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# Importance of the doctrines of frustration and force majeure in light of COVID-19

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*The ongoing COVID-19 pandemic, and the measures to contain its spread, significantly impact contractual relationships in many ways. Unforeseen and uncontrollable events could be legitimate defences for being unable to execute obligations undertaken during better times. This article discusses two such defences in detail — frustration and force majeure — as applicable in Australia in the context of COVID-19. This article contends that while frustration and force majeure provide two possible defences for non-performance, the outcome will vary based on the circumstances of each case. Whether it is the application of the principles of frustration or force majeure, it is important to consider the commercial efficacy when applying these principles to contractual parties.*

## I Introduction

The ongoing COVID-19 pandemic, and the measures to contain its spread, significantly impact contractual relationships in many ways. Australia's federal, state and territory governments have imposed a stringent set of restrictions to prevent the transmission of COVID-19.[1] Given these restrictions, parties to commercial contracts find themselves in situations where the performance of those contracts becomes impossible or substantially onerous. In certain circumstances, unforeseen and uncontrollable events could be legitimate defences for being unable to execute obligations undertaken during better times. In the midst of this global pandemic, this article undertakes an in-depth analysis of the legal defences to non-performance of contractual obligations. The two doctrines this article addresses are *frustration* and *force majeure*. Although Australia previously faced global influenza pandemics in 1918, 1957, 1968 and 2009, there are no known relevant cases

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1 Eg, Australian national response measures included:
- (a) restricting all non-essential businesses from opening;
- (b) requiring all Australians to stay at home unless the nature of their work prevents working from home;
- (c) shopping only for essentials such as groceries and pharmaceuticals;
- (d) restricting personal exercise in the neighbourhood to a maximum of two people;
- (e) restricting outside home visits to attending medical appointments or for compassionate reasons;
- (f) social distancing such as the 'two-person rule' and the '4-square metre rule'; and
- (g) imposing a travel ban for all Australians and mandatory hotel quarantine for 14 days for all returning Australians.

'Coronavirus (COVID-19) Health Alert', *Department of Health (Cth)* (Web Page, 6 July 2021) <https://www.health.gov.au/news/health-alerts/novel-coronavirus-2019-ncov-health-alert>.

that exemplify how the impact of those pandemics were treated by the Australian courts in the context of the frustration of contract. Similarly, cases that apply force majeure clauses to events pertaining to pandemics are rare. However, although a significant world event may impact many contracts and lead to a series of similar decisions, each case has to be decided on its own merits, and a previous decision involving a similar event may have little or no impact on that process.[2]

This article discusses the instances in which *frustration* and *force majeure* can be invoked during the current pandemic. While the focus is on the Australian legal principles, the relevant legal principles in the UK and the legal developments witnessed in common law jurisdictions will be used as a guide to arrive at a conclusion as to how *frustration* and *force majeure* may apply in the context of the COVID-19 pandemic.

## II Doctrine of frustration

The doctrine of frustration allows a party to be excused from performing an obligation in a contract 'if an event occurs that so fundamentally affects or prevents the performance of the contract that it would be unjust to require the parties to perform their obligations'.[3] In *Paradine v Jane*,[4] the need to perform contractual obligations was upheld even though the performance had subsequently become onerous or impossible due to intervening circumstances.[5] The impossibility of performance was developed as a relaxation of the principle of 'absolute contract' as required in the case of *Paradine v Jane*.[6] Originally, the doctrine of frustration was conceptualised in English law as the impossibility of performance.[7] However, rather than adopting the principle of impossibility of performance, the case of *Taylor v Caldwell* ('*Taylor*')[8] developed the doctrine of frustration based on the theory of implied condition.[9] Blackburn J construed the doctrine of frustration by recognising that where the performance of the contractual obligations are conditional upon the continued existence of a given person or thing, there would be a condition implied in the contract to excuse the performance when performance becomes impossible due to expiration of the person or thing.[10] In the 19th century,[11] this authority was rarely considered, and courts were

2 See JW Carter, LexisNexis, *Carter on Contract Law in Australia* (online at 2012) [39-001]–[ 39-180] ('The Doctrine of Frustration').

3 Andrew Godwin, 'The Contractual Impact of COVID-19 on Corporate and Financial Transactions' (2020) 48(2) *Australian Business Law Review* 116, 122.

4 (1647) Aleyn 26; 82 ER 897.

5 Fengming Liu, 'The Doctrine of Frustration: An Overview of English Law' (1988) 19(2) *Journal of Maritime Law and Commerce* 261, 263.

6 Ibid.

7 *Taylor v Caldwell* (1863) 3 B & S 826; 122 ER 309 ('*Taylor*').

8 Ibid.

9 GHL Fridman, 'The Theory and Practice of Frustration' (1977) 25(2) *Chitty's Law Journal* 37; Catharine MacMillan, 'English Contract Law and the Great War: The Development of a Doctrine of Frustration' (2014) 2(2) *Comparative Legal History* 278.

10 MacMillan (n 9) 280.

11 *Appleby v Myers* (1867) LR 2 CP 651; *Boast v Firth* (1868) LR 4 CP 1.

sceptical of implying its conditions to resolve cases.[12] However, this case was later used to extend impossibility beyond the physical to include those where the contract's commercial viability had been lost.[13] The first creative use of the doctrine can be discerned from *Krell v Henry*.[14] Darling J extended the use of the implied condition in *Taylor* beyond impossibility arising from physical destruction[15] to encompass the failure of the contract's commercial purpose by cancellation of certain events.[16] While this extension attracted criticism,[17] it was accepted by the Court of Appeal in the same case[18] and applied in later coronation cases.[19]

At the time of delivery, Blackburn J had not anticipated the influence the case would bear on many of the common law developments that took place regarding the doctrine in the First World War era.[20] The impossibility of performance aspect was given further recognition because of the Great War waged by British forces from 1914 to 1918.[21] At the time, the war's length and intensity were unanticipated, resulting in significant losses for the country.[22] Although the government's mantra was initially 'business as usual', this attitude changed considerably during the war and post-war periods, when the judiciary relaxed the sanctity of contract to allow contractual obligations to be discharged due to impossibilities individuals and businesses faced in fulfilling their agreements under the contracts.

Lord Radcliffe in *Davis Contractors Ltd v Fareham Urban District Council* ('*Davis Contractors*') expressed the modern test for determining when a contract is frustrated as follows:

> [F]rustration occurs whenever the law recognises that, without default of either party, a contractual obligation has become incapable of being performed because the circumstances in which performance is called for render it a thing radically different from that which was undertaken by the contract. Non-haec in foedera veni. It was not this that I promised to do.[23]

This English formulation was adopted in Australia in the case of *Codelfa*

12 See, eg, *Carstairs v Taylor* (1871) LR 6 Exch 217; *Duncan v Koster* (1872) LR 4 PC 171; *Jacobs, Marcus & Co v Crédit Lyonnais* (1884) 12 QBD 589.

13 See also *Jackson v Union Marine Insurance Co Ltd* (1874) LR 10 CP 125, affirming *Jackson v Union Marine Insurance Co Ltd* (1873) LR 8 CP 572.

