



## **Covid-19: Understanding some of the legal implications for businesses**

The Covid-19 virus has changed our socio-economic context in significant ways in a short span of time. As Mauritius and the rest of the world strives towards a semblance of normality after unprecedented curfew and other such restrictive measures to curb the spread of the pandemic, financial ripple effects are already being felt across various sectors of the economy as businesses struggle to recover from strains which hit them in ways they were not prepared for.

Leaders around the world are warning that the coming weeks will be even more difficult. While various measures are being introduced by Governments to mitigate the economic impact of the pandemic, business operators are well advised to keep abreast of the legal implications involved and to prepare for a smooth recovery back to better days. This article is an attempt to clarify for business operators some legal facets of the Covid-19 pandemic, namely its effect on contractual performance, and with a specific focus on tenancy agreements, maritime and shipping contracts.

### **Effect on contractual performance**

Due to the lockdown conditions and other restrictive and sanitary measures, operators might face or might already be facing difficulties to honor their contractual obligations. Disputes may potentially arise from non-performance, eventually with domino effects on sub-contracts and other related contracts. An understanding of the various legal mechanisms available can help business operators make a proper assessment of risks, identify potential conflicts and dead-ends, and decide on the best strategies to be adopted.

#### *- Force Majeure*

One question which arises frequently is the extent to which the doctrine of *force majeure* can be used as a defense mechanism for non-performance of contractual obligations for reasons related to the Covid-19 pandemic. Lawyers<sup>i</sup> in Mauritius<sup>ii</sup> and elsewhere<sup>iii</sup> - who have written on the subject recently all point to the impossibility of having a black or white answer to this question. Ultimately, it will depend on factors such as the specific terms of the contract, the law applicable to the contract, specific circumstances surrounding execution of the contract and previous and future approach adopted by the judiciary.

The legal basis for the doctrine of *force majeure* in Mauritius is provided by Articles 1147 and 1148 of the Mauritius Civil Code. However, the Code does not define what consists of *force majeure* in specific terms. The general understanding of *force majeure* is that it must have the three characteristics of (1) *exteriorité* (the event was external to/beyond the reasonable control of the party invoking the force majeure) (2) *imprévisibilité* (a party to a contract could not have anticipated it at the time of concluding the contract) (3) *irrésistibilité* (its effects could not have been prevented by reasonable means). If a party to a contract succeeds in its invocation of this defense mechanism, then it is exonerated from its contractual obligations without any liability for payment of damages or penalties.



Given the above parameters, the extent to which a party can invoke *force majeure* as a defense mechanism in the current Covid-19 context will have to be appreciated on a case-to-case basis, bearing in mind previous decisions of the Mauritian judiciary on the question and future evolution of jurisprudence based on the current pandemic context. Courts in general in Mauritius, France and UK have adopted a rather reserved approach towards using *force majeure* to justify exoneration of contractual liabilities. For instance, in *General Construction Co. Ltd. V Ibrahim Cassam & Co. Ltd* 2011 SCJ 19, the Court of Civil Appeal established that cyclone Hollanda cannot be considered as a *force majeure* event and cannot thus exonerate the construction company's liability for damages caused by a crane owned by the said company. The decision was upheld by the Judicial Committee of the Privy Council. However, there are not many court cases in Mauritius which specifically address the issue of force majeure in the context of an epidemic or virus outbreak.

In the light of the above, there is no certainty regarding whether Covid-19 will be considered as a *force majeure* event by the Mauritian courts although there are arguments in favor of same. One can argue that the Covid-19 pandemic meets the three criteria of the force majeure test, namely externality, irresistibility and unpredictability; for instance, that the resulting strict curfew measures by Government could not have been reasonably anticipated, the resultant consequences could not be reasonably prevented and the pandemic was an external factor beyond the control of contractual parties. This is however subject to other factors such as the date and context in which the contract was formed and executed, and caution should be exercised in coming to rushed conclusions as the applicable decision will depend on the specific characteristics and context of the contractual relationship. Business operators are well advised to keep updated on upcoming developments.

For instance, while French court judgements related to epidemics over the past years indicate a reluctance of the Courts to qualify them as *force majeure* events<sup>iv</sup>, the March 2020 Colmar Court of Appeal decision, which qualified the risk of contagion by the Covid-19 virus as force majeure marks a change in previous trends. We have yet to see what approach the Mauritian courts will adopt.

