws could entail either relief for a contractual party or drastic consequences.

3.3 International instruments regulating international commercial contracts

As mentioned above, when dealing with the international law, international instruments and conventions often regulate and govern certain positions. These instruments and conventions are binding when contracts are concluded with countries who are contracting/member states to the conventions. Therefore, reference must be made to these instruments and conventions as they will be applied in most cases.

The growth of the international trade over the last century has been immense. It enables countries and individuals from different regions to expand their markets to goods, services and produce which would not have been possible without the global trade industry. With the international trade developing on a daily basis, the need for uniformity and rules regulating the trade was much needed. This led to the Hague Conventions of 1964, which is essentially made up of two conventions, namely the Convention relating to a Uniform Law on the International Sale of Goods (ULIS) and the Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods (ULFC).

These conventions did not succeed as originally intended, because they generated a small, mainly German, body of case law.[93] Between 1964 and 1980, these Conventions only attracted 10 adherents.[94] The "failure" of ULIS and ULFC is largely because the Conventions were primarily a European creation and countries with different legal systems could not accept some of the Uniform Laws.[95] Furthermore, legal experts were of the opinion that ULIS was substantially complicated and

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93 Ziegel 2000 *NZ Bus LQ* 337 - 338.
94 Ziegel 2000 *NZ Bus LQ* 337 - 338.
95 Ziegel 2000 *NZ Bus LQ* 337 - 338.

lengthy.[96] However, the importance of these Conventions cannot be ignored, as they had significant influence on the CISG.

The General Assembly of the United Nations established the UN Commission on International Trade Law (UNCITRAL) which was tasked with preparing an acceptable Uniform Law, with specific reference to international sale contracts, to countries with different legal systems.[97] This was achieved at the Vienna diplomatic conference in 1980 as the CISG was approved.

The CISG aims to remove the legal barriers in international trade and promote international trade.[98] According to article 1(1) of the CISG, the convention applies to sale contracts for goods between parties, where their places of business are in different States, and when the States are contracting parties, and lastly, "… when the rules of private international law lead to the application of the law of a Contracting State".[99] The CISG has been ratified by 93 countries, as of 2021, which showcases its importance. The CISG provides the international trade with a recognised set of rules, that consequently regulates the position of international sale contracts, or commercial contracts. These set of rules can still be interpreted differently, which is problematic, as these different interpretations lead to different judgements, ultimately creating contradicting precedents. Therefore, in order to reduce the risk of different interpretations, the UN promotes the ratified countries to interpret the CISG uniformly.[100] This further confirms the importance of the correct interpretation when referring to and using the CISG.

Another particularly important international instrument regulating the international trade is the Incoterms. The Incoterms are a set of terms, which is published by the International Chamber of Commerce (ICC). These terms are internationally

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96 Ziegel 2000 *NZ Bus LQ* 337 - 338.
97 Ziegel 2000 *NZ Bus LQ* 337 - 338.
98 Ziegel 2000 *NZ Bus LQ* 337 - 338.
99 Article 1(1) of the CISG.
100 As set out in article 7 of the CISG.

recognised, and they clarify the buyers and sellers' obligations to prevent confusion in foreign trades.

3.3.1 CISG

As stated above, the CISG is applied to sale contracts between parties whose place of business are in different countries.[101] Article 4 of the CISG provides an understanding of what the convention governs, and it reads as follows:

> This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. In particular, except as otherwise expressly provided in this Convention, it is not concerned with:
>
> (a) the validity of the contract or of any of its provisions or of any usage;
>
> (b) the effect which the contract may have on the property in the goods sold.[102]

Thus, it is clear that the CISG governs explicitly the formation of the contract, as well as the obligations of the contractual parties in an international sale contract. The CISG ultimately eliminates uncertainties when it comes to the formation and conclusion of international sale contracts and provides for a recognised set of rules containing the aforementioned.

Article 7 of the CISG provides for a general guideline when parties want to interpret the CISG, and it states the following:

> (1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.
>
> (2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.[103]

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101 Article 1(1) of the CISG.
102 Article 4 of the CISG.
103 Article 7 of the CISG.

As stated in article 7(2) of the CISG, the "uncertainties" or "gaps" of the CISG (matters not governed by the CISG), should firstly be filled with the underlying principles of the CISG, and thereafter by using the relevant law as provided for by the private international law. The underlying principles of the CISG (as referred to in article 7(2) of the CISG) is made up of the principles as set out by the International Institute for the Unification of Private Law (UNIDROIT). These principles set forth general rules applicable to international contracts.[104]

Article 79 and 80 of the CISG addresses the impossibility of performance, which reads as follows:

Article 79:

(1) A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.

(2) If the party's failure is due to the failure by a third person whom he has engaged to perform the whole or a part of the contract, that party is exempt from liability only if:

  (a) he is exempt under the preceding paragraph; and

  (b) the person whom he has so engaged would be so exempt if the provisions of that paragraph were applied to him.

(3) The exemption provided by this article has effect for the period during which the impediment exists.

(4) The party who fails to perform must give notice to the other party of the impediment and its effect on his ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, he is liable for damages resulting from such nonreceipt.

(5) Nothing in this article prevents either party from exercising any right other than to claim damages under this Convention.

Article 80:

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[104] UNIDROIT principles will be dealt with in more detail below.

> A party may not rely on a failure of the other party to perform, to the extent that such failure was caused by the first party's act or omission.[105]

Articles 79 and 80 of the CISG provide contractual parties with a framework of how this relief works, what a party needs to prove together with the steps that need to be taken to prove the same, as well as the consequences of relying on such relief.

3.3.1.1 Requirements in terms of article 79 of the CISG

The requirements in terms of article 79(1) can be simplified and summarised into three general requirements. Firstly, the failure to perform contractual obligations was caused by an impediment. Secondly, the impediment is beyond the contractual party's control. Thirdly, the impediment together with its consequences, was unforeseeable and unavoidable at the time of concluding the contract. Contractual parties to international contracts will ask whether COVID-19 can be seen as an "impediment", whether COVID-19 was beyond their control and lastly, whether or not COVID-19 was unforeseeable and unavoidable at the time of conclusion of the contract.

The word "impediment" needs to be explained, in order to determine what qualifies as an impediment. When reference is made to the word "impediment", it is of substantial importance to interpret this word correctly, as this will determine whether or not article 79 of the CISG can be applied to the non-performance of the contract. An impediment is not defined by the CISG; however, an impediment means a hindrance or obstruction when doing something. The CISG Advisory Council elaborates on an impediment and states the following in Council Opinion No 7:

> A change of circumstances that could not reasonably be expected to have been taken into account, rendering performance excessively onerous ('hardship'), may qualify as an "impediment" under Article 79(1). The language of Article 79 does not expressly equate the term "impediment" with an event that makes performance absolutely impossible. Therefore, a party that finds itself in a

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105 Articles 79 and 80 of the CISG.

situation of hardship may invoke hardship as an exemption from liability under Article 79.[106]

For a party to be exempted from their contractual obligations, the impediment must be the sole reason for the failing to perform their contractual obligations. There should be a causal link between the impediment and the failure to perform the contractual obligation.

The foreseeability of an event will be determined from an objective third party's point of view.[107] The required degree of "unforeseeability" is reached when the objective test indicates that the said third party would not have foreseen the event at the conclusion of the contract.[108] It is important that the "unforeseeabilty" requirement should be interpreted narrowly, like many events that are unforeseeable in terms of article 79(1) of the CISG, such as a fire, is in fact foreseeable, and a party should take steps to reduce such a risk by taking the necessary steps to prepare for such an occurrence.

An impediment must fall beyond a party's control. The concept of "sphere of risk" is used to determine whether the impediment fell within or beyond the party's control. The sphere of risk can be explained as the general risks that a party has to bear.[109] From case to case, the contract determines what obligations the contractual parties have, and when they should act and when they should not (or cannot).

A party is obligated to fulfil its contractual obligations if it is possible. A party should act in a manner that is expected from them. If certain events occur outside the party's control, then it can be seen as unavoidable. However, a party should, act in a reasonable manner in each circumstance, should an unforeseeable event occur, even if they are not obligated to.