14 (1902) 18 TLR 823.

15 Few cases of physical destruction arose, although see *Redmond v Dainton* [1920] 2 KB 256.

16 Liu (n 5) 264.

17 'Current Topics' (1902) 46(42) *Solicitors' Journal and Reporter* 709, 710.

18 *Krell v Henry* [1903] 2 KB 740 ('*Krell* (CA)').

19 *Blakely v Muller* [1903] 2 KB 760; *Herne Bay Steam Boat Co v Hutton* [1903] 2 KB 683 ('*Herne Bay*'); *Civil Service Co-Operative Society Ltd v General Steam Navigation Co* [1903] 2 KB 756; *Chandler v Webster* [1904] 1 KB 493.

20 Paxton Blair, 'Breach of Contract due to War' (1920) 20(4) *Columbia Law Review* 413; E Merrick Dodd, 'Impossibility of Performance of Contracts due to War-Time Regulations' (1919) 32(7) *Harvard Law Review* 789; MacMillan (n 9); Howard Hunter, 'From Coronations to Sand Bans: Frustration and Force Majeure in the 21st Century' (2011) 25(4) *Commercial Law Quarterly* 6.

21 MacMillan (n 9).

22 Ibid.

23 [1956] AC 696, 729 ('*Davis Contractors*').

*Construction Pty Ltd v State Rail Authority (NSW)* ('*Codelfa*').[24] The High Court of Australia approved the test in *Codelfa*, which followed the same formula as *Davis Contractors* and settled that 'change of obligation' as the basis of the doctrine of frustration in Australia.[25] The doctrine of frustration is one way in which parties to a contract are excused from further contractual obligations. However, it is not the only principle that recognises the possibility of discharge of contractual obligations. The doctrine of impossibility and supervening illegality are two such concepts, which would result in parties being discharged from contractual obligations.[26] It is important to note that instances in which the doctrine of frustration were applied also include both illegality[27] and impossibility by way of death,[28] destruction of subject matter[29] and cancellation of certain events.[30] However, the doctrine of frustration is no longer limited to situations where the performance of the contract is physically impossible. The doctrine of frustration applies to situations 'where performance is ... fully possible, but the exchange has become undesirable'.[31]

In view of the above discussion of the doctrine of frustration, the following sections will discuss how the impact of the COVID-19 pandemic on contractual performance may be addressed under illegality and impossibility of performance, frustration of purpose, and impracticability and onerous nature of performance.

## A Impossibility of performance due to supervening illegality

As of 6 July 2021, there were 185,354,861 coronavirus cases worldwide, and COVID-19 had claimed the lives of 4,008,613 people.[32] In Australia, as of 6 July 2021, there were 30,832 confirmed COVID-19 cases with 910 deaths.[33] The COVID-19 pandemic had resulted in multibillion-dollar industries being bankrupt, countless jobs lost, and many economies collapsed. There is a general strand of actions that resulted in response to the COVID-19 pandemic. First, the pandemic led to social distancing, which shut down financial markets, corporate offices, businesses and events.[34] Second, fear and uncertainty resulted in consumers, investors and international trade partners

24 (1982) 149 CLR 337 ('*Codelfa*').

25 Jane P Swanton, 'Discharge of Contracts by Frustration: Codelfa Construction Pty Ltd v State Rail Authority of New South Wales' (1983) 57(4) *Australian Law Journal* 201, 207.

26 Liu (n 5) 272.

27 *Ertel Bieber & Co v Rio Tinto Co Ltd* [1918] AC 260.

28 *Robinson v Davison* (1871) LR 6 Exch 269.

29 *Taylor* (n 7).

30 *Krell* (CA) (n 18).

31 Arthur Anderson, 'Frustration of Contract: A Rejected Doctrine' (1953) 3(1) *DePaul Law Review* 1, 4.

32 'COVID-19 Coronavirus Pandemic', *Worldometer* (Web Page, 6 July 2021) <https://www.worldometers.info/coronavirus/>.

33 'Coronavirus (COVID-19) Current Situation and Case Numbers', *Department of Health (Cth)* (Web Page, 6 July 2021) <https://www.health.gov.au/news/health-alerts/novel-coronavirus-2019-ncov-health-alert/coronavirus-covid-19-current-situation-and-case-numbers>.

34 Peterson K Ozili and Thankom Arun, 'Spillover of COVID-19: Impact on the Global Economy' (March 2020) *SSRN Electronic Journal* <https://ssrn.com/abstract=3562570>.

cutting back consumption and investment.[35] Third, the number of days spent under lockdown, international travel restrictions, and monetary and fiscal policy decisions dramatically and negatively affected economic activities.

While it is correctly identified by Michael Douglas and John Eldridge, the COVID-19 outbreak is unlikely to cause a surge in cases in which the subject matter of the contract is destroyed. The government-imposed restrictions have the potential to provoke a frustration of contracts based on impossibility of performance due to supervening illegality. For example, the Victorian governmental restrictions applied from 13 September 2020 provide that entertainment and cultural venues in metropolitan Melbourne be closed.[36] Such restrictions would make it impossible for the events scheduled to be performed as it could be illegal to conduct such events in view of the governmental restrictions.[37] Within this context, it is safe to assume that a party's obligations cannot be performed due to supervening illegality frustration through impossibility. It is hard to envisage any court ruling that there has not been frustration due to impossibility.[38]

## B Frustration of purpose

The doctrine of frustration of purpose is different from frustration by impossibility. The former is where the performance of the contract is still possible, but supervening events make the contract's performance of no value to the recipient.[39] In *Krell v Henry* ('*Krell* (CA)'),[40] a flat was advertised for rent that had a view of the procession route for King Edward VII's coronation. Due to the King's illness, however, the procession was cancelled and the party that had agreed to rent the flat filed court proceedings for the recovery of the deposit paid and refused to pay the rest of the owed money. Vaughan Williams LJ justified the extension of the doctrine in *Taylor*, explaining the discharge of the contract because the state of things that constituted the basis of the contract did not eventuate.[41] This can be differentiated from impossibility because the renting out of the flat was still possible — the subject matter of the contract was not extinguished — but the basis of the state

35 Ibid.

36 'Entertainment and Culture', *Victorian Government* (Web Page, 25 June 2021) <https://www.coronavirus.vic.gov.au/entertainment-and-culture>. These include galleries, museums, national institutions and historic sites, zoos, wildlife parks, petting zoos, aquariums and animal farms, outdoor amusement parks and outdoor arcades, indoor cinemas and drive-in cinemas, and concert venues, theatres and auditoriums.

37 Nicole Lim, 'COVID-19: Implications for Contracts under Singapore and English Law' (2020) *Singapore Comparative Law Review* 119, 123.

38 Andrew A Schwartz, 'Contracts and COVID-19' (2020) 73 *Stanford Law Review Online* 48, 52. Schwartz discusses the rule of impossibility under US law, confirms such position when explaining the resulting impossibility of performance of a contract to babysit due to physical dangers involved with entering someone's house or due to a government restriction restricting movement.

