نموذج سـيرة ذاتيــة

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المؤهلات العلميــة :

- دكتوراه الدولة فى القانون الدولى (Ph.D) من جامعة باريس 1 (السوربون) وحاصل على جائزة الدولة الفرنسية التقديرية للعلوم القانونية عام 1985.
- دبلوم الدراسات المتعمقة للقانون الدولى (DEA) من جامعة باريس 1 (السوربون) عام 1978.
- دبلوم القانون الدولى من جامعة عين شمس عام 1971.
- دبلوم القانون العام من جامعة عين شمس عام عام 1972.
- ليسانس القانون دور يونيه 1967 من جامعة عين شمس.

المؤلفات العلميـــة :

- القانون الدولى الخاص / الجزء الأول ... الجنسية والموطن.
- القانون الدولى الخاص / الجزء الثانى ... تنازع القوانين والإختصاص القضائى الدولى.
- إجراءات التحكيم في المنازعات التجارية.
- القانون الواجب التطبيق على موضوع التحكيم.
- التحكيم الدولى (باللغة الإنجليزية).
- اثار وباء الكورونا فيروس على الالتزامات التعاقدية (باللغة الفرنسية واللغة الإنجليزية).
- قانون الطيران المدنى المصري وتكامله مع إتفاقية شيكاغوعام 1944.
- القانون الدولى العام (قانون الحرب والسلام).
- الموظف الدولي، حصاناته وإمتيازاته).
- الجرائم الدولية الموجهة ضد مرفق الطيران المدنى (باللغة الفرنسية).
- الإطار القانونى للحريات الجوية ومبدأ السماوات المفتوحة.
- الجرائم الدولية بين القانون الدولى الجنائى والقانون الجنائى الدولى (باللغة الفرنسية).

الخبرات المهنية :

- أستاذ المواد القانونية والشرطية بكلية الشرطة.
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- أستاذ بمعهد القادة بأكاديمية الشرطة المصرية.
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آثار الكورونا فيروس COVID - 19 على الالتزامات التعاقدية

الأستاذ الدكتور رجائي حسين الشتيوي
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منذ ظهور فيروس كورونا COVID-19 لأول مرة في ووهان ، الصين في ديسمبر 2020 ، سعت البلدان في جميع أنحاء العالم إلى فرض حظر السفر وحجر المواطنين وعزل المصابين لوقف انتشار الفيروس الجديد.
ولا يزال انتشار الفيروس بدرجة كبيرة في جميع أنحاء العالم مما يتعين معه دراسة التأثير الكامل للوباء وتدابير الطوارئ الناتجة عنه على التجارة الدولية والاقتصاد العالمي حيث أبلغ الكثيرون عن اضطرابات تجارية وتشغيلية كبيرة ، بما في ذلك فصل العمال وغلاف المطارات والموانئ وتعطيل قنوات العرض والتوزيع ونقص العمالة المدربة وضعف الطلب الإقليمي والدولي.
وبالنظر إلى الطبيعة غير المعتادة للوباء المستجد ، فقد تركز الاهتمام في الأوساط القانونية على احتمال أن الأطراف في العقود التجارية قد تتذرع بالقوة القاهرة والمفاهيم القانونية الأخرى في الانظمة القانونية المتغايرة من أجل تبرير التأخير في اداء التزاماتهم التعاقدية أو التحلل منها كلية، وقد تم بالفعل الإبلاغ عن العديد من مطالبات القوة القاهرة التي تشمل مشتريًا أو موردًا في وسائل الإعلام العالمية ، ويبدو من المحتمل أن يتبع ذلك مطالبات أوسع ، حيث ستنتشر آثار الموجة الوبائية في جميع أنحاء العالم وقد يكون أي عقد يحتوي على شرط محدد للقوة القاهرة موضوع لمطالبة الطرف المتضرر بهذه العقود التي يحكمها إطار القانون المدني بتعويضات أو اعانات في حالة اعتبار الوباء من القوة القاهرة وسواء كانت القوة القاهرة في هذه الحالة قد تضمنها العقد أم لا ذلك ان تأثير الوباء على الاطراف المتعاقدة واضح مع التدابير الطارئة التي تؤثر على السلع والعمال والخدمات اللوجستية مما يجعلهم غير قادرين على الوفاء بالتزاماتهم التعاقدية في الوقت المحدد وهو ما ينعكس سلبا علي الأسواق المحلية والعالمية ويسبب اضطرابات .