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106 CISG Advisory Council 2021 https://www.cisgac.com/cisgac-opinion-no7-p2/# para 3.1.
107 Miettinen *Interpreting CISG article 79(1)* 29.
108 Miettinen *Interpreting CISG article 79(1)* 29.
109 Miettinen *Interpreting CISG article 79(1)* 30.

3.3.1.2 Force majeure and the CISG

Force majeure and the term impediment are often used as synonyms when reference is made to the CISG and impossibility of performance.[110] However, it is important to separate the concept of *force majeure* and an exempting impediment in terms of the CISG, as the latter differs from both the traditional *force majeure* concept as well as the *force majeure* provisions of national legal systems.[111] In short (since *force majeure* is dealt with in more detail in chapter 4) *force majeure* refers to a practical impossibility, while an impediment refers to a more flexible concept.[112]

The drafters of the CISG did not want to refer to *force majeure* in the CISG, which is evident out of a study of the drafting history of the CISG (from ULIS in article 74(1), where no reference was made to *force majeure* as well). Although they do not explicitly refer to *force majeure*, the application of article 79 of the CISG provides contractual parties with similar relief which *force majeure* would have provided to the contractual parties.

The CISG provides relief to contractual parties. However, a party should be able to prove that COVID-19 qualifies as an impediment and meets the further "requirements" of article 79.

3.3.2 UNIDROIT Principles of International Commercial Contracts

The UNIDROIT principles were first published in 1994, with a second edition in 2004, the third edition in 2010, and the most recent fourth edition in 2016.[113] These principles provide a non-binding codification or restatement which deals with the international contract law.

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110 Miettinen *Interpreting CISG article 79(1)* 45.
111 Miettinen *Interpreting CISG article 79(1)* 45.
112 Miettinen *Interpreting CISG article 79(1)* 45-46.
113 UNIDROIT 2021 https://www.unidroit.org/instruments/commercial-contracts/upicc-model-clauses/.

Although they are non-binding, specific reference is made to the UNIDROIT principles in the CISG, as it is referred to in article 7 of the CISG and adopted by many worldwide. The UNIDROIT principles essentially refers to the Model Clauses that contractual parties may use in their contract. The Model Clauses are divided into four categories as follows:

(i) to choose the UNIDROIT Principles as the rules of law governing the contract (see Model Clauses No. 1…),

(ii) to incorporate the UNIDROIT Principles as terms of the contract (see Model Clause No. 2…),

(iii) to refer to the UNIDROIT Principles to interpret and supplement the CISG when the latter is chosen by the parties (see Model Clauses No. 3…), or

(iv) to refer to the UNIDROIT Principles to interpret and supplement the applicable domestic law, including any international uniform law instrument incorporated into that law (see Model Clauses No. 4....).[114]

The UNIDROIT principles provide a framework for when contracts are drafted, and how certain principles can be used. The UNIDROIT principles deals with *force majeure* in article 7.1.7, and this "model *force majeure* clause" reads as follows:

(1) Non-performance by a party is excused if that party proves that the non-performance was due to an impediment beyond its control and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.

(2) When the impediment is only temporary, the excuse shall have effect for such period as is reasonable having regard to the effect of the impediment on the performance of the contract.

(3) The party who fails to perform must give notice to the other party of the impediment and its effect on its ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, it is liable for damages resulting from such non-receipt.

(4) Nothing in this article prevents a party from exercising a right to terminate the contract or to withhold performance or request interest on money due.[115]

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[114] UNIDROIT 2021 https://www.unidroit.org/instruments/commercial-contracts/upicc-model-clauses/.

[115] Article 7.1.7 of The UNIDROIT principles.

The above provides contractual parties with a standard *force majeure* clause, and it provides with a "non-binding" standard of what a contract could read like when including *force majeure*. The UNIDROIT principles are considered to be one of the most important "soft law" instruments in the international trade law. Soft law can be described in simple terms as a set of non-binding laws or alternatively laws with a binding force somewhat weaker than the binding force of "recognised laws". The UNIDROIT principles fails to define the word impediment which subsequently opens the door for interpretation when such a clause is inserted into a contract. However, it does provide certain requirements to trigger the clause, consequences of a temporary impediment, further conditions to be adhered to such as notice that has to be given by the party when attempting to trigger the *force majeure* clause and consequences of the clause in general.

When a UNIDROIT "model *force majeure* clause" is included into a contract, the party seeking to trigger the *force majeure* clause must prove that COVID-19 qualifies as an impediment and meets the further "requirements" of the clause. This position is very similar to article 79 of the CISG, as article 79 and the UNIDROIT "model *force majeure* clause" is almost identical, with one of the only differences being that the CISG does not refer to *force majeure* but rather to impossibility of performance whereas the UNIDROIT principles makes specific reference to *force majeure*.

3.3.3 Incoterms

The Incoterms are a set of rules, published by the ICC, which essentially governs foreign trade contracts by clarifying the obligations of the contractual parties. These terms are widely used and can be found in almost all modern contracts. Incoterms were developed in 1936, and they are regularly updated to conform with the changing trade practices.

Although the Incoterms are regularly updated, it still does not deal with *force majeure* and the impossibility of performance. An example of a regularly used

Incoterm is the Cost, insurance, and freight (CIF) Incoterm. It has been defined by the ICC as follows:

> 'Cost, Insurance and Freight' means that the seller delivers the goods on board the vessel or procures the goods already so delivered. The risk of loss of or damage to the goods passes when the goods are on board the vessel. The seller must contract for and pay the costs and freight necessary to bring the goods to the named port of destination. The seller also contracts for insurance cover against the buyer's risk of loss of or damage to the goods during the carriage. The buyer should note that under CIF the seller is required to obtain insurance only on minimum cover. Should the buyer wish to have more insurance protection, it will need either to agree as much expressly with the seller or to make its own extra insurance arrangements.[116]

Although this does not deal with *force majeure*, it has impact on the contract as well as the contractual parties. Should one of the parties fail to perform, the contract as a whole can become null and void (which has the effect that the "guilty" party will be held liable for damages occurring out of this breach). This provides a reminder that when a contract does not make provision for *force majeure*, it could have impact on the "guilty" contractual party immensely if the non-performance was the consequence of an unforeseen and unavoidable event. This is a cause for concern for contractual parties when COVID-19 (hypothetically) qualifies as a *force majeure* event, and the contract does not include such a clause. Furthermore, the common law of the applicable country does not provide any relief for non-performance due to an unforeseen event, for example in South Africa with the common law principle of supervening impossibility.

3.4 Conclusion

When an international contract is concluded, parties must decide on various factors, such as what law is applied to the contract and what clauses are included in the contract. Parties should essentially aim to draft the contract with care and as

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116 ICC date unknown https://iccwbo.org/resources-for-business/incoterms-rules/incoterms-rules-2010/.

unambiguously as possible. However, this is not always the case, as parties often enter into contracts without due diligence.

When parties to an international contract fail to disclose what law should be applied to the contract and a dispute arises between the contractual parties, the parties are referred to the private international law. The private international law assists parties in determining what law must be applied to the contract, what jurisdiction must be applied, and in some cases, whether or not foreign judgements can be recognised and/or enforced to the contract. The application of different laws to a contract can, in certain cases, be immense, as one law would discharge the contract and the other law would not. Therefore, the private international law is instrumental in settling contractual disputes, especially when impossibility of performance occurs, as the outcome can vary depending on which national law is to be applied to the contract.

When dealing with international contracts, the enforcement can be quite challenging as established throughout this chapter. Parties have to consider international instruments and conventions as the aforementioned forms part of the application of the international law. An example of such a convention is the CISG. The latter aims to remove the legal barriers in the international trade and is applied to all sale contracts where the contractual parties' places of business are in different States, when the States are contracting parties, and lastly when the rules of private international law led to the application of the law of a Contracting State. The CISG governs specifically the formation of a contract, as well as the obligations of the contractual parties.

Articles 79 and 80 of the CISG address explicitly the impossibility of performance. The requirements in order to rely on this relief in terms of article 79(1) is that an impediment must have must have caused the failure to perform the contractual obligations. The impediment must be beyond the contractual party's control, and lastly, the impediment together with its consequences was unforeseeable and unavoidable at the time of concluding the contract. Contractual parties to

international contracts have to prove that COVID-19 qualifies as an "impediment", that COVID-19 was beyond their control and that COVID-19 was unforeseeable and unavoidable at the time of conclusion of the contract, in order to successfully rely on this relief in terms of the CISG.