39 Rodrigo Andrés Momberg Uribe, 'The Effect of a Change of Circumstances on the Binding Force of Contracts: Comparative Perspectives' (PhD Thesis, Utrecht University, 2011) 147.

40 *Krell* (CA) (n 18).

41 Ibid 754.

of things was no longer active.[42] It is worth noting that English law applied this doctrine in a strict sense to preserve the sanctity of contracts.[43]

Another coronation case, *Herne Bay Steam Boat Co v Hutton* ('*Herne Bay*'),[44] concerned a naval review, which was also cancelled due to the King's illness. Contrary to *Krell* (CA), however, the contract was not discharged for two reasons — first, because the venture was the defendant's own, the risk being borne by him alone; and second, the naval review was not the sole basis of the contract; therefore, the subject matter was not completely destroyed.[45] The contradiction between *Krell* (CA) and *Herne Bay* has attracted the notice of commentators. Some suggested the former was a private affair while the latter was more public; therefore, the Court acted to uphold the sanctity of contract.[46] Others suggested that equities and individual circumstances also played a part, such as the connection between the thing hired and the event, the advertisement in *Krell* (CA) and the owners' expenses.[47] A comparison of the two cases supports conditions for the application of the doctrine of frustration of purpose, which are that the non-existence or occurrence of a state of things should frustrate the purpose for both parties concerned, and if it is only partially frustrated, the contract will not be discharged.[48]

Similar to impracticability, the doctrine of frustration of purpose has thus been considered under English law as a source of uncertainty and danger for the principle of sanctity of contracts. Therefore, 'English cases provide no illustration of discharge by "pure" frustration of purpose since the coronation cases'.[49] Australian cases distinguish between frustration of purpose and disappointment, finding that the frustration of purpose can be deduced,[50] because the expected performance is not realised in full. In *Scanlan's New Neon Ltd v Tooheys Ltd*[51] pursuant to the plaintiff's purchase of neon signs, the government prohibited the use of illuminated signs for security reasons during the Second World War. The hirers were seen to have assumed the risk that using the signs may be affected, but the Court found that the purpose was not frustrated.[52]

Douglas and Eldridge note that in the COVID-19 pandemic context, the case of *Krell v Henry* was a decision that 'will doubtless attract renewed attention as the community grapples with an unprecedented spate of event cancellations'.[53] This provides some optimism that COVID-19 could come

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42 See John D Wladis, 'Common Law and Uncommon Events: The Development of the Doctrine of Impossibility of Performance in English Contract Law' (1987) 75(5) *Georgetown Law Journal* 1575, 1613.

43 Guenter Treitel, *Frustration and Force Majeure* (Sweet & Maxwell, 2nd ed, 2004) 329.

44 *Herne Bay* (n 19).

45 Ibid 683.

46 See R Brownsword, 'Henry's Lost Spectacle and Hutton's Lost Speculation: A Classic Riddle Solved? (1985) 129 *Solicitors' Journal* 860.

47 Wladis (n 42) 1620.

48 Ibid 1608.

49 Treitel (n 43).

50 *Davis Contractors* (n 23) 715.

51 (1943) 67 CLR 169.

52 See also *Consolidated Neon (Phillips System) Pty Ltd v Tooheys Ltd* (1942) 42 SR (NSW) 152; *Claude Neon Ltd v Hardie* [1970] Qd R 93.

53 Michael Douglas and John Eldridge, 'Coronavirus and the Law of Obligations' [2020] (3)

within this heading. Due to the global pandemic, many parties to contracts find themselves without states of things contemplated when they entered into the contracts. This favours parties relying on the doctrine of frustration of purpose because the virus brought the world to a standstill and it would be unrealistic there may be agreements untouched under these conditions. Referring to the case of *Li Ching Wing v Xuan Yi Xiong*,[54] a case dealing with termination of a residential tenancy agreement due to the impact of the SARS pandemic, Godwin identifies that the court would look into the specific facts of each case including the 'duration of the supervening event, the subsequent measures taken to remove the dangers that the virus posed, and the role of the World Health Organization'.[55] In this case, the Court determined that an isolation order to evacuate the building for 10 days was relatively insignificant when compared to the 2-year term of the tenancy contract.[56] Thus, the claims of the frustration of purpose due to the impact of the COVID-19 pandemic would have to be considered in the context of the specific fact of the given case and a comparison between what the parties contemplated at the time of entering into the contract and the change effectuated by the changing circumstances.

### C Impracticability and onerousness

In *Davis Contractors*, the House of Lords rejected the discharge of a contract due to onerousness.[57] The House of Lords stated that frustration should be solely based on the terms of the contract and the surrounding circumstances, not on assumptions of parties' intentions and the judgment of the reasonable man under those conditions.[58] It was contended that excessive onerousness may be considered in English law when it is viewed as a whole with other situations that may excuse non-performance. In that sense, the performance is radically different to what was anticipated: 'it would not be an abuse of language to say that the task contemplated under the original contract had

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*UNSW Law Journal Forum* 1, 4.

54 [2004] 1 HKLRD 754.

55 Godwin (n 3) 124.

56 Ibid 123.

57 *Davis Contractors* (n 23) 697 (Viscount Simonds), thereby holding that the contract had not been discharged because

> [the fact that], without the fault of either party, there [had] been an unexpected turn of events which [rendered] the contract more onerous than [had been] contemplated ... [was] not a ground for relieving [the contractors] of the obligation [which they had] undertaken ...

58 Ibid 720, 721 (Lord Reid):

> It appears to me that frustration depends, at least in most cases, not on adding any implied term but on the true construction of the terms which are in the contract, read in the light of the nature of the contract and of the relevant surrounding circumstances when the contract was made ...
>
> ...
>
> On this view, there is no need to consider what the parties thought, or how they or reasonable men in their shoes would have dealt with the new situation if they had foreseen it. The question is whether the contract which they did make is, on its true construction, wide enough to apply to the new situation: if it is not, then it is at an end.

become an impossible one to perform'.[59]

Some opine that the decision in *Codelfa* went beyond what the principles under *Davis Contractors* would consider as an event of frustration.[60] However, despite the fact that *Codelfa* considered a frustrating event as one that did not cause the performance impossible or illegal, but caused delay and greater expense to the performance, the case did not indicate a shift in the judiciary's attitude towards the treatment of frustrating events. As Carter points out,[61] despite the decision in *Codelfa*, deterioration of the domestic or international economy does not typically raise serious issues of frustration. The scope of events that may be considered as frustrating, therefore, remains narrow. Thus, the doctrine of frustration in Australia 'embraces "legal" impossibility and "commercial" impossibility; but ... it is not enlivened by "commercial impracticality"'.[62]

While the long-term impact of the COVID-19 pandemic is yet to be known, the experience of different countries globally, and specifically the Australian experience, suggests that irrespective of the time required to eradicate the disease or develop a vaccine or other cure, the lockdowns, travel bans and similar measures taken by the governments to stop the spread of the disease are temporary in nature. In such a context, it cannot be argued that the effects of the COVID-19 pandemic would constitute an event of the frustration of the contract.