1 - موقف منظمة الصحة العالمية (WHO)

في فبراير 2020 ، أعلنت منظمة الصحة العالمية أن وباء COVID-19من فيروس كورونا هو حالة طوارئ صحية عامة ذات اهتمام دولي USPPI وفي 11 مارس 2020 أعلن د. تادرس أدهانوم غيبريسوس ، المدير العام لمنظمة الصحة العالمية في مؤتمر صحفي أن : " Coronavirus COVID-19 قد اصبح وباء وتهديدا عالميا وأنه ليس مجرد أزمة للصحة العامة بل انها أزمة ستؤثر على جميع القطاعات ، لذلك يجب إشراك كل قطاع وكل فرد في القتال والمكافحة ". وبالتالي أصبحت الكورونا فيروس وباء وتهديدا عالميا وتأثيرها في جميع أنحاء العالم، واوضحت تقارير المنظمة إصابة أكثر من 180،000 حالة كورونا في أكثر من 170 بلدا وإقليما في جميع أنحاء العالم وبدأت المنظمة في تنفيذ تدابير جذرية للتخفيف من انتشار الوباء بما في ذلك الحجر الصحي وإغلاق المطاعم والمقاهي ومراكز التسوق والمحلات التجارية ، وحظر التجمعات وإلغاء الفعاليات والمؤتمرات في جميع أنحاء العالم والحظر الصارم للسفر جوا وبحرا وسكك حديد وبرا.
ومما لا شك فيه أن Coronavirus COVID-19 كان له ، وسيظل ، له تأثير سلبي على الاقتصاد العالمي. مع تعطل سلاسل التوريد والعمليات التجارية الداخلية والدولية ولن يتمكن العديد من الأفراد والشركات بالتأكيد من الوفاء بالتزاماتهم التعاقدية الحالية. فكيف يمكنهم تلافي الآثار المدمرة لتنفيذ العقود الخاصة بهم؟

2 - الموقف القانوني الدولي:

ان اعفاء الأطراف في عقود تجارية من الوفاء بالتزاماتهم التعاقدية قد يتعارض مع النظرية المستقرة لتنفيذ العقود والمستندة الي فكرة قدسية العقد (Pacta Sunt Servanda)، وقد يتفق ويرتكز علي بعض المفاهيم والمذاهب القانونية التي تبرره وخاصة ان هناك العديد من المفاهيم والمذاهب القانونية في الدول ذات نظام القانون المكتوب وتلك ذات نظام قانون الشرع العام والتي يمكن تطبيقها بشكل قانوني على وباء الكورونا فيروس COVID-19 لإعفاء الأطراف المشاركة في العقد من اداء التزاماتهم التعاقدية.

2.1 – مفهوم « القوة القاهرة » : Force Majeure

عندما يسبب Coronavirus COVID-19انقطاعًا في أنشطة تنفيذ الالتزامات التعاقدية ، فإن السؤال هو ما إذا كان يمكن للطرف التذرع بالقوة القاهرة كحدث استثنائي خارج عن سيطرة الأطراف لعدم الوفاء بالتزاماتهم خاصة بعد أن فرضت دول العالم حظراً على السفر والسياحة وحجر المواطنين وعزل المصابين من أجل وقف انتشار الوباء؟
مصطلح (القوة القاهرة – Force Majeure) مستمد من القانون المدني الفرنسي (كود نابليون) المتأثر بالحضارة الرومانية، وقد تم تطبيقه على الولايات القضائية الأخرى المرتكزة علي القانون المدني ، والعديد من النظم القانونية لها تعريفات تشريعية محددة