Although the CISG provides a clear framework on the impossibility of performance, it fails to define the word "impediment". This leads to confusion and uncertainty as parties are forced to interpret whether or not their specific event qualifies as an impediment. This contradicts article 7 of the CISG which aims for the CISG to be interpreted in conformity and without the different interpretations of parties. The drafters of the CISG were adamant not to refer to *force majeure* in the CISG, but rather "the impossibility of performance", which essentially provides similar relief as the relief sought for through *force majeure*.

The UNIDROIT principles provide a framework for when contracts are drafted and how certain principles can be used. Albeit that these principles are non-binding, they have received recognition worldwide and are used as an example for various contracts. The UNIDROIT principles deals with *force majeure* in article 7.1.7 and refer to the *force majeure* event as an "impediment". These principles also fail to define the word, which subsequently opens the door for interpretation. The Incoterms does not deal with *force majeure* but affirms the importance of contractual performance and the impact of a party that fails to perform its obligations. This confirms the importance of including a *force majeure* clause to create a possible "safety net" for a party.

Chapter four follows, where specific reference is made to *force majeure* in order to ultimately determine its limits with COVID-19 affecting the performances of contractual parties. Chapter four consists of the study of *force majeure* on a South African and international position, as well as applying the findings of chapter two and three to determine under which circumstances will a party to an international contract be able to invoke *force majeure* when claiming possibility of performance.

Chapter 4: Limits of *force majeure*

4.1 Introduction

Chapter two and three introduced the South African law of contract and international law of contract. The aforementioned chapters set out how contracts are concluded and how they can be drafted in general by including specific clauses such as *force majeure*. Should a breach of contract occur, the party seeking relief should establish what breach occurred, as certain breaches have specific remedies available to remedy the breach. The contract in itself should also be considered, as the contract could also provide relief should certain events take place (such as *force* majeure). When the contract includes a *force majeure* clause, the party attempting to rely on such a clause have to prove that the event that hindered contractual performance impossible, qualifies as a *force majeure* event in terms of the contract. In the event of the contract, more specifically the *force majeure* clause, if drafted without including such details, the question arises as to what the limits of *force majeure* are, what events qualifies as a *force majeure* event and when are parties able to rely on such relief.

When parties conclude international contracts and fail to agree on the governing law, the international law of contract becomes applicable. As established in chapter three, it is evident that the position of *force majeure* and a breach of contract due to the impossibility of performance in the international law of contract is not dealt with in much detail. Although international instruments such as the CISG and the UNIDROIT principles provide contractual parties with the basics of the impossibility of performance and *force majeure*, there is still room left for interpretation as to what qualifies as an "impediment". Thus, more than ever, contractual parties would require clarity on the limits of *force majeure*.

As stated in chapter two, *force majeure* has received international recognition in both domestic and international contracts. It is a common clause in contracts that essentially frees the contractual parties from their liabilities and/or obligations should an event, which can be described as "extraordinary" or "beyond the control

of the parties", prevent the contractual parties from fulfilling their contractual obligations.[117] According to the South African law of contract, *force majeure* can be described as:

> Subsequent impossibility of performance (through forces of nature, so-called acts of God, conduct of third parties for whom the parties to the contract are not responsible, or unforeseen circumstances) ordinarily terminates contractual obligations that have become impossible to perform.[118]

Force majeure essentially provides relief to contractual parties when an unforeseen event takes place, which consequently results in the impossibility of contractual performances.

This chapter essentially scrutinises *force majeure* as a whole, in order to establish the limits of this intriguing principle. In achieving the aforesaid, the origin and developments of *force majeure* are discussed, specifically the French Civil Code of 1804 and the Spanish flu, which affected *force majeure* over the years, and could provide clarity on dealing with similar factual events. Thereafter, a thorough study of *force majeure* follows, first, with an overview of *force majeure* in the South African law of contract. The South African position includes the requirements of *force majeure*, the application of this legal principle together with the consequences and challenges of claiming *force majeure* in general. Secondly, the international position follows. The requirements and application of *force majeure* on an international standard are dealt with briefly, followed by examples of *force majeure* clauses.

This chapter aims to provide an understanding of the legal principle of *force majeure*, to establish the limits and scope of *force majeure*. This will ultimately assist contractual parties to determine whether COVID-19 could qualify as a *force majeure* event.

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117 Le Roux 2020 https://www.lexisnexis.co.za/news-and-insights/covid-19-resource-centre/practice-areas/contract-law/force-majeure-an-analysis-of-what-force-majeure-is.

118 Hutchison, Pretorius and Du Plessis *The Law of Contract* 409.

4.2 Origins of force majeure

The term *force majeure* originated in the French Civil Code of 1804 ("French Code"), one of the oldest codifications published.[119] In this codification, *force majeure* is used to describe circumstances outside the contractual party's control. Section IV of the French Code deals with "Damages and Interest resulting from the non-performance of the obligation."[120] Article 1147 reads as follows:

> The obligor will be found liable for the payment of damages, either by reason of the inexecution of the obligation, or by reason of delay in the execution, at all times when he does not prove that the inexecution does not result from an outside cause which cannot be imputed to him, and further that there was no bad faith on his part.[121]

Article 1148 of the French Code, states that there is no ground for damages and interest when a "*force majeure*" or "of a fortuitous occurrence" prevented the obligor from fulfilling its contractual obligations.[122] Article 1150 further states that the obligor shall be held liable for damages and interest if the said "event" was foreseeable at the time of concluding the contract.[123] Although the principle of *force majeure* is included in the French Code, the latter does not elaborate in section IV on which events are included as "*force majeure*" or "of a fortuitous occurrence".

The case of *Krell v Henry*,[124] or better known as the "coronation case", is deemed to be one of the most important cases in developing the legal principle of *force majeure*.[125] King Edward VII's coronation was cancelled because of his illness. The Court subsequently held that a contract for leasing a room to watch the King's coronation procession was discharged because the King was ill and unable to proceed with the coronation.[126] Ever since the Court held the aforementioned in

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119 Mazzacano 2011 *NJCL* 41.
120 Section IV of the French Civil Code 1804.
121 Article 1147 of the French Civil Code 1804.
122 Article 1148 of the French Civil Code 1804.
123 Article 1150 of the French Civil Code 1804.
124 *Krell v Henry* [1903] 2 KB 740 (Eng).
125 Tsang 2020 *Fordham International Law Journal* 188.
126 Tsang 2020 *Fordham International Law Journal* 188-189.

Krell v Henry, a contract under the English Law is discharged if the "… common purpose of the contracting parties is frustrated by a supervening event".[127] The coronation case provided a much needed precedent when dealing with supervening events or *force majeure* occurrences.

In 1918 the "Great Influenza", also known as the "Spanish Flu", infected approximately 500 million people worldwide.[128] The Spanish flu consequently led to the cancelation of most worldwide events (including the implementation of quarantines, and schools and churches being closed) to curb the spread of the flu. The Spanish flu caused various disruptions in commerce, business activities and daily life. These disruptions subsequently led to non-performance of contracts and questions were being asked about the *force majeure* principle.

The Supreme Court of Oregon held in *Phelps v School District*[129] that an epidemic (such as the Spanish flu) was not an act of God that would allow the school to avoid paying the teachers who were willing and able to teach but prohibited by the schools being closed due to the epidemic.[130] On the contrary, the North Dakota Supreme Court in *Sandry v Brooklyn School District*[131] held that the school was excused from paying the driver his salary during the closure of the school.[132] The court distinguished the teacher from the driver and affirmed that the teacher was qualified and enjoyed statutory protections, and the driver did not enjoy the same benefits.[133]

The Spanish flu and subsequent court decisions on disputes regarding the implementation of *force majeure* and the impact of the Spanish flu on non-

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127 Tsang 2020 *Fordham International Law Journal* 188-189.

128 Wert 2020 https://www.deanmead.com/2020/03/force-majeure-covid-19-and-a-look-back-at-the-great-influenza-of-1918-part-one/.

129 *Phelps v School District* No. 109, Wayne Country.

130 Farris and Chee date unknown https://www.law360.com/articles/1264775/contract-performance-during-pandemic-lessons-from-1918.