However, it must be noted that the *Business Impacts of COVID-19 Survey* (July–August), released on 27 August 2020, indicates that more than a third of businesses (35%) reported they expected it to be complicated or challenging to meet financial commitments over the following 3 months.[63] It was further noted that the household consumption decreased by 12.1% in the June quarter constituting the largest quarterly fall in household consumption recorded in the National Accounts.[64] Douglas and Eldridge argue that:

> Many in the business community will also be driven to re-examine authorities which suggest that the doctrine may be engaged where changes to the commercial practicability of the contract would render performance of the contract radically different from that agreed.[65]

The question posed is whether the preservation of the sanctity of contract is worth forcing parties to fulfil their obligations in a post-pandemic world.[66] On

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59 Ibid 709.

60 'Force Majeure under Common Law', *Ashurst* (Web Page, 17 March 2020) <https://www.ashurst.com/en/news-and-insights/legal-updates/quickguide---force-majeure-under-common-law/>.

61 JW Carter, 'An Introduction to Frustration and Force Majeure' (2011) 25(4) *Commercial Law Quarterly* 3.

62 Ibid.

63 'Business Indicators, Business Impacts of COVID-19, August 2020', *Australian Bureau of Statistics* (Web Page, 27 August 2020) <https://www.abs.gov.au/statistics/economy/business-indicators/business-conditions-and-sentiments/aug-2020>.

64 'Insights into Household Consumption', *Australian Bureau of Statistics* (Web Page, 2 September 2020) <https://www.abs.gov.au/articles/insights-household-consumption>.

65 Douglas and Eldridge (n 53) 3.

66 JJ Gow, 'Some Observations on Frustration' (1954) 3(2) *International and Comparative Law Quarterly* 291. Gow discusses the importance attached to the sanctity of contract in

a policy level, such a practice would not serve the ends of justice.[67] If the law's aim is to regulate society's behaviour, it must operate from a seat where the realities of society are seen and accepted. In view of the doctrine of hardship adopted in civil jurisdictions, which allows a party to request the court to modify or terminate the contract, it is argued that excessive onerousness should be considered as a factor which discharges contractual obligations in view of the impact of the COVID-19 pandemic. If the common law cannot be adopted to accommodate the challenges of applying the doctrine of frustration in the context of the COVID-19 pandemic, the recourse would need to be made for legislative attempts to provide fair and equitable outcomes. The enactment of *COVID-19 (Temporary Measures) Act 2020* in Singapore may provide some guidance in how such legislation could provide some relief for contracting parties who are unable to fulfil obligations due to the pandemic.[68]

## D Limitations and the consequences of frustration

There are three limitations on the doctrine of frustration. First, the parties must not have provided for the event of frustration in the contract. Second, the event must not have occurred due to the fault of either party. Finally, the frustrating event must not have been an event that could be foreseen at the time of entering into the contract.[69] The first limitation will be discussed in detail in the second part of this article when discussing the force majeure clauses. The application of the second limitation would limit impact in the context of the COVID-19 pandemic as the pandemic itself, and the resulting limitations and restrictions, could be seen as a deliberate act of one party. However, the third limitation would be necessary in the context of the pandemic as a party attempting to claim the doctrine of frustration would be faced with the difficulty of establishing that the pandemic was not an event reasonable to be foreseen by either party.

Douglas and Eldridge note that the formulation of the doctrine of frustration in the case of *Davis Contractors*

> omits an aspect of the doctrine which, while controversial, is often cited as one of

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English law and how it became a sacrosanct concept in the 19th century through the adaptation of subjectivism.

67 Ibid. It is important to note the dicta in *British Movietonews Ltd v London and District Cinemas Ltd* [1951] 1 KB 190. Denning LJ emphasised the possibility of courts exercising a qualifying power to determine what is just and reasonable in a given situation rather than being limited to constructing the intention of the parties to a contract. However, such a notion was refuted by the House of Lords in *British Movietonews Ltd v London and District Cinema Ltd* [1952] AC 166. Viscount Simon (at 185) expressly recognised that

> a consideration of the terms of the contract, in the light of the circumstances existing when it was made, shows that they never agreed to be bound in a fundamentally different situation which has now unexpectedly emerged, the contract ceases to bind at that point-not because the court in its discretion thinks it just and reasonable to qualify the terms of the contract, but because on its true construction it does not apply in that situation.

See Michael D Aubrey, 'Frustration Reconsidered: Some Comparative Aspects' (1963) 12(4) *International and Comparative Law Quarterly* 1165, 1166.

68 Lim (n 37) 125.

69 Simon Kozlina (compiler), *Contract Law: Principles, Cases and Legislation* (Lawbook, 3rd ed, 2016) 604.

> the key requirements for its engagement — namely the requirement that the frustrating event was not foreseen by the parties at the time of the contract's formation.[70]

In the context of the COVID-19 pandemic, such omission would be significant as from the experiences of past pandemics, including the influenza A (H1N1) virus, 'Asian Flu' caused by an A (H2N2) virus and 'Hong Kong Flu' caused by an A (H3N2) virus,[71] it can be argued that a pandemic caused by a virus is an event that can be foreseen by the parties to a contract. Such argument would be carrying much force since the cause of the COVID-19 pandemic, the SARS-CoV-2 virus, is genetically closely related to the severe acute respiratory syndrome coronavirus (SARS-CoV)[72] that emerged in 2003 in China and spread to four other countries.[73] While it may be possible to argue that the occurrence of a pandemic is a foreseeable event, the resulting government guidelines, behavioural changes and business interruptions were not.[74] The doctrine of frustration may apply to contracts relating to major outdoor gatherings and events such as music festivals, concerts, sporting events, markets and conferences that were cancelled due to the government's response to COVID-19. Godwin also supports such conclusion where he notes that 'it may be possible for parties in the context of the current COVID-19 pandemic to argue frustration on the basis that the scale of the pandemic and the severity of the public health response could not have been foreseen'.[75] However, it must be borne in mind that 'the threshold for establishing frustration is a high one and organisations should not assume that COVID-19 has frustrated their contracts'.[76] This is because the doctrine's foreseeability element may determine that, while COVID-19 itself was not foreseeable, the specific cause preventing performance was not sufficiently connected to the pandemic.[77] For example, a situation that fails on the foreseeability requirement would be where COVID-19 caused a decrease in foot traffic at a retail store, resulting in a loss of revenue and difficulty paying rent.[78] While COVID-19 itself was not foreseeable, the specific cause of the difficulty in paying rent in this example would be a reasonably foreseeable commercial risk. Although it is a problematic situation, circumstances have not rendered

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70 Douglas and Eldridge (n 53) 3.

71 'Past Pandemics', *World Health Organization* (Web Page) <https://www.euro.who.int/en/health-topics/communicable-diseases/influenza/pandemic-influenza/past-pandemics>.