للقوة القاهرة والتي تنطبق سواء احتوى العقد على شرط القوة القاهرة أم لا. وقد قنن المصطلح وظهر في العديد من دول القانون المكتوب (Civil Law مثل إيطاليا ، فرنسا ، إسبانيا ، ألمانيا ، بلجيكا ، هولندا، الدنمارك، السويد، فنلندا، .....). وهكذا أصبحت شروط القوة القاهرة بمثابة وقاية لأطراف في عقد ضد المخاطر الناجمة عن بعض الأحداث الاقتصادية، والكوارث السياسية والطبيعية.
ومن خلال الدراسة بعناية للقانون الواجب التطبيق (Applicable Law) ومن خلال صياغة بند القوة القاهرة وحالاتها بالعقد ، يمكن أن يأتي شرط القوة القاهرة لإنقاذ الطرف المضرور من الحدث بمعالجات اصلاحية قانونية لوضعه خلال الحدث غير المتوقع. و القوة القاهرة شرط شائع في العقود التي تعفي أساسا الاطراف من أي مسؤولية أو التزام عندما يقع حدث أو ظرف غير عادي خارجين عن سيطرة الأطراف، مثل الحرب ، و الإضراب ، و مكافحة الشغب ، و الجريمة، والأوبئة أو الظروف التي وصفها المصطلح القانوني "القوة القاهرة " مما يمنع أحد الطرفين أو كليهما من الوفاء بالتزاماتهم بموجب العقد ويُقصد بالقوة القاهرة عمومًا أن تتضمن أحداثًا خارجة عن السيطرة المعقولة لأطراف العقد ، وبالتالي فهي لا تغطي ما يلي من أحداث :
أي نتيجة لإهمال أو تحايل طرف ، مما يؤثر سلبًا على قدرة ذلك الطرف على الوفاء بالتزاماته.
أي نتيجة للظروف المعتادة والطبيعية للقوة الخارجية: (أ) إذا كان السبب هو الأمطار العادية المتوقعة ، فربما لا تكون حالة قوة قاهرة ؛ (ب) إذا كان السبب هو فيضان مفاجئ يضر بالمكان أو يجعل الحدث خطيرًا للحضور ، فمن شبه المؤكد أنه حالة قوة قاهرة ، بخلاف عندما يكون المكان في مجري الفيضان المعروف أو في منطقة معرّضة للأمطار الغزيرة ؛ (ج) قد تكون بعض الأسباب حالات محدودة او مشكوك فيها مما بوجب تقييمها في ضوء الظروف الغير معتادة.

وفي القانون الدولي ، يعني مصطلح « القوة القاهرة » قوة لا تقاوم أو حدث غير متوقع خارج سيطرة الدولة ، مما يجعل من المستحيل ماديًا الوفاء بالتزام دولي ، ويرتبط ذلك بمفهوم « الحالة الطارئة »، هذا وتفترض المحاكم أن العقود التجارية الدولية تتم صياغتها مع تقييم المخاطر المهنية المدرجة بالفعل في العقد الذي تم التفاوض عليه، وبالتالي فإن الأطراف نفسها هي التي يجب أن تتخذ احتياطات ضد تجسيد الخطر من خلال تضمين شروط القوة القاهرة وصياغتها بعناية في عقودهم وهذا صحيح بشكل خاص في حالة العقود التي تنص علي أن القانون الواجب التطبيق هو قانون دولة نظامها قانون الشرعة العامة (Common Law) حيث لا يوجد مفهوم القوة القاهرة في قانون الشرعة العامة وبدلاً من ذلك ، يتم التعامل مع القوة القاهرة عمومًا في نطاق قانون الشرعة العامة على أنها محور بين الاطراف للموافقة علي الحالات التي يتضمنها العقد، وعلى هذا النحو لن تنطبق إلا عندما يتم تضمين شرط القوة القاهرة وبيان حالاتها في العقد وهذا بعكس الرأي القائل بأن هذه الشروط تستخدم لتفادي المخاطر في حالة وقوع حدث معين.
ومن ناحية أخرى ، فإن إدراج شرط القوة القاهرة في العقد الذي يحكمه القانون المكتوب (Civil Law) والذي يعترف عمومًا بمبدأ القوة القاهرة ، يسمح للأطراف بتجاوز أي قيود على المبدأ المنصوص عليه في القانون الواجب التطبيق وسواء كان مصدر القوة القاهرة هو القانون أو شرط في العقد ذلك ان القوة القاهرة تعمل عمومًا علي تبرير عدم أداء طرف في العقد لالتزاماته التعاقدية عندما يكون عدم الأداء ناتجًا عن حدث معرف يمثل قوة قاهرة ويوضح كذلك السبل المتاحة للطرفين عندما يصبح العقد مستحيلاً أو صعبًا أو باهظ الثمن بسبب أحداث خارجة عن سيطرة الطرف المعني. ولتحديد ما إذا كان الحدث هو حدث قوة قاهرة أم لا، فمن الضروري عادةً تطبيق المعيار الموضوعي الوارد في القانون الواجب التطبيق أو وفق ما هو مدون بالعقد.
هذا وفي المفاهيم العامة للقوة القاهرة ، يشكل الحدث أو الموقف الموضوعي حالة قوة قاهرة إذا كان : (1) لا يمكن التنبؤ به (في وقت إبرام العقد) ؛ (2) لا مفر منه من حيث الحدوث أو الأثر ؛ و (3) من المستحيل تجاوزه. بالإضافة الي وجوب أن يكون هناك صلة سببية بين حدث القوة القاهرة وعدم أداء الطرف المعني لالتزاماته التعاقدية، وبالتالي يجب على الطرف المتضرر أن يثبت أن حدث القوة القاهرة قد تسبب في عدم الأداء ....). وقد تكون حالة القوة القاهرة هي القوة العظمى ذاتها التي تحول دون تنفيذ العقد وهو ما يعني في الواقع الدفاع عن استحالة التنفيذ أو عدم جدواه. وأهمية بند القوة القاهرة في العقد أنه يحرر طرفي العقد من جزء من التزامه بموجب العقد أو يوقف تنفيذه. وتجدر الإشارة هنا الى أن بعض الأنظمة القانونية تحد من مفهوم القوة القاهرة لتقصره علي « عمل الله « Acte of God(مثل الفيضانات و الزلازل والأعاصير، الخ) وتستبعد عمل الإنسان أو التقنية (مثل أعمال الحرب، أو الأنشطة الإرهابية ، أو النزاعات العمالية ، أو انقطاع أو فشل الأنظمة الكهربائية أو أنظمة الاتصالات). النقطة الهامة في صياغة العقد هي التمييز بين عمل الله وأشكال القوة القاهرة الأخرى.