131 *Sandry v Brooklyn School District* No. 78 of Williams County.

132 Farris and Chee date unknown https://www.law360.com/articles/1264775/contract-performance-during-pandemic-lessons-from-1918.

133 Farris and Chee date unknown https://www.law360.com/articles/1264775/contract-performance-during-pandemic-lessons-from-1918.

performance of contractual obligations went two ways. Most case law found that the Spanish flu did not excuse a duty to perform. However, cases such as the *Phelps v School District* provided an exception to the aforesaid. Albeit the Spanish flu impacted approximately 500 million people, it did not quite have the same effect as COVID-19 did on the world in the early 2020's. Other "virus pandemics" such as the human immunodeficiency virus (HIV), swine flu and severe acute respiratory syndrome (SARS), just to name a few, did not impact the world the same way as COVID-19.

From December 2007 to June 2009, the United States of America (USA) was impacted by the "great recession". This event was the most prolonged economic downturn in the USA since World War II (prior to COVID-19).[134] Unemployment in the USA was at 10%, and gross domestic products dropped over 4%.[135] In *Route 6 Outparcels LLC v Ruby Tuesday Inc.*[136] Ruby Tuesday relied on the great recession "… to avoid an obligation in a ground lease requiring it to open a branch of its restaurant chain in Pennsylvania".[137] Pursuant to the lease agreement, Ruby Tuesday ("the defendant") agreed to open the restaurant on Route 6 Outparcels ("the plaintiff") property by no later than March 2009.[138] The defendant failed to open the restaurant and argued that the failure to open the restaurant was due to the great recession.

The ground lease agreement contained a *force majeure* clause which stated the following:

> Except for any payments due [plaintiff] in accordance with this [l]ease, [plaintiff] and/or [defendant] shall be excused for the period of any delay and shall not be deemed in default with respect to the performance of any of the terms, covenants, and conditions of this [l]ease when prevented from so doing by cause or causes

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134 Travisano and Lufrano 2020 https://www.ebglaw.com/insights/lessons-on-force-majeure-application-from-past-crises/ para 31.

135 Travisano and Lufrano 2020 https://www.ebglaw.com/insights/lessons-on-force-majeure-application-from-past-crises/ para 32.

136 *Route 6 Outparcels LLC v Ruby Tuesday Inc.* 88 AD 3d 1224 (NY App Div 3d Dept 2011).

137 Travisano and Lufrano 2020 https://www.ebglaw.com/insights/lessons-on-force-majeure-application-from-past-crises/ para 32.

138 Travisano and Lufrano 2020 https://www.ebglaw.com/insights/lessons-on-force-majeure-application-from-past-crises/ para 32.

> beyond the [plaintiff's] and/or [defendant's] control, which shall include, without limitation, all labor disputes, governmental regulations or controls, fire or other casualty, inability to obtain any material, services, acts of God, or any other cause, whether similar or dissimilar to the foregoing, not within the control of the [plaintiff] and/or [defendant].[139]

The defendant's case was based on the global economic downturn in the early 2008's, which essentially prevented their performance under the ground lease agreement, and consequently, it argued that it should be excused from its contractual obligations based on the ground lease agreement's *force majeure* clause.[140]

In sum, the economic downturn caused a "drastic decline of its stock price, forcing [it] to reclassify over $500 million of its long-term debt and to determine that complying with the lease provisions requiring construction of a new restaurant" would divert needed funds away from meeting debt obligations and leverage thresholds under its loan covenants.[141]

The Court held that the economic downturn did not lead to a *force majeure* event and consequently could not excuse the defendant from her performance. Even though the clause was drafted widely, the parties agreed to limit the impact of *force majeure* to circumstances beyond the non-performing party's control. "… economic recessions were not the type of event falling within the clause's purview".[142]

The limits of *force majeure* should be scrutinised as the COVID-19 pandemic is an unknown event for mankind. Although there are similarities between COVID-19 and the above-mentioned events, COVID-19 brought the world to a standstill, which means that the principle of *force majeure* will be tested in ways that were not tested

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139 *Route 6 Outparcels LLC v Ruby Tuesday Inc.* 88 AD 3d 1224 (NY App Div 3d Dept 2011).

140 Travisano and Lufrano 2020 https://www.ebglaw.com/insights/lessons-on-force-majeure-application-from-past-crises/.

141 Travisano and Lufrano 2020 https://www.ebglaw.com/insights/lessons-on-force-majeure-application-from-past-crises/ para 33.

142 Travisano and Lufrano 2020 https://www.ebglaw.com/insights/lessons-on-force-majeure-application-from-past-crises/ para 33.

before in order to provide the much-needed relief to contractual parties during these testing times.

4.3 Force majeure in the South African law

To successfully invoke the *force majeure* clause, there are certain general requirements that should be complied with. Firstly, reference must be made to the contract in itself, as it could indicate what procedure ought to be followed in order to trigger the *force majeure* clause. However, this is not always the case as most clauses are not drafted in such detail. In general, there are certain conditions that must be fulfilled for the *force majeure* clause to be triggered. These conditions were confirmed in *Glencore Grain Africa (Pty) Ltd v Du Plessis* and are the following:

1. The impossibility to perform must be objectively impossible;
2. The impossibility must be absolute as opposed to probable or relative;
3. The impossibility must be unavoidable, and the test to be used to determine the aforesaid is the reasonable person test (a reasonable person should be unable to perform); and
4. The failure to perform must not be the fault of either contractual party.
5. The non-performance must not be the fault of either party; and
6. The mere fact that a disaster or event was foreseeable, does not necessarily mean that it ought to have been foreseeable or that it is avoidable by a reasonable person.[143]

A contractual party attempting to rely on *force majeure* could be expected to meet the abovementioned conditions. However, the conditions can differ from case to case, as every case is governed by the contract and what was agreed upon.

4.3.1 Application of force majeure

For *force majeure* to be applicable to a contract, the contract should firstly include such a clause, and secondly, the scope of *force majeure* is determined by the wording of the clause. The event which triggers the clause is a supervening event

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143 *Glencore Grain Africa (Pty) Ltd v Du Plessis* [2007] JOL 21043 (O).

that is outside the control of the party.[144] There are different ways to define such events in contracts, and the clauses are either drafted widely or narrowly.

A narrowly drafted clause includes specific events that are covered by the clause, for example, an act of God, a fire, and war.[145] Such a clause does not make provision for any other event outside the listed events, and a party may only rely on the specific events listed in the contract.[146] However, a widely drafted *force majeure* clause includes more "events" that qualify as *force majeure* events. In addition to the "standard list" of *force majeure* events (such as an act of God, a fire, and war), this clause normally includes what is known as "a catch all phrase", which entails that "any event arising beyond the control of the parties, rendering the performance impossible"[147] would tend to qualify as a *force majeure* event. The wording of the contract is of substantial importance, as it determines whether a party can rely on *force majeure* when they are unable to perform their contractual obligations or not.

A party that aims to obtain *force majeure* relief must prove that the *force majeure* event prevented, hindered, or delayed (depending on the wording of the contract and the circumstances of the event) them from performing their contractual obligation.[148] The wording of the contract is essential in establishing the causation. If the provision states that the performance must be prevented, the proof is required to show that the performance is physically or legally not possible due to the *force majeure* event.[149] However, if the provision states that the performance should be delayed or hindered, proof is required to show that the performance was

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144 Van Schalkwyk *The nature and effect of force majeure clauses* 4.

145 Mzobe, Khusi and Visser 2020 https://www.adams.africa/commercial-law/covid-19-force-majeur-or-breach-of-con tract/.

146 Mzobe, Khusi and Visser 2020 https://www.adams.africa/commercial-law/covid-19-force-majeur-or-breach-of-con tract/.

147 Mzobe, Khusi and Visser 2020 https://www.adams.africa/commercial-law/covid-19-force-majeur-or-breach-of-con tract/.

148 Norton Rose Fulbright 2020 https://www.nortonrosefulbright.com/en-za/knowledge/publications/849d7568/q-and-a-on-covid-19-related-force-majeure-claims.