72 Yella Hewings-Martin, 'How Do SARS and MERS Compare with COVID-19?', *MedicalNewsToday* (online, 10 April 2020) <https://www.medicalnewstoday.com/articles/how-do-sars-and-mers-compare-with-covid-19>.

73 'Severe Acute Respiratory Syndrome (SARS)', *World Health Organization* (Web Page) <https://www.who.int/westernpacific/health-topics/severe-acute-respiratory-syndrome>.

74 Austin Moore, 'COVID-19 and Commercial Interruption: Potential Defenses to Non-Performance' (2020) 36(2) *Entertainment and Sports Lawyer* 4, 4.

75 Godwin (n 3) 124.

76 Shane Ogden and Oliver Collins, 'COVID-19 NFP Guidance: Managing Your Contractual Agreements in the Midst of COVID-19', *King & Wood Mallesons* (Web Page, 6 April 2020) <https://www.kwm.com/en/au/knowledge/insights/covid-19-information-guide-managing-your-contractual-arrangements-20200406>.

77 Ibid.

78 Anthony Borgese et al, 'COVID-19: Force Majeure and Frustration of Your Contracts', *MinterEllison* (Web Page, 23 March 2020) <http://www.minterellison.com/articles/covid-19-force-majeure-and-frustration-contract>.

the contract 'radically different' from what was initially promised.[79] By contrast, a contract between a company and concert organiser in which the event is cancelled due to government bans on large indoor public gatherings and concerts may be a frustrated contract.[80]

Overall, in common law, a frustrated contract is automatically terminated.[81] Any contractual rights and liabilities that 'have accrued unconditionally prior to the time of the frustrating event remain in place, while the parties will be discharged from most future obligations'.[82] This means that frustration may not apply for contracts frustrated due to COVID-19, especially if this frustrating event is likely only to be temporary.[83] Termination may also be undesirable for a long-term contract, if the contract has already been partially performed or if the other party is an important commercial partner. Further, under common law, losses lie where they fall when a contract has been frustrated. Therefore, any expenses incurred, or costs paid in the preparation of performing an obligation prior to frustration, cannot be recovered.[84] These costs are likely to hamper businesses that are already struggling with a loss of revenue because of restrictions introduced in response to the pandemic. Legislation in some Australian states have offset this harshness, however, by allowing for the adjustment of rights if a contract becomes frustrated.[85] Difficult or uneconomic performance is not sufficient to satisfy the criteria.[86] There is a certain level of risk in claiming that a contract has been frustrated, particularly in relation to costs and damages.

Given the uncertainties of the circumstances in which frustration applies, the parties to a contract usually prefer to include a force majeure clause in the contract rather than rely on the common law doctrine of frustration. The next section discusses the application of the force majeure clauses in the context of the COVID-19 pandemic.

## III Force majeure

A force majeure clause is incorporated into a contract to protect the parties when the parties cannot perform the contract due to an event outside the control of the parties, and cannot be avoided by exercising reasonable care. First, a caveat for the reader; it is not common for the words 'force majeure' to appear in a contract other than as part of a longer list of exceptions.[87] There

79 *Davis Contractors* (n 23) 729.
80 Borgese et al (n 78).
81 Jeannie Peterson, Andrew Robertson and Arlen Duke, *Contract: Cases and Materials* (Lawbook, 13th ed, 2016) 535.
82 Ibid.
83 Ogden and Collins (n 76).
84 Borgese et al (n 78).
85 See, eg, *Frustrated Contracts Act 1978* (NSW); *Frustrated Contracts Act 1988* (SA); *Australian Consumer Law and Fair Trading Act 2012* (Vic) pt 3.2.
86 'Force Majeure under Common Law' (n 60).
87 Ewan McKendrick (ed), *Force Majeure and Frustration of Contract* (Routledge, 2nd ed, 1995) 7.

is, however, no general doctrine of force majeure in English law, although parties use it in contracts,[88] forcing English law to recognise it.[89] While it is not possible to provide a complete definition of the term 'force majeure', in *Lebeaupin v Richard Crispin & Co* it was stated that

> [f]orce majeure ... [means] all circumstances independent of the will of man, and which it is not in his power to control, and such force majeure is sufficient to justify the non-execution of a contract. Thus war, inundations and epidemics are cases of force majeure; ... [and also] a strike of workmen.[90]

There are certain instances that fall within the meaning of force majeure.[91] In the absence of doctrine of force majeure in English law, the application and operation of the force majeure clauses would be determined under the principles of contractual interpretation. The approach of English courts and tribunals towards force majeure clauses has been to adopt a strict construction[92] to ensure that parties are not to be excused without clear intention to do so of their obligations imposed by the contract. Furthermore, in line with this strict construction approach, Parker LJ in *Channel Island Ferries Ltd v Sealink UK Ltd* ('*Channel Island Ferries*')[93] recognised that 'it is for the party relying on a force majeure clause to bring himself squarely within the clause'.[94] Thus, the burden is placed on the party, relying on the clause to bring itself within the parameters of said clause.[95] This principle was echoed by Lord Denning MR in *Bremer Handelsgesellschaft mbH v Mackprang Jr*,[96] where the clause was likened to the common law of exceptions, in which the party relying on the exception must prove that it applies to them.[97] Also, it has been noted that

> a force majeure clause will be construed according to its natural and ordinary meaning, read in the light of the contract as a whole, giving due weight to the context

88 In *Hackney Borough Council v Doré* [1922] 1 KB 431, Sankey J, after making the comment 'default was caused by inevitable accident or force majeure', was forced to state that he regretted introducing foreign words into English statutes without giving them proper definition: ibid.

89 Origins of the force majeure clauses have been traced back to the *French Civil Code 1804* art 1148 and considered as the equivalent of the 'Vis Major' (irresistible violence) clauses which can be traced back to Roman law principles of contract law. See generally J Denson Smith, 'Impossibility of Performance as an Excuse in French Law: The Doctrine of Force Majeure' (1936) 45(3) *Yale Law Journal* 452. However, such a construction was rejected by Bailhache J in the case of *Matsoukis v Priestman & Co* [1915] 1 KB 681 where it was stated that force majeure clauses 'ought to give them a more extensive meaning than "act of God" or "vis major". The difficulty is to say how much more extensive': at 685–7.

90 [1920] 2 KB 714, 719.

91 'Plain Language: Force Majeure' (2014) 52(3) *Law Society Journal* 32, 32–3. These circumstances include legislative or administrative interference, such as changes of laws or government policies, refusals to grant licences, embargoes, abnormally bad weather, earthquakes and hurricanes, delays in shipping due to administrative decisions or war, machinery breakdowns, strikes, pandemics etc.

92 Clare Ambrose, 'Force Majeure in International Contracts: The English Law Perspective' [2003] (3) *Business Law International* 234, 237.

93 [1988] 1 Lloyd's Rep 323 ('*Channel Island Ferries*').

94 Ibid 327.

95 *Avimex SA v Dewulf & Cie* [1979] 2 Lloyd's Rep 57, 67 (Robert Goff J).

96 [1979] 1 Lloyd's Rep 221.