Other considerations worth mentioning with respect to *force majeure* include (1) whether parties to the contract had included a force majeure clause in it or not (2) if they had, whether specific mention was made under the clause to cover epidemics or eventually broader terms such as 'any other similar events or circumstances beyond the reasonable control of the parties'. In the absence of a *force majeure* clause, the Articles 1147 and 1148 will still apply. But in the presence of a *force majeure* clause, the extent to which a party may avail itself of the general provisions of Article 1147 and 1148 will vary depending on how the clause was drafted. For instance, the clause could have excluded epidemics and infectious diseases from its scope, or it could have certain set conditions for its application, which if not met may entail an invalidation of the claim, leaving the defaulting party in breach and without a defence should a claim for damages be made for non-performance.<sup>v</sup>

- *Exception d'inexécution*

This mechanism would enable one party to refuse to execute its obligation so long as the other party has not executed its obligations. However, the consequences of this non-performance must be of a serious nature as was stated in *Manser Saxon Contracting Ltd. V Goundan co. Ltd*. In an article on the mechanism of *exception d'inexécution* as a defence for non-performance of contractual obligations related to the Covid-19 pandemic, French lawyer Me. Amael Beauvallet, suggests that the business operator



should try to identify such potential blockages at an early stage, and the mechanism of *exception d'inexécution* could potentially be used, prior to the occurrence of a dispute, to press for some forms of guarantees which can provide some level of comfort to both parties. We could think potentially of deferment terms, letters of undertaking, bank guarantees.<sup>vi</sup> Me Beauvallet stresses for instance the importance of seeking mutually agreed solutions on such 'mitigating' terms: '*Cette période très particulière de l'état d'urgence sanitaire est marquée par une impérieuse nécessité de trouver des solutions négociées. Les parties à un contrat doivent, le plus possible, s'entendre à l'amiable sur les modalités d'exécution de leurs engagements en temps de crise. Si le droit des contrats peut leur permettre de mettre fin à leurs accords, il leur permet aussi d'étoffer leurs engagements par des garanties, superflues il y a quelques semaines, malheureusement nécessaires aujourd'hui.*'

- *Frustration*

Common law jurisdictions do not have the doctrine of *force majeure*. If a contract is governed by English law for instance, *force majeure* will not apply, unless a *force majeure* clause is included in the contract. English law applies instead the common law doctrine of frustration under which a contract may be discharged if after its formation, events occur making performance impossible or illegal. However, it appears that the test applied to establish frustration is quite stringent<sup>vii</sup>.

- *Material Adverse Change*

The extent to which the Covid-19 pandemic can be invoked under material adverse change clauses are also being currently analyzed by lawyers. A material adverse change clause (so-called MAC clause) gives the right to a purchaser to cancel a deal on the basis of circumstances occurring between signing and closing the deal that have materially and adversely affected the target company. Such clauses typically occur for instance in M&A contracts. The example of Polish airline company LOT pulling out of its decision to acquire a company part of the Thomas Cook Group is cited as an example. The deal was signed in January 2020 and LOT pulled out in April 2020, apparently because of Covid-19.<sup>viii</sup>

Whether the Covid-19 pandemic would qualify under a MAC clause is again uncertain, as it will depend on the specific wording of the clause, which might for example specify in which cases a withdrawal from the contract will be possible. Assuming it does fit in situations provided for, then there will have to be a determination regarding whether the Covid-19 pandemic reaches the threshold provided for. Ultimately, it will depend on the interpretation which a court or an arbitral tribunal might give of the clause, taking into consideration the specific situation of the parties.

## **Tenancy Agreements**

The vast majority of tenancy agreements are now bearing the brunt of the 20 March -1 June national lockdown. While the deferment provisions introduced under The Covid 19 (Miscellaneous Provisions) Act 2020 provides for a 'relief' period until December 2021 for unpaid rents running from March to August 2020, some operators have expressed their concern that the problem is only going to be postponed, with considerable rent arrears piled up by the end of the deferment period on the one hand for tenants, and on the other, a potential shortfall of six months rental revenues for landlords, who possibly rely on the revenue as their sole source of income and may have immediate difficulties to meet their own



contractual obligations towards other parties (for instance loan payments to banks, maintenance and other service contracts).

How far the doctrines of *force majeure* or *exception d'inexécution* are applicable to non-performance of tenancy agreements in such a context would again be a matter of applying the set of criteria mentioned above. However, these defense mechanisms would be relevant only in a context where the business relationship has deteriorated to the point where litigation or arbitration have become necessary.

The other side of the coin would be to stress on how far tenants and landlords can go through this *impasse* with the least possible damage, by an early assessment of risks and alternative solutions, and negotiating suitable intermediary solutions as soon as possible with their contractual counterparts. The worst approach indeed is to take no action, to blame non-performance on events beyond control, on the supplier, the client or another party, overly relying on aid from public authorities and expecting miracle legal solutions. Business operators should be as proactive as possible in these trying times, and seek assistance from their sectoral associations if any. For instance, the Mauritius Chamber of Commerce and Industry (MCCI) have been playing an active role during the recent weeks in helping landlords and tenants of the island's main shopping malls in their negotiations. Recourse to mediation can also be extremely helpful and the MCCI Arbitration & Mediation Center (MARC) can provide the appropriate institutional and administrative support to facilitate a mediated settlement agreement on win-win solutions which can help preserve the business relationship for the long term.