149 Van Schalkwyk *The nature and effect of force majeure clauses* 4.

difficult or unprofitable due to the *force majeure* event.[150] Furthermore, the *force majeure* event should be the only or the substantial causation of the inability to perform the contractual obligations.[151] If there are other causes for non-performance, and that event is not a *force majeure* event, as listed and stated in the provision of the contract, then relief could possibly not be available.

Force majeure clauses normally require that the non-performing party should give notice of the inability to perform to the other party. The clause could further require the aforesaid notice to be given within a certain number of days of the triggering "*force majeure* event".[152] Failure to do so, could in certain cases, prohibit the party from obtaining the relief of *force majeure*.

4.3.2 Consequences of claiming force majeure

There are possible outcomes when claiming *force majeure*, and it varies depending on the wording of the clause in the contract. Leading law firms, such as Norton Rose Fulbright, published an article on the consequences of claiming *force majeure*.[153] It provides that normally, suspension of performance, or termination of the contract, is a consequence of successfully invoking the *force majeure* clause, but certain contracts could encounter compensation or re-negotiation of provisions in the contract. *Force majeure* clauses could also be layered, which means that the type of relief available to the contractual parties changes from time to time or at the option of the parties.

Normally, the rights and obligations are suspended for the duration of the *force majeure* event, for one or both of the parties (depending on the circumstances).[154] Suspension is the most common consequence in *force majeure* provisions. It is of

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150 Van Schalkwyk *The nature and effect of force majeure clauses* 4.

151 Norton Rose Fulbright 2020 https://www.nortonrosefulbright.com/en-za/knowledge/publications/849d7568/q-and-a-on-covid-19-related-force-majeure-claims.

152 Gibson https://www.gibsondunn.com/force-majeure-clauses-a-4-step-checklist-and-flowchart/ 2.

153 Norton Rose Fulbright 2020 https://www.nortonrosefulbright.com/en-za/knowledge/publications/849d7568/q-and-a-on-covid-19-related-force-majeure-claims.

154 Van Schalkwyk *The nature and effect of force majeure clauses* 19.

substantial importance for parties to know when performance should resume, as this allows them to plan and ensure that they resume their performances. The affected party may not be able to resume their performances immediately after the *force majeure* event has passed. Therefore, there should be a consensus between parties as to when the fulfilment of contractual obligations should resume.

Some *force majeure* provisions can have consequences such that the rights, obligations, and the contract as a whole be terminated. Depending on contract's provisions, termination can take place automatically once *force majeure* is claimed, or the parties may have their own discretion as to whether they would like to terminate the contract, after a specified period. It is critical to comply with the termination requirements of the contract, once the parties have decided to terminate the contract.

In some cases, although this is rare, the affected party could claim financial compensation from the non-affected party, for any costs associated with the *force majeure* event. This option is not normally used, but it is available to contractual parties when agreeing on terms and provisions during the drafting of the *force majeure* clause.

The final option available to contractual parties when agreeing on the terms of the *force majeure* clause is negotiation. This allows the parties to re-negotiate the terms of the contract once an event triggers the *force majeure* clause. The contract in itself must include such an option to the parties in order for an affected party to rely on the option of re-negotiating their contract in such an event.

4.3.3 Challenges in claiming force majeure

The burden of proof can be challenging to prove in some cases, as potential difficulties could arise when claiming *force majeure*. To claim the relief of *force majeure*, the event should be included as a "*force majeure* event", which can be left undisputed by the parties, as the event can easily meet the definition of *force majeure* events in the contract. However, the basic requirements that should be

fulfilled is that the *force majeure* event must have caused the failure of performance of contractual obligations by the party, as well as the party must have taken sufficient steps to reduce or minimise the challenges caused by the *force majeure* event.[155] These two requirements can be challenging to prove, as there may be other factors that caused the non-performance by the parties. Furthermore, reasonable steps should be taken by the party to reduce the impact of the *force majeure* event, and without proof that reasonable endeavours were taken, the party may be unable to get relief through *force majeure*.[156]

The challenge of relying on *force majeure* when an unforeseen event arises can be reduced if the contract, specifically the *force majeure* clause, is drafted properly. Parties tend to fail in a claim when the contract is written ambiguously, and therefore the *force majeure* clause should be written clearly, stating which events will be included as *force majeure* events, as well as certain requirements in place to successfully rely on *force majeure*.

4.4 Force majeure in the international contract law

In the event of an international contract not containing a *force majeure* clause, the contract may provide contractual parties with relief in the form of an additional or alternative clause when an unforeseen event causes the non-performance. An example of such a clause is the doctrine of frustration, which aims to discharge the contract in circumstances where an unforeseen event arises that renders the contractual performance impossible. The aforementioned has the purpose of avoiding an injustice where a significant change in the circumstances occurred without it being any party's fault. The contract together with the laws of the countries concluding the contract determine if the *force majeure* clause can be excluded from the contract or not. Therefore, each case should be determined on

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155 Goodrich, McDonnell and Tung 2018 https://www.whitecase.com/sites/whitecase/ files/files/ download/publications/proving-force-majeure-claims-a-difficult-enterprise.pdf 1.

156 Goodrich, McDonnell and Tung 2018 https://www.whitecase.com/sites/whitecase/ files/files/ download/publications/proving-force-majeure-claims-a-difficult-enterprise.pdf 1.

a case-to-case basis, with the parties obliged to consider the applicable laws and the contract in itself.

4.4.1 Requirements to trigger force majeure in an international contract

This position is very similar to the South African position as discussed in *para* 4.3.1 above. The requirements to be adhered to when a party attempts to rely on *force majeure* in an international contract are mostly determined by the contract but there are specific "general requirements" that has been developed over the years. Firstly, the contracting party must comply with the procedural requirements provided in the contract, if any. These requirements could include notifying the other party of the possible *force majeure* event hindering their contractual performance. If such a notice is procedurally required, then the same must comply with the stipulated time frame. Secondly, the affected party must prove that the non-performance was unavoidable and caused by the unforeseen event. Thirdly and lastly, the party should demonstrate that no reasonable steps would have avoided the non-performance caused by the unforeseeable event. These requirements are by no means mandatory and set in stone, and every case is determined by the applicable law and the contract in itself. However, the aforementioned conditions have been adopted as the "general requirements" globally.

4.4.2 Drafting of international contracts

International contracts, be it companies from different countries entering into business, or individuals from different countries concluding agreements, has to include a *force majeure* clause for the principle to be applied to the contract. The drafting of the contract determines the requirements to be adhered to as well as which events will be included and excluded as *force majeure* events. As most international contracts are pre-drafted and standard, parties tend to be deprived of the contractual freedom to draft their contract. Most international companies use their standard contract, and a contracting party can either accept or reject it. These

companies would normally not accept proposals to amend their contract as their standard contract has already been approved by their legal department and/or lawyers.

The case of *Seadrill Ghana Operations Limited v Tullow Ghana Limited*[157] illustrates the importance of drafting a *force majeure* clause. This case provides a practical example of the effects of a *force majeure* clause. In this case, Tullow entered into a contract with Seadrill, to hire an oil rig, for purposes of extracting oil off the coast of Ghana. The contract was for five years, and it included a *force majeure* clause. In September 2014, a dispute arose between Cote d'Ivoire and Ghana, regarding the uncertainty surrounding the boundary between the two countries, which essentially proceeded to arbitration. Cote d'Ivoire obtained a Provisional Measures Order, which was of effect to the extent that no new drilling could be undertaken in the area.[158] Tullow had three oilfields in that specific area, and they were able to complete their "required work", as existing wells that were already functioning and drilled could complete existing wells, but no new drilling could take place.

The completion of the last well was expected to be complete in September 2016, and then the rig would be relocated to other oilfields.[159] The relocation of the rig would only be possible if the government of Ghana approved the Greater Jubilee Full Field Development Plan (Greater Jubilee Plan).[160]

A technical issue on storage and offloading unit was discovered in February 2016. This unit was used in one of the oilfields, and Tullow believed that the Ghanaian government could not approve the Greater Jubilee Plan due to this technical problem.[161] Consequently, it was argued that no work was left for the rig to undertake from October 2016.

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157 *Seadrill Ghana Operations Ltd v Tullow Ghana Ltd* [2018] EWHC 1640.
158 *Seadrill Ghana Operations Ltd v Tullow Ghana Ltd* [2018] EWHC 1640.
159 Williams 2020 https://www.clarionsolicitors.com/blog/force-majeure-events-and-clauses-not.
160 Williams 2020 https://www.clarionsolicitors.com/blog/force-majeure-events-and-clauses-not.
161 Williams 2020 https://www.clarionsolicitors.com/blog/force-majeure-events-and-clauses-not.