97 McKendrick (ed) (n 87).

> in which the clause appears and to the nature and object of the contract and, in the case of ambiguity, construing the clause contra proferentem.[98]

The proposition put forward in the case of *Channel Island Ferries*[99] also requires that a party wishing to be encompassed by the force majeure clause must show either physical or legal impossibility.

Similar to the UK, force majeure clauses are not recognised in the Australian context as a legal doctrine, and therefore it operates only as a contractual right which becomes relevant when included in the contract. In the context of COVID-19, the application and relevance of the force majeure clause would depend on a few essential factors. These include whether it is possible to categorise the COVID-19 global pandemic or the resultant legislative and executive actions as an event of force majeure covered by the clause; what effect the event has on the party's ability to perform; what notice, if required, to bring the clause into effect, and the consequences of a valid force majeure clause.[100] The next four sections will discuss these factors in detail.

## A Could COVID-19 or resulting legislative and executive action be considered as a force majeure event?

As discussed above, a general force majeure clause includes a list of events that it would specify as force majeure occurrences.[101] The terms 'infectious disease', 'epidemic', 'pandemic', 'government action', or 'national emergency' are commonly used in force majeure clauses. The World Health Organization on 11 March 2020 declared that COVID-19 could be characterised as a pandemic. The significant impact of the virus has prompted the Australian Government to apply a string of measures to ensure the country's wellbeing by declaring a human biosecurity emergency.[102] This includes policy measures such as the central bank's provision of liquidity to financial (bond and equity) markets, sustained flow of credit to banks, small and medium enterprises, public health sector, individuals and essential businesses,[103] government's approval of a large federal stimulus package for industries and industries most affected by the COVID-19 pandemic,[104] income

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98 Philip McNamara, 'Force Majeure Clauses' [1992] *Australian Mining and Petroleum Law Association Yearbook* 585, 601.

99 *Channel Island Ferries* (n 93) 327.

100 Ambrose (n 92) 238; Lim (n 37) 20.

101 Godwin (n 3) 120. Godwin categorises the events included under a force majeure clause into five categories: (1) an 'Act of God' such as a natural disaster; (2) laws and changes in law that prevent the performance of obligations; (3) war and civil disturbance; (4) epidemics; and (5) strikes.

102 *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Declaration 2020* (Cth).

103 'Business and Employers', *Australian Government* (Web Page) <https://www.australia.gov.au/business-and-employers>.

104 'COVID-19 Government Assistance for Business', *Australian Government* (Web Page) <https://business.gov.au/risk-management/emergency-management/coronavirus-information-and-support-for-business/government-assistance-for-business>.

support for individuals and social welfare payments to support households,[105] border quarantine, social distancing policy, and travel bans.[106] Moreover, the Reserve Bank of Australia has spent $90 billion on its coronavirus support fund.[107] The level of government involvement required to maintain a semblance of normalcy is indicative of the impact the pandemic has had on individuals' daily lives. Therefore, COVID-19 and resulting legislative and executive action would fall within the abovementioned terms if included in the contract.

A noteworthy question in this regard would be the position of those who entered into a contract where the terms 'pandemic' or 'government actions' are not specifically mentioned, however, refer to all-inclusive phrases such as 'any other reason beyond the reasonable control of the parties'. It is important to consider how such a phrase would be interpreted in the context of COVID-19 and whether the parties can claim the protection of the force majeure clause. The principles of contractual interpretation, specifically the rule of 'ejusdem generis' (of the same kind) would be relevant in determining the application of the force majeure clause in the context of COVID-19. At times called Lord Tenderden's Rule, the concept of ejusdem generis is where a clause containing a list of things belonging to a particular class is followed by a term such as 'other', which compels the reader to read such phrase 'as ejusdem generis with, and not of a quality superior to, or different from, those specifically mentioned'.[108] This forces the general words to assume a similar meaning to the preceding specific terms. As an essential step in interpreting a phrase that includes an 'other' criterion, one must first understand the genus to which the term belongs. For ejusdem generis to apply, there must be some similarity between the words that come before 'other'.

*Friends of DeVito v Wolf* ('*Friends of DeVito*'),[109] recently decided in the US, provides insight into how courts may interpret all-inclusive provisions in the context of COVID-19. In this case, a governor's order was challenged by several petitioners. The petitioners were four Pennsylvania businesses and one individual seeking extraordinary relief from Governor Wolf's 19 March 2020 order to close all non-life-sustaining businesses to reduce the spread of the virus.[110] The businesses of the petitioners were classified as non-life-sustaining. During the course of the case, the Court needed to decide if the broad powers granted to the Governor under the *Emergency Management Services Code* ('*Emergency Code*') were operable. The *Emergency Code* specifies several instances in which such powers would be triggered. The provisions of the *Emergency Code* apply to 'disasters', defining 'disaster' as a 'man-made disaster, natural disaster or war-caused disaster'.[111]

105 'Work and Financial Support', *Australian Government* (Web Page) <https://www.australia.gov.au/work-and-financial-support>.

106 'International and Travel', *Australian Government* (Web Page) <https://www.australia.gov.au/travel-and-consumers>.

107 Ozili and Arun (n 34).

108 *Gundling v Chicago*, 176 III 340, 52 NE 44, 45 (1898).

109 (MD Pa Sup Ct, No 68 MM 2020, 13 April 2020) ('*Friends of DeVito*'); 35 Pa Cons Stat § 7102 (1978).

110 *Friends of DeVito* (n 109).

111 35 Pa Cons Stat § 7102.

Of relevance here, 'natural disaster' is defined as follows: 'Any hurricane, tornado, storm, flood, high water, wind-driven water, tidal wave, earthquake, landslide, mudslide, snowstorm, drought, fire, explosion or *other catastrophe which results in substantial damage to property, hardship, suffering or possible loss of life*'.[112]

In the present case, the plaintiffs contended that the pandemic was not a natural disaster as defined by the *Emergency Code*. In applying the canon of ejusdem generis, the plaintiffs argued that, although the definition uses the phrase 'and other catastrophe', because a viral illness is not included in the list of applicable disasters, COVID-19 cannot be a natural disaster because it does not belong to the same genus as the others on the list.[113] However, the Court resorted to a wider reading of the phrase 'and other catastrophe' as opposed to the restricted meaning that the plaintiffs attached to it. While the Court mentioned the disease definitely results in 'hardship, suffering or possible loss of life', the primary inquiry was whether 'it nevertheless may not be classified as a "natural disaster" caused by unforeseen factors based upon the application of the doctrine of ejusdem generis'.[114]

The Court mentioned two reasons for determining the question in the affirmative. First, it states that the specific disasters lacked commonality 'as while some are weather related (eg, hurricane, tornado, storm), several others are not (tidal wave, earthquake, fire, explosion)'.[115] The only commonality detected was that all caused 'substantial damage to property, hardship, suffering or possible loss of life'.[116] The second reason the Court gave for including COVID-19 in the same genus was legislative intent. The Court saw that, by setting out a list of disasters followed by 'other catastrophe which results in substantial damage to property, hardship, suffering or possible loss of life', the legislature intended to expand the list and provide those in power with the tools to combat disaster situations.[117] Because Parliament gave no indication that it intended to reduce the scope of the provision or list of instances in which actions would be taken to protect people from hardship or loss of life, the Court could not reach such a restriction into the statute.[118] In fact, the Court found that