### **Maritime trade and shipping agreements**

The maritime industry is another sector where difficult times are expected. We have already seen the consequences on cruise travel. Potential contractual difficulties may occur in a wide range of areas such as leasing, shipbuilding, insurance, construction projects, financing arrangements, delays or breaches of contracts for international sales of goods due to port closures. Besides the *force majeure* and other defense mechanisms described above, for maritime contracts, the Hague and the Hague-Visby Rules, and eventually the Rotterdam Rules provide for exceptions to liability, which may apply subject to the governing law of the contract and ratification by the relevant country.

Madhvendra Singh, Fellow of the Chartered Institute of Arbitrators and international arbitrator, who has 15 years of experience in the maritime sector as a Navy officer and who has collaborated with the MCCI and MARC on a recent arbitration training initiative, foresees potential disputes in the shipbuilding industry. *'Although standard form shipbuilding contracts have express Force Majeure (FM) clauses, and provide for permissible delays, shipbuilders will have to prepare themselves to meet the challenge. The standard terms of these clauses would usually provide for (i) the shipbuilder to prove that the event that has occurred is within the agreed list of events and beyond the reasonable control of the parties (ii) the shipbuilder to prove that the delay is consequent to the Force Majeure event, and (iii) the shipbuilder has notified the shipowner of the occurrence of FM event as per contractual terms and of its impact and its cessation, in order to claim Permissible Delay'*, he explains.

Madhvendra Singh anticipates similar difficulties in all subsectors of the shipping industry where contractual obligations have halted due to port closures or lockdowns. Another issue he foresees is related to the repatriation and turnaround of crew. Although many flag states have permitted for crew repatriation and turnaround on foreign ports, it might be a matter of concern as to who pays for it, he warns.



### **Effective contract management to minimize risks**

The dire and unprecedented conditions brought by the Covid-19 pandemic could push business operators in the coming months to seek to renegotiate, vary or end contractual obligations. Business operators may consider involving their legal advisers at an early stage for a proper assessment of risks involved and for advice on the best course of action. For instance, strict compliance with provisions regarding how notices should be issued when one party is considering to delay, vary, suspend or terminate a contract is crucial as a failure to do so can make a party liable for wrongful termination. It is also important to keep track of all documents, exchanges, records which could provide evidence in case justifications need to be provided for non-performance of contractual obligations. Moreover, non-performance in one contract can often lead to a domino-effect, affecting other contracts across the whole chain and it is important to give consideration to the related risks as well.

### **Handling potential contractual tensions – Dispute Resolution Tips**

In the current fragilized socio-economic context, alternative dispute resolution (ADR) methods such as negotiation, conciliation, mediation and arbitration might be preferred over litigation, which tend to be more adversarial and damaging to relationships. ADR improve chances of finding win-win solutions and of preserving the business relationship in the longer term. Besides, it provides more flexibility and more confidentiality to parties. Parties can also choose a mediator or an arbitrator who has technical or expert knowledge in the field of the dispute, and disputes can take a shorter time period to be resolved compared to court litigation. The MCCI Arbitration & Mediation Center (MARC) provides institutional support for both domestic and international disputes and assistance to operators throughout the mediation or arbitration process. MARC also operates a special mediation scheme for SMEs, which enables SMEs to gain access to the mediation service at a significantly reduced cost.

### **A curse and a blessing?**

Time will tell how well our economy and business community will fare after Covid-19. It has come as a curse as well as a blessing. A blessing in the sense of its potential for teaching us not to take things for granted and to reflect on better ways to manage our resources. Some scientists are already predicting other similar epidemics in the years to come, due to climate change. On the contractual front, *force majeure* clauses might need to be redrafted to include a better reflection of risks related to pandemics, amongst other precautions, really merely a tip of the iceberg. On other fronts, there is so much to be done to re-engineer our world towards a more balanced approach to economy, trade and investment, and of the use of resources in ways that are more respectful of humanity and of the environment. While we can have no foresight on similar future epidemics, the worst approach might well be to just focus on getting back to normal business as soon as possible, without the least concern about a fundamental revision of our socio-economic paradigms and our business ethics.

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<sup>i</sup> *'Force Majeure and Coronavirus (Covid-19) under the Laws of Mauritius – What is Force Majeure?'*, Dentons Mauritius, 26 March 2020

<sup>ii</sup> *'Covid-19 and its impact on contractual performance in Mauritius – Force Majeure'*, DLA Piper Africa, Nicolas Richard, 13 May 2020

<sup>iii</sup> *'La force majeure: un remède contre le Covid-19 ?'*, Stephenson Harwood, 1 April 2020

<sup>iv</sup> CA Paris, 25 September 1998; CA Nancy, 22 Novembre 2010, n 00003; CA Paris, 17 Mars 2016,

<sup>v</sup> *Navigating the challenges posed by Coronavirus*, Stephenson Harwood, 23 March 2020.

<sup>vi</sup> *Covid-19, anticipation des difficultés contractuelles et exception pour risque d'inexécution*, Amaël Beauvallet, 3 April 2020

<sup>vii</sup> Ibid.

<sup>viii</sup> *MAC Clauses in light of COVID-19*, Dr Markus Altenkirch & David Weiss, 27 April 2020, Global Arbitration News.