Tullow terminated the contract with Seadrill and therefore stopped paying the rig hire charges. Tullow justified this termination on the grounds of the *force majeure* clause in the contract. Seadrill believed that the termination by Tullow was due to the oil prices falling, which caused the reduction in the hire of oil rigs on a daily market from approximately $600 000 to $200 000.[162] Therefore, Seadrill proceeded with legal action against Tullow in the Commercial Court of London. There were two issues before the court, firstly, if Tullow could rely on *force majeure*, and secondly, whether Tullow used reasonable endeavours to avoid or overcome the alleged *force majeure* events.[163] According to the contract, and more specifically, the *force majeure* clause, if a party were unable to perform their contractual obligations, the parties would not be held responsible if the non-performance was caused by the prescribed *force majeure* events.[164] Furthermore, the clause provided that both parties should use reasonable endeavours to overcome or avoid the alleged *force majeure* events. One of the *force majeure* events was a "drilling moratorium imposed by the government".[165]

The clear wording in the clause meant that the drilling moratorium imposed by the Ghanaian government was seen as a *force majeure* event by the court. However, the problem before the court was to ascertain if the *force majeure* event was the causation of the non-performance of the contractual obligations (being the drilling obligations) by Tullow. The court determined that two events caused Tullow to be unable to perform their contractual obligations. Firstly, the moratorium imposed by the Ghanaian government, and secondly, the refusal of the government to approve the Greater Jubilee Plan.[166] Therefore, the was a *force majeure* event, and the second was not.

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162 Williams 2020 https://www.clarionsolicitors.com/blog/force-majeure-events-and-clauses-not.
163 Williams 2020 https://www.clarionsolicitors.com/blog/force-majeure-events-and-clauses-not.
164 Kangisser and Larrington 2018 https://www.haynesboone.com/news/alerts/risky-business-english-court-rejects-force-majeure-claim-in-offshore-drilling-contract.
165 Kangisser and Larrington 2018 https://www.haynesboone.com/news/alerts/risky-business-english-court-rejects-force-majeure-claim-in-offshore-drilling-contract.
166 Williams 2018 https://www.clarionsolicitors.com/blog/force-majeure-events-and-clauses-not.

The case of *Intertradex v Leisieur*,[167] was considered by the court. This case confirmed that the *force majeure* event must be the sole causation of a party's failure to perform their obligations in terms of the contract.[168] The court stated that the proper interpretation of the contract would ultimately be the deciding factor, and therefore in the *Seadrill* case the *force majeure* event did not prevent Tullow from using the oil rig from October 2016.[169] However, the government's refusal to approve the Greater Jubilee Plan, along with Tullow not being willing to pay the increased daily hire rate was the causation of Tullow not being able to perform their contractual obligations.[170] The court decided that Tullow could not rely on the *force majeure* clause in the contract, and furthermore that Tullow had to pay the $254 million in terms of the rig hire contract.[171]

4.4.3 Examples of force majeure clauses in contracts

As established in paragraph 4.4.2 above, contractual parties have the freedom to include and exclude certain clauses when drafting their contract. However, when entering into a contract with companies such as Samsung and Ferrari, it is normally accepted that a "standard contract" already exists and that such a contract will be used. When scrutinising such contracts, it is evident that they include *force majeure* clauses, referred to below, to ultimately determine the scope of *force majeure* in international commercial contracts.

Samsung has the following *force majeure* clause in their terms and conditions of sale which is available on their website:

> 1. We will not be liable or responsible for any failure to perform, or for the delay in performance of, any of our obligations under the Contract that is caused by events outside our reasonable control ("*Force majeure* Event").

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167 *Intertradex SA v Lesieur Tourteraux* SARL: 1978.

168 Kangisser and Larrington 2018 https://www.haynesboone.com/news/alerts/risky-business-english-court-rejects-force-majeure-claim-in-offshore-drilling-contract.

169 Williams 2020 https://www.clarionsolicitors.com/blog/force-majeure-events-and-clauses-not.

170 Williams 2020 https://www.clarionsolicitors.com/blog/force-majeure-events-and-clauses-not.

171 Williams 2020 https://www.clarionsolicitors.com/blog/force-majeure-events-and-clauses-not.

2. A *Force majeure* Event includes any act, event, non-happening, omission or accident beyond our reasonable control and includes in particular (without limitation) the following:

   (a) strikes, lock-outs or other industrial action;

   (b) civil commotion, riot, invasion, terrorist attack or threat of terrorist attack, war (whether declared or not) or threat or preparation for war;

   (c) fire, explosion, storm, flood, earthquake, subsidence, epidemic or other natural disaster;

   (d) impossibility of the use of railways, shipping, aircraft, motor transport or other means of public or private transport;

   (e) impossibility of the use of public or private telecommunications networks

   (f) the acts, decrees, legislation, regulations or restrictions of any government;

   (g) failure of continuous electrical supply;

   (h) acts of sabotage;

   (i) pandemic or an epidemic.

3. Our performance under the Contract will be suspended for the period that the *Force majeure* Event continues, and we will have an extension of time for performance for the duration of that period. We will use our reasonable endeavours to bring the *Force majeure* Event to a close or to find a solution by which our obligations under the Contract may be performed despite the *Force majeure* Event. Should the Event of *Force majeure* continue to prevent or restrict us from fulfilling our obligations for more than 60 (sixty) days after on which the *Force majeure* Event first occurred, then you will be entitled to terminate the Contract with us by giving us not less than 30 (thirty) days written notice to that effect.[172]

Ferrari also has an electronic version of their general terms and conditions of sale available on their website, and in clause 11 of the aforementioned it mentions *force majeure*, which states the following:

11. *FORCE MAJEURE*

The Vendor shall not be liable for any delay or failure in performance caused by circumstances beyond its reasonable control.[173]

It is evident that there is a difference between the two *force majeure* clauses in the different terms and conditions of sale. One is drafted widely and the other narrowly.

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172 Samsung 2021 https://shop.samsung.com/za/terms-and-conditions%20.

173 Ferrari date unknown https://store.ferrari.com/en-us/help/legalarea/sale-terms.

At first sight, one would tend to favour the Samsung contract, as it elaborates on *force majeure* in more detail, defining *inter alia* the *force majeure* and listing potential *force majeure* events. Whereas the Ferrari contract merely provides a sentence to regulate this position. However, the *force majeure* events are not limited to any events and include circumstances beyond its reasonable control. Subsequently, the scope of *force majeure* events differs and is open for argument and interpretation. The latter will most likely include more events and be advantageous to contracting parties. This practical example showcases the importance of drafting the *force majeure* clause, and although a clause omits to include events such as a pandemic, it is not of definite consequence that COVID-19 could not trigger such a clause. This inclusion or exclusion can be open for interpretation, and alternative factors such as the requirements of *force majeure* and the facts of each case will most likely play an important role in determining the aforesaid.

4.5 Conclusion

The understanding of *force majeure* is essential when the performance of contractual obligations becomes impossible. *Force majeure* ultimately provides contractual parties with relief when parties fail to perform their contractual obligations. When parties include this clause into their contract, the clause must be well written, unambiguously, and that *force majeure* events are described in detail.

The term *force majeure* was first used in the French Civil Code of 1804. Although the principle was included in the French Code, it does not elaborate on which events are included as *force majeure* or "of a fortuitous occurrence". The principle received great recognition in the case of *Krell v Henry*, where the Court held that a contract is discharged due to an event beyond the control of the parties (King Edward VII being ill and unable to proceed with the coronation). Previous "viruses" and "pandemics" have not impacted the world on the same level as COVID-19 has (and continues to do). However, it is evident out of previous outcomes that *force majeure* matters are dealt with on a case-to-case basis and the outcome varies depending

on the facts of the case, the contract in itself and the drafting of the *force majeure* clause.