2.1.1. مفهوم القوة القاهرة في دول القانون المكتوب : (Civil Law)

القوة القاهرة (Force Majeure) تجد أصولها في أنظمة القانون المكتوب . وتنطبق على حالات عدم تنفيذ العقد ، سواء احتوى العقد على بند القوة القاهرة أم لا. ومع ذلك فان هناك اختلافات جوهرية بين القوانين الوطنية هذه الدول فيما يتعلق بطبيعة الأحداث المؤهلة ومدي كفاية "عدم قابلية التنفيذ المطلق" من عدمه لإعفاء طرف العقد من التزامه أو التخفيف منه، وطبيعة وكيفية معالجة ذلك. وعمومًا لا تعد أحكام القوة القاهرة من النظام العام في دول القانون المكتوب ، وبالتالي ، قد يحيد بند القوة القاهرة في العقد عن المتطلبات القانونية لشرط القوة القاهرة التي ينص عليها ويطلبها النظام القانوني السائد. وتختلف دول القانون المكتوب عادة في متطلبات ومقتضيات القوة القاهرة التعاقدية ، سواء في نطاقها أو معالجتها، فقد تكون أوسع أو أضيق من أنظمة القانون المكتوب الأكثر تشددًا ، اعتمادًا على القدرة التفاوضية للأطراف في وقت إبرام العقد والطريقة التي تمت بها صياغة العقد المعني وبشكل عام ، سيكون من الأيسر تقديم مطالبة لحالة قوة قاهرة إذا تم ادراج الحدث في العقد وقت ابرامه (على الرغم من أنه لا يزال يتعين تلبية متطلبات الاختبار الموضوعية الأخرى).
وبالرغم من أن الأوبئة نادرة في العصر الحديث ، فإن الذاكرة الحديثة تشمل السارس والإيبولا والعديد من أوبئة الإنفلونزا الخطيرة والتي يتفق الأطراف علي أدراجها والنص عليها على وجه التحديد بالعقد ضمن احداث القوة القاهرة أو قد تكون مشمولة بعبارات أكثر عمومية مثل "المرض" ، "العمل الحكومي"؛ "الطوارئ الوطنية"؛ "الحجر الصحي" أو "الاحتواء".