> the General Assembly's stated goals, as set forth in the *Emergency Code*, were to, inter alia, '[r]educe vulnerability of people and communities of this Commonwealth to damage, injury and loss of life and property resulting from disasters,' and to 'strengthen' the Governor's role 'in prevention of, preparation for, response to and recovery from disasters'.[119]

For these reasons, the COVID-19 pandemic qualified as a catastrophe that warranted the Pennsylvania Governor's authority under the *Emergency Code*. Indeed, this action would be a lesson to all states undergoing the deleterious

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112 *Friends of DeVito* (n 109) slip op 21–2 (emphasis added).
113 Ibid slip op 22.
114 Ibid slip op 23.
115 Ibid slip op 24.
116 Ibid slip op 25.
117 Ibid slip op 24.
118 Ibid.
119 Ibid slip op 25; 35 Pa Cons Stat §§ 7103(1), (4).

effects of the pandemic. It is obvious then that lawmakers intend to provide the necessary powers to relevant authorities to act in exigencies in a swift and effective manner. To curtail these powers would render the legislation nugatory. Furthermore, given the scale of the pandemic, which is projected to surpass the Spanish flu, requires legislative mechanisms that allow those in authority to be given the tools to make the necessary decisions to overcome the difficulties faced.

To resolve these difficulties, and in the face of conflicting needs, trade-offs need to be made. As seen in the *Friends of DeVito* case, the plaintiffs' economic impacts had to be balanced against the disease's impact, which could spread exponentially if not curtailed in the initial stages. While the Court was sympathetic to the needs of the plaintiffs when determining if the pandemic was a natural disaster that warranted the exercise of the Governor's powers, it held the latter consistent with the intention of the legislature. The Court used the canon effectively to realise what the legislation intended to accomplish; thus, it is a worthy example to all dispute resolution factions faced with this unprecedented global calamity.

In view of the above discussion, it is important to identify the general approach taken by the courts in the interpretation of contractual obligations. While recognising the difference in interpreting legislative instruments and contractual documents, it is necessary to consider whether the Australian courts would adopt a wider approach as witnessed in the case of *Friends of DeVito*. The precedent established in the past would provide an indication whether the courts would adopt a wider construction of catch-all provisions in force majeure clauses in the Australian context. The Australian courts have generally adopted the 'plain meaning' approach rather than the contextual approach to contractual interpretation.[120] The literal, or 'textualist' approach to the contractual interpretation adopted in the case of *Australian Broadcasting Commission v Australasian Performing Right Association Ltd*[121] was reaffirmed by the High Court in *Western Export Services Inc v Jireh International Pty Ltd*[122] where the Court approved the judgment of Mason J in *Codelfa*.[123] Thus, the 'text to context' approach, as witnessed in the English courts to contractual interpretation, was not favoured in Australia.[124] Therefore, it remains questionable whether the Australian courts would adopt the same approach as in the case of *Friends of DeVito* in relation to 'catch-all' provisions in force majeure clauses.

One last aspect that requires specific attention in this regard is the impact of the force majeure certificates issued in certain jurisdictions. Notably, the China Council for the Promotion of International Trade, a quasi-governmental organisation that promotes foreign trade, by 3 March 2020 issued 'a total of 4,811 certificates of *force majeure*, involving contracts with a gross amount of approximately 373.7 billion yuan'.[125] While these certificates are expected to

120 Kane Loxley, 'Intention, Meaning and the Case for Reform of Contractual Interpretation in Australia' (2012) 21(3) *Griffith Law Review* 637, 637.

121 (1973) 129 CLR 99.

122 (2011) 282 ALR 604.

123 *Codelfa* (n 24).

124 Loxley (n 120) 637.

125 'CCPIT Provides COVID-19 Force Majeure Certificates and Other Services', *China*

carry significant weight in the Chinese tribunals in matters involved with contractual performance, the application outside China has been subject to considerable doubt due to the rejection of such claims by other contractual parties.[126] Given the preference of international contracts in the application of English law in these matters, the contracting parties would be expected to follow the rules and principles as discussed in this section in order to determine whether the force majeure clause was triggered due to the COVID-19 pandemic.

## B What effect does the COVID-19 pandemic or resulting legislative and executive action have on the party's ability to perform contractual obligations?

The inclusion of the terms 'pandemic' or 'governmental action', however, does not automatically mean the force majeure clause would apply. If one was to bring a case into the purview of the current pandemic, it must be established that a party was 'prevented' or the ability to perform contractual obligations was 'hindered' or 'disrupted' due to the COVID-19 pandemic and the resulting governmental action.[127] It must be noted that difficulty in the performance itself would not be sufficient to invoke the protection of the force majeure clause. Also, the reduction in profitability or extra expenses incurred would not establish that the performance is impossible. It has been identified explicitly in Australia that commercial impracticability may not be sufficient to claim the protection of force majeure clauses.[128]

While the long-term impact of the COVID-19 pandemic is not yet known, the experience of different countries, and specifically the Australian experience, suggests that whether the lockdowns, travel bans and similar measures taken by the governments to stop the spread of the disease would be covered by the force majeure clause will have to be construed in light of the impact and the length of time for which those measures remain in place.

It is important to note that after the National Cabinet accepted the Australian Health Protection Principal Committee's advice, it issued the following declarations:[129]

- prohibition of outdoor mass gatherings of more than 500 people (from 16 March 2020);
- the requirement for anyone arriving in Australia from overseas to

*Council for the Promotion of International Trade* (Web Page, 13 March 2020) <https://en.ccpit.org/infoById/40288117668b3d9b0170d2952a7f0799/2>.

126 Bate Felix and Jessica Jaganathan, 'France's Total Rejects Force Majeure Notice from Chinese LNG Buyer', *Reuters* (online, 6 February 2020) <https://www.reuters.com/article/us-china-health-total-idUSKBN2001XQ>; Alison Frankel, 'Chinese Force Majeure Certificates Presage Complexity of Resolving Post-Crisis Disputes', *Reuters* (online, 17 March 2020) <https://www.reuters.com/article/us-otc-covid19-idUSKBN2133MQ>.

127 Lim (n 37) 121.

128 *Gardiner v Agricultural and Rural Finance Pty Ltd* (2008) Aust Contract R ¶90-274 (Spiegelman CJ), citing *Hyundai Merchant Marine Co Ltd v Dartbrook Coal (Sales) Pty Ltd* (2006) 236 ALR 115.

129 Scott Morrison, 'Update on Coronavirus Measures' (Media Statement, 18 March 2020) <https://www.pm.gov.au/media/update-coronavirus-measures>.

self-isolate for 14 days (from 15 March 2020);
- prohibition of indoor gatherings of more than 100 people (from 18 March 2020);
- restrictions on visits to aged-care residents (from 18 March 2020);
- closure of particular non-essential businesses (from 23 March 2020);
- travel ban (from 25 March 2020);
- some elective surgeries suspended (from 25 March 2020); and
- access to remote communities restricted (from 26 March 2020).[130]

These government actions had rendered numerous ventures as illegal. These measures would have the direct potential to affect hundreds of thousands of businesses, individual ventures and contracts within and outside of Australia. Thus, it is important to consider whether the 'pandemic' or 'governmental action' resulted in the person concerned being unable to take reasonable steps to continue the contract. For example, the force majeure clause could be successfully invoked when the contract involves physical work, and the country has been placed under lockdown. However, if the contract can be performed virtually from home, even a measure as extreme as lockdown may not invoke force majeure. Conversely, it is possible that, even in countries with relaxed social distancing measures, there may be instances in which citizens would cautiously refrain from engaging in any activity. Thus, the situation in a given context may be judged by the dangers faced in that time period — that is, the number of deaths, spread, and flattening of the curve. It may be agreed that individuals need to make a tough judgment call and can only do so confidently with hindsight.

## C What are the procedural requirements to be satisfied to activate the force majeure clause?

There are several different ways in which force majeure clauses provide for the activation of the clause. Generally, this includes a notice requirement where the contracting parties must be informed of the occurrence of a force majeure event.[131] The notice requirement will also contain the possibility to temporarily suspend the performance of contractual obligations until the passing of a force majeure event and/or termination of the contractual obligations in the event the performance is no longer possible. The force majeure clauses may also contain provisions that emphasise a party must not have contributed to the occurrence of the force majeure event and that adequate precautions were taken to overcome the effects of the event, and even after reasonable measures were taken, the performance of the contractual obligations was impossible.[132] What would constitute adequate or reasonable steps would depend on each individual case, and it would be impossible or

130 'How the Federal Government's Emergency Restrictions on COVID-19 (Coronavirus) Work', *Justice Connect* (Web Page, 15 October 2020) <https://justiceconnect.org.au/resources/how-the-federal-governments-emergency-restrictions-on-coronavirus-covid-19-work/>.

131 McNamara (n 98) 598.

132 Anthony Groom, 'Force Majeure Clauses' [2004] *Australian Mining and Petroleum Law Association Yearbook* 286, 296.

feasible to determine precisely the nature of the steps to take to overcome a force majeure event.[133] In the context of COVID-19, the nature of the actions taken by a contracting party would depend upon the nature of the restrictions and the risks involved in alternative methods of performance.

## D What are the limitations and consequences of a valid force majeure clause?

Once a force majeure clause is successfully activated, a number of consequences would flow from such activation. The precise nature of the consequences would depend on the force majeure clause itself and the wording used to define the consequences. However, the consequences of successfully activating a force majeure clause can generally result in suspension, termination, compensation, or further negotiation. The suspension provisions would allow parties to break from the performance of contractual obligations for an agreed time or until the effects of the force majeure event ceased to exist. In the context of COVID-19, it must be noted that the impact of the force majeure event may continue until a vaccination is developed. However, based on the effectiveness of the controlling mechanisms, it would be possible to return to some form of normalcy even before the development of the vaccination. In such a context, the period of suspension would end once some form of operation is possible. Termination provisions would enable a party to terminate contractual obligations, and on rare occasions, it would allow for the payment of compensation as well. Finally, force majeure clauses may allow for further negotiation as to the operation of the contract and the ability to discuss continuing contractual obligations. Carter identifies that force majeure clauses in Australian contracts are often used as 'taken off the shelf — as boilerplate clauses'.[134] Recognising the danger in such an approach, he recommends a three-step process[135] to make sure that the boilerplate clauses are adapted to the circumstances of each case — first, the identification of the trigger for the clause; second, the identification of whether the trigger is automatic or leads to a procedure; and finally, a statement of consequences. Thus, it is vital for contracting parties to clearly articulate the intended consequences of successfully activating a force majeure clause within the contract.

Considering the impact coronavirus has caused the global population, the force majeure clause is an important aspect to be considered in future contracts. Thus, it is vital to consider the possibility of using the force majeure

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133 Ibid.

134 Due to this issue, he identifies that there are four features which are common to force majeure clauses in contracts including:

1. they tend to deal with both relevant and irrelevant events;
2. they do not distinguish between the parties' respective performance obligations — it begs the question to say that the clause does not apply to an obligation to pay money;
3. their drafting is not finely tuned to the needs of those who have the task of administering them; and
4. when attention turns to the clause, it ends up being a square peg in a round hole

Carter, 'An Introduction to Frustration and Force Majeure' (n 61) 4.

135 Ibid.

clause in future contracts, especially considering the possibility of second and third waves or more deadly strands of the disease. The question of whether an existing event can constitute a force majeure event is a matter which when discussed in previous case law has not resulted in a conclusive application. In the case of *Reardon Smith Line Ltd v Ministry of Agriculture, Fisheries and Food*, Sellers LJ noted that

> there is no settled rule of construction that a specific exception, such as strikes or war, cannot be relied upon if the strike or war was operative at the time when the contract was made or the ship ordered to the affected port. It must depend on the proper construction of the contract.[136]

However, in the case of *Trade and Transport Inc v Iino Kaiun Kaisha Ltd*, Kerr J noted that pre-existing events would not qualify as a force majeure event if:

> (a) the pre-existing cause was doomed to operate on the adventure; and
> (b) the existence of facts which showed that the excepted cause was bound to operate:
>   (i) were known to the parties at the time of entry into the contract (or at least to the party seeking to rely on the exception); or
>   (ii) should reasonably have been known to the party seeking to rely upon them and would have been expected by the other party to the contract to be so known.[137]

In this context, it has been noted that whether a pre-existing event would be considered a force majeure event 'depends upon the wording of the relevant force majeure clause and also whether the existence of the event was known to one or both parties'.[138] Given the unpredictable nature of the impact of the COVID-19 pandemic, it would be difficult to argue that it would be 'doomed to operate on the adventure'. In view of the long-term impact of the COVID-19 pandemic, it would be necessary for the contracting parties to ensure an express reference to the COVID-19 pandemic as a valid force majeure event even if it is an existing event.

## IV Conclusion

In this article, the case was made to recognise the COVID-19 pandemic under the doctrines of force majeure and frustration as valid defences against contractual non-performance. This article found that the law as it prevails in Australia and the UK is such that courts are concerned with preserving the sanctity of contract. They attempt to refrain from recognising that agreements entered into can be discharged easily due to changes that could be overcome with added effort. It is based on the effort, money and time additionally required to fulfil a contract entered into under different circumstances; however, courts have increasingly recognised justifications for the discharge of contracts. Therefore, this article makes the case that the circumstances of individual cases should be considered to ensure that justice is done. In view

136 [1962] 1 QB 42, 83.
137 [1973] 1 WLR 210, 227.
138 Groom (n 132) 300.

of the impact the COVID-19 pandemic may have on contractual performance, such an approach would ensure commercial efficacy and certainty.