To successfully rely on *force majeure*, the event should meet the basic requirements to trigger the clause, and any additional requirements as set out in the contract. Therefore, the wording of the *force majeure* clause is of utmost importance, as the contract in itself is the primary source that would ultimately regulate the position. The *Seadrill v Tullow* case acts as an example of a poorly drafted clause and how costly this can be.[174]

When claiming *force majeure* there are a couple of possible outcomes for contractual parties. Normally either suspension of performance or termination of the contract is the consequence of triggering a *force majeure* clause, but certain contracts could encounter compensation or re-negotiation of provisions in the contract. If not specified in the contract, the performance in terms of the contract is suspended, or alternatively, the contract is terminated. There are difficulties to prove that the event qualifies as a *force majeure* event. Without precise wording of what events are included in the contract; the qualification of an event is open for interpretation. Suppose a party can prove that the event was unforeseeable at the time of conclusion of the contract, no reasonable steps could have been taken to avoid the event, and the non-performance is not because of a party's fault. In that case, one could argue that *force majeure* should be applied and offer relief to the contractual party.

The requirements to successfully invoke the *force majeure* clause in an international contract is similar to the South African position. Depending on the contract, parties have to meet the following requirements:

1. The party must comply with the requirements as set out in the contract;
2. The party should prove that the non-performance was unavoidable and caused by an unforeseen event; and

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174 Williams 2020 https://www.clarionsolicitors.com/blog/force-majeure-events-and-clauses-not.

3. The party should prove that no reasonable steps would have avoided the non-performance caused by the unforeseeable event.

When comparing the two *force majeure* clauses from Samsung and Ferrari, the Samsung clause described *force majeure* in detail, elaborating on what events qualify as *force majeure* events. The Ferrari clause merely states that the company will not be responsible for any "failure in performance caused by circumstances beyond its reasonable control". Once again, the burden of proof will be difficult, but should a party meet the "general requirements" of *force majeure* it could argue that *force majeure* should be invoked.

The world that we live in today did not expect to come to a complete standstill as it did in the early 2020's. COVID-19 has changed the world and impacted almost every single person. Thus far, this study has provided insight on the law of contract in South Africa and internationally. Furthermore, *force majeure* has been dealt with in detail in order for contractual parties to determine whether they can invoke such a clause. What remains is to conclude the findings of each chapter in order to determine under which circumstances a contractual party can invoke *force majeure* when claiming impossibility of performance during the COVID-19 pandemic. Chapter five follows and answers the aforementioned and ultimately assists contractual parties to determine if they can rely on the legal principle of *force majeure*.

Chapter 5: Conclusion

COVID-19 brought the world to a standstill, subsequently affecting local and international trade, which ultimately affected the performance of the contracts regulating such trades. The impact of COVID-19 has been enormous. This is due to the implementation of lockdowns by various countries, which subsequently led to the closing of national borders in an attempt to curb the spread of COVID-19. Such drastic measures have caused individuals and entities unable to proceed with their normal activities, resulting in non-performance of their contractual obligations in numerous cases.

As established throughout this study, *force majeure* is a contractual clause that essentially provides relief to contractual parties when an unforeseen event takes place which consequently results in the impossibility of contractual performances. Under normal circumstances, when a contractual party breaches its contract, for instance, failing to deliver the goods bought by the opposing party (not performing in terms of the contract), then such a party will be liable for the damages resulting from the breach. When such a breach occurs, the "innocent" party will be able to rely on remedies as provided for in the law of contract. However, when the contract contains a *force majeure* clause, it can provide relief to the non-performing party, which could excuse the contractual party's non-performance.

Considering the above and the global scale of COVID-19, contracts are being interpreted like never before for parties to successfully rely on *force majeure*, which essentially provide them with contractual relief. With this being said, the scope and limitations of *force majeure* (which includes whether an event qualifies as a *force majeure* event as well as the outcomes of invoking such a clause) are being tested in order to determine whether COVID-19 qualifies as a *force majeure* event or not.

The research question which this study aimed to answer was to establish the circumstances under which a party to an international commercial contract can be able to invoke *force majeure* when claiming impossibility of performance as a result of the COVID-19 pandemic. Furthermore, the aim of this study was to establish

whether COVID-19 can indeed qualify as *force majeure*, and what the limits of *force majeure* are, which includes, when *force majeure* can be relied on and what the outcome of triggering such a clause entail. In achieving the aforementioned, the objectives of this study were divided into three parts. Firstly, this study scrutinises the South African law of contract, which essentially aimed to provide the reader with background into the law of contract. Furthermore, the South African law of contract is also relevant as parties to international commercial contracts are free to choose that a specific law ought to govern their contract, such as the South African law. If contractual parties fail to choose (alternatively agree on) a governing law, the international law of contract becomes applicable. This led to the second part of the study, the international law of contract, which consisted of a study of the international laws and instruments to essentially determine the international *force majeure* position. Thirdly, a comprehensive study into the legal principle of *force majeure* followed, which essentially enables the contractual party to answer under which circumstances he/she/it will be able to invoke *force majeure* when claiming impossibility of performance during the COVID-19 pandemic.

As established in chapter two, there are certain requirements for a valid and legally binding contract. Further to these requirements, there should be an offer by the offeror and acceptance by the offeree. The offer should be clear, and the acceptance gives rise to the formation of the contract. Contractual parties do not always have the freedom to draft their own contracts and include and exclude specific clauses to their liking. Clauses in contracts play a fundamental role in regulating contractual outcomes. An example of such a clause is *force majeure*, where a party cannot perform their contractual obligations due to an event preventing them from doing so. Unfortunately, people tend to enter into contracts without scrutinising the contents of the contract beforehand. This often leads to the exclusion of important clauses such as *force majeure*, which could cause a predicament when an unforeseen event results in non-performance of contractual obligations.

When a contractual party is in breach, it is important to determine what type of breach occurred, as each breach provides specific relief and remedies to the contractual party. As stated in chapter two, relief does not only include the remedies in terms of the law of contract, as the contract in itself also provides relief and security to parties. It was established and confirmed throughout chapter two that non-performance due to the restrictions imposed during the COVID-19 pandemic qualify as a breach of contract. As a result, the remedies in terms of the law of contract will be at the innocent party's disposal and the party will be able to invoke such relief and institute action against the non-performing party. Unless the non-performing party can rely on *force majeure* to excuse its non-performance, it has to establish whether the contract includes a *force majeure* clause, and if so, whether COVID-19 qualifies as a *force majeure* event or not. If this cannot be proven, then the non-performing party will be liable for the damages caused by the breach.

In the event of a contract not containing a *force majeure* clause, the non-performing party may be able to rely on the common law should it be able to prove certain requirements. In terms of the South African common law, the principle of supervening impossibility could apply to the contract. If a party is able to prove that the contract was valid and that the contractual obligations became objectively impossible after the conclusion of the contract, without the said party causing the unavoidable and unforeseen event (which caused the non-performance), then the party can attempt to rely on the doctrine of supervening impossibility. If succeeding, the contractual obligations will be extinguished.

Following chapter two was a study into the international law of contract. When dealing with international commercial contracts, parties can choose that a certain law regulates the contract. In the event of contractual parties failing to disclose the aforementioned, the international law of contract becomes applicable. There are a few focal points that are instrumental when a breach of contract in an international contract occurs. Firstly, the parties should clearly understand which law is to be applied to the contract. Failure to do so leads to the application of the private international law. The private international law or "the conflict of laws" assists

individuals and/or entities in determining which law should be applied to the contract and what jurisdiction is applicable to the contract. Once the aforementioned has been determined, parties can proceed to the next step, which is using the international instruments in dealing with their breach of contract.

With the exponential growth of the international trade over recent decades, the need for uniformity and rules regulating such trades has been a global necessity. International organs, such as the UN, have been developing rules since the early 1960s, and due to the success and failures over the years, they were able to draft the CISG. The CISG aims to establish a uniform law to govern international sale contracts, by providing contracting parties with a recognised set of rules that regulate the position of international sale contracts. It further aims to guide parties with the formation of a contract, and the rights and obligations of the contractual parties in such a contract. However, the CISG is only applicable to contracts where the contracting parties are from different signatory countries and in instances where the private international law refers to the application of the CISG. The CISG is recognised worldwide, and its principles could also be instructive and useful to parties where the CISG is not governing the contract, as parties are free to negotiate their own terms (if the contract allows). In addition, they can refer to the CISG for guidance even though their countries are not signatories to the CISG.