هذا والمعايير التقليدية للقوة القاهرة هي عدم القدرة على التنبؤ ، والحتمية والتأثير في أداء الالتزام التعاقدي ،،التي يجعله مستحيلاً.
و"القوة القاهرة" تعني حدثًا أو ظرفًا استثنائيًا : (1) خارج سيطرة طرف في العقد (2) لا يمكن تقديره بشكل معقول قبل أو وقت إبرام العقد (3) ليس بإمكان هذا الطرف ، بعد نشأته ، أن يتجنبه أو يتغلب عليه بشكل معقول ، و (4) لا يسند بشكل كبير إلى الطرف الآخر، وغالبًا ما تستبعد البنود التي تحدد مفهوم القوة القاهرة بعض المعايير التقليدية – ومنها ما لا يمكن التنبؤ بها - وتطبق بشكل منهجي معيارًا أقل صرامة. وغالبا لا تحدد شروط القوة القاهرة الأخرى مفهوم القوة القاهرة بل تشير إلى مصدر خارجي مثل "الأسباب المعترف بها عمومًا للقوة القاهرة" أو "القوة القاهرة المعترف بها من قبل الفقه القانوني في الدولة ".

2.1.2. القوة القاهرة والقانون الواجب التطبيق: (Loi Applicable)

من الأهمية الإشارة الي أن جميع الأنظمة القانونية بالعالم (دول القانون المكتوب ودول قانون الشرع العام) تتعامل مع مفهوم القوة القاهرة عموما بصدد العقود التجارية الخاضعة لأحكامها، ففي دول القانون المكتوب يطبق مفهوم القوة القاهرة بصفة عامة، بينما في دول قانون الشرع العام والتي عادة لا يعتد بها بالتطبيق العام لمفهوم القوة القاهرة (على الرغم من وجود اختلافات ، كما هو الحال في بعض المستعمرات الإنجليزية السابقة)، فيعتد القانون الإنجليزي بمفاهيم مختلفة تمامًا مثل "عمل الله" و "تدمير العقد" بينما يعتد القانون الأمريكي بمفهوم "عدم القدرة علي أداء الالتزام". ونظرا للغياب الفعلي لمفهوم القوة القاهرة في هذا النظام القانوني فان الأطراف الراغبة في استدعاء حالة من حالات القوة القاهرة لا خيار لهم سوى أن ينصوا ويحددوا هذا المفهوم في عقودهم يحكمها قانون الشرع العام الواجب التطبيق. ومن ناحية أخرى، فإن أحد الأهداف الرئيسية لإدراج بند القوة القاهرة في عقد يحكمه قانون مكتوب هو أن البند يسمح للأطراف بالتحلل من أي قيود للقانون الواجب التطبيق فقد تكون احكام القانون الوطني إما مقيدة للغاية أو موسعة للغاية ولا تعكس بالضرورة مصالح ونوايا الأطراف فيما يتعلق بتوزيع المخاطر فيما بينهم، مما يتعين معه ان يكون بند القوة القاهرة في العقد صريحًا ومحددا لحالاته في هذا الصدد، وبالتالي فان دور القانون الواجب التطبيق يتقلص إلى حد كبير عندما تكون شروط العقد (ومنها شرط القوة القاهرة) واضحة وكاملة ومحددة ويصبح لاختيار القانون الذي يحكم العقد دورًا مهمًا في تفسير شرط القوة القاهرة في العقد بشكل عام.

2.1.3. مفهوم القوة القاهرة في دول قانون الشرع العام : (Droit Commun)

اذا اثبت أحد أطراف العقد أن عدم أداء الالتزام التعاقدي كان لا يمكن التنبؤ به أو تخفيفه وقت ابرام العقد أوان الأداء مستحيل بالفعل أو صعب ماليًا فلا يكون بالتالي أي من الطرفين مسئولا عن أي قصور في الأداء للأسباب الخارجة عن إرادته ، والتي لم يكن بالإمكان منع حدوثها من خلال ممارسة العناية المعقولة الناجمة عن مبدأ حسن النية في تنفيذ العقود وبذلك يكون هذا الطرف احدي حالات القوة القاهرة. وقد يشير بند القوة القاهرة أحيانا إلى وباء عالمي ويحدده ويصفه علي وجه التحديد، ومع ذلك لا يعتب يعتبره حدث من أحداث القوة القاهرة لأنه غير منصوص عليه في بند محدد من العقد كحدث قوة قاهرة. وواقع الأمر أن وباء الكورونا فيروس...قد أدي الي استحالة مبررة لعدم تنفيذ الالتزامات التعاقدي
فالحجر الصحي وقيود السفر والمحظورات والقيود على الأنشطة التجارية العادية التي تفرضها الحكومات تشكل أفعالًا مادية لـ "الحظر الحكومي" التي تبرر القصور في أداء الالتزامات التعاقدية. عندما يحكم العقد نظام قانون الشرع العام ومن ثم تقضي المحاكم عمومًا بحرية الأطراف في العقد للاتفاق على حل واسع أو ضيق في حالة القوة القاهرة.
وقد يستخدم مصطلح "قوة قاهرة" في بعض الأحيان للإشارة إلى أحكام أخرى تنطبق بشكل متكرر على حالات استثنائية مثل شروط "الإكراه" وتلك التي تنشئ إطارًا لإجراء تغييرات على العقد عند حدوث تغيرات كبيرة في الظروف التي تشكل قوة قاهرة ويعتمد الاختبار الموضوعي الدقيق على الصياغة المحددة لبنود العقد إلا أن أنظمة قانون الشرع العام تتبع بشكل عام نهجًا متسقًا بالرغم من بعض الاختلافات (الدقيقة) ولذا فمن المهم معالجة تفسير شرط القوة القاهرة في الفقه القانوني لكل دولة من دول هذا النظام.
وقد كانت المحاكم الإنجليزية حتى وقت قريب الي حد ما تطبق معيار عدم القدرة على التنبؤ بأحداث القوة القاهرة وقضت بأن الطرف المعني يجب أن يكون بشكل عام "جاهزًا وراغبًا وقادرًا" على تنفيذ العقد، إلا في حالة حدوث قوة قاهرة تمنعه من أداء التزامه التعاقدي فيعفي هذا الطرف المعني من الأداء طوال استمرار حدث القوة القاهرة أو آثارها.
وفي المملكة المتحدة حيث يسود قانون الشرع العام الإنجليزي لا تنطبق مبادئ القوة القاهرة في العقود تلقائيًا بل يجب على أطراف العقود التي يحكمها قانون الشرع العام الإنجليزي والذين يرغبون في تطبيق حالة القوة القاهرة لإعفائهم من الأداء عند قصورهم في أداء التزاماتهم التعاقدية بسبب هذا الحدث غير المتوقع أن يحددوا الحلول اللازمة لإصلاح ما يشكل حالة قوة قاهرة في العقد ذاته والا ترتب علي عدم القيام بذلك عدم اعتبار الحدث الذي يعوق أداء الالتزامات التعاقدية من أحداث القوة القاهرة حيث لم يتم تحديده في العقد كحدث من أحداث القوة القاهرة.
هذا ويلاحظ آن مفهوم القوة القاهرة له تطبيق واسع في دول قانون الشرع العام (إنجلترا واسكتلندا وأغلب مستعمراتها، إيرلندا، الولايات المتحدة باستثناء ولاية لويزيانا، كندا باستثناء منطقة كيبيك، .....) وغالبًا ما ينص عليه في العقود التجارية التي يحكمها هذا النظام القانوني والذي يتيح للأطراف اقتراح الحلول الملائمة لتلافي قصور أحد الأطراف عن أداء التزاماته التعاقدية عندما يصبح من المستحيل تنفيذها أو من الصعب أدائها أو باهظة الثمن عند لتشغيل بسبب أحداث خارجة عن السيطرة المعقولة للأطراف ولا يمكن توقعها أو تفاديها وهو ما فسرته المحاكم الإنجليزية والأمريكية بأن مصطلح القوة القاهرة وهو أوسع في مدلوله من مصطلح « عمل الله » وأن « النقطة الأساسية في مفهوم القوة القاهرة أن يكون الحدث ذو الصلة (مثل وباء الكورونا فيروس.....) منشئ لقوة قاهرة لا يستطيع اطراف العقد التنبؤ بها وقت ابرام العقد وتخرج عن سيطرة الطرف المتضرر».

2.1.4 احداث القوة القاهرة :

تميل المحاكم والمحكمون الدوليون إلى تفسير شروط القوة القاهرة بشكل ضيق. لذلك، يجب في صياغة العقود استخدام لغة واضحة للغاية عند تحديد الأحداث التي من شأنها أن تبرر عدم الأداء وتوضح صراحة ما إذا كانت الشروط تنطبق على جميع الأحداث أو