The CISG specifically refers to the impossibility of performance in articles 79 and 80. Although no reference is made to the term "*force majeure*", article 79 provides for a clear framework when dealing with impossibility of performance. In essence, if a party can prove that an impediment caused its failure to perform, the impediment was beyond their control, and the impediment was unforeseeable and unavoidable at the conclusion of the contract, then such a party will be able to rely on the CISG's relief. Although the requirements and the consequences of invoking article 79 are clearly set out in the CISG, the word "impediment" is not clearly defined. Parties have to prove that the event causing their non-performance was an impediment. Parties can refer to the CISG's Advisory Council, which describes an "impediment". In short, the Advisory Council states that an impediment must be

the sole reason for the failure to perform their contractual obligations and there should be a causal link between the impediment and the failure to perform the contractual obligation. Parties must prove that COVID-19 qualifies as an impediment should they attempt to rely on article 79 of the CISG.

The UNIDROIT principles provides a non-binding framework for the drafting of contracts. Although these principles are non-binding, they are internationally recognised and referred to by international instruments such as the CISG. The UNIDROIT principles include a model *force majeure* clause, which is very similar to the CISG's article 79. This model clause also refers to an impediment, which unfortunately is not described in much detail. This opens a door for a wide interpretation of what qualifies as an impediment and essentially *force majeure*. The Incoterms, which regulates and governs most international commercial contracts, fails to mention *force majeure*. However, these rules clearly states that when a party fails to perform, the contract as a whole can become null and void (which has the effect that the "guilty" party will be held liable for damages occurring out of this breach). The aforementioned confirms the importance of having a *force majeure* clause in an international commercial contract, as some breaches could be the consequence of an unforeseen event rendering performance impossible. Without the inclusion of such a clause in the contract, a party will be liable for damages incurred out of its breach.

Chapters two and three provided an introduction to the South African law of contract and international law of contract. The aforementioned chapters set out how contracts are concluded and how they can be drafted in general by including specific clauses such as *force majeure*. Chapter four provided insight into the legal principle of *force majeure* from a South African and international point of view. As stated above, *force majeure* is a contractual clause that aims to excuse the contractual party from their liabilities and/or obligations when an unforeseeable and unavoidable event prevents the party from fulfilling its contractual obligations.

Under South African law, the contractual party wishing to invoke the *force majeure* clause should first consider the contract, as the contract could give an indication of what procedure ought to be followed to successfully trigger such a clause (if included). Due to the fact that in most cases these clauses are drafted vaguely and without much detail, parties are required to prove that certain requirements were met in order to rely on the relief of *force majeure*. These general requirements include the following: the impossibility to perform must be objectively impossible, absolute as opposed to probable or relative and unavoidable. In addition, the mere fact that the disaster or event was foreseeable does not necessarily mean that it was foreseeable or avoidable by a reasonable person. Although a party has to prove that the above-mentioned criteria were met, the party cannot disregard the contract, specifically the procedure outlined in the contract (should a contract contain additional requirements).

When comparing the South African *force majeure* position with the international *force majeure* position, specifically the CISG and the UNIDROIT principles, it is clear that the "South African requirements" are similar to the "international requirements". It is further evident that there are certain "recognised requirements" for invoking *force majeure* in a contract, albeit a South African or international contract. Firstly, the contract must contain a *force majeure* clause. Without including such a clause, a party will not be able to rely on the relief *force majeure* brings. The only alternative relief available to the party when the contract does not contain a *force majeure* clause and an unforeseen event causes non-performance will be the common law (if applicable). For instance, the doctrine of supervening impossibility in terms of the South African common law, and alternative clauses such as the doctrine of frustration, which could essentially discharge the contract (also depending on whether such as clause is included in the contract). Should the contract contain a *force majeure* clause, the party can thereafter establish whether the event qualifies as a *force majeure* event in terms of the wording of the clause. This is of significant importance because even if an event is regarded as a "typical *force majeure* event", if the event is specifically excluded in the contract, then a

party will not be able to rely on *force majeure*. Furthermore, a contract can be limited to only certain *force majeure* events, resulting in the party not being able to rely on *force majeure*. In determining if the event is included as a *force majeure* event and if the clause is drafted widely or narrowly, parties can refer to the clause itself.

In the event of a party proving that the aforementioned requirements are met, the party should further demonstrate that the event was not foreseeable at the time of concluding the contract. Parties have to prove that a reasonable person would not have been able to foresee this event, and no reasonable steps would have reduced its impact. This is important, as parties could use *force majeure* as an excuse for not performing their contractual performances.

Should a party successfully invoke the *force majeure* clause, the outcome could vary depending on the contract. Suspension of contractual obligations or termination of the contract is generally the outcome of successfully invoking *force majeure*. However, depending on the contract, alternative outcomes could occur, such as the claiming of financial compensation and re-negotiations of the contract as a whole. It should be noted that these are not usual outcomes of *force majeure*, as generally, the rights and obligations of the party/parties will be suspended for the duration of the *force majeure* event.

The scope of this study had a specific goal to establish the circumstances under which a party to a contract can be able to invoke *force majeure* when claiming impossibility of performance during the COVID-19 pandemic. The answer to the research question is that for a party to rely on *force majeure* the starting point is to determine whether the contract includes a *force majeure* clause, and thereafter interpret the clause and apply it to the factual circumstances of the case. The clause in itself will set out the requirements to successfully invoke *force majeure*. In the event of the clause being drafted vaguely with little detail to regulate this position, a party should first ascertain what events can be included as *force majeure*. If the event can qualify as a *force majeure* event, the party should be able to further

prove that the event was unavoidable and not the fault of any of the parties, and also that the event was not foreseeable at the time of concluding the contract.

In conclusion, the application and effect of the *force majeure* clause depends on the wording of the clause. If the clause includes a pandemic or government lockdown, then a party could successfully rely on the *force majeure* clause during COVID-19. Parties should be aware that *force majeure* is not regarded as a "get out of jail free card". The individual or entity relying on *force majeure* must prove that they adhered to the contractual requirements of invoking *force majeure* (if any) and the "general requirements" that were dealt with in chapter four above.

Prior to 2020, COVID-19 was definitely not foreseeable, subsequently leaving parties unable to perform their contractual obligations. If the clause is not limited to only specific events, there is definitely a case to be made that COVID-19 could qualify as a *force majeure* event. However, parties concluding contracts after the declaration of COVID-19 as a global pandemic will most probably find it difficult to rely on *force majeure*, as a party will not be able to prove the requirement of an event being unforeseeable. Therefore, the timing, interpretation, and the clause in itself will determine an event qualifiable nature. The contents of the contract should be scrutinised to determine the procedure to be followed in invoking the clause and the outcome of such invocation will entail. Should the clause fail to disclose such specifics, a party should notify the opposing party of the inability to perform due to the event that qualifies as a *force majeure* event in terms of the contract. The outcomes will also depend on the contract, which normally include suspension of performance, or termination of the contract. Ultimately, this study proves that contractual parties would be able to invoke *force majeure* when claiming impossibility of performance during the COVID-19 pandemic.

When drafting a contract and including a *force majeure* clause, parties are recommended to define the *force majeure* event. Parties could also focus on the effects of the "*force majeure*" event, as the effect may be easier to prove and result in a more descriptive definition for *force majeure* (such as governmental restrictions

due to a global pandemic). Parties should specifically list the events that will qualify, as including phrases such as "similar events" will only open the door for further interpretations. Parties are also recommended to specify the procedure to be followed when invoking *force majeure*, such as "notifying the opposing party within ten business days of the non-performance due to the *force majeure* event" and stipulating that the opposing party has "ten business days to accept or reject the *force majeure* claim". Such details in the clause will regulate these events more precisely and ensure that parties have guidelines to follow when an unforeseen event causes contractual non-performance.

COVID-19 brought testing times to humankind and the law of contract. However, the law of contract provides the non-performing party with a *bona fide* relief in *force majeure*, as opposed to the liability of damages or specific performances (to name a few) occurring out of their breach of contract. The importance of this study is evident to COVID-19 but also to future pandemics, epidemics, disasters and qualifiable *force majeure* events. A simple, yet effective contractual clause, can provide much needed relief to a party in breach of a contract due to an unforeseeable event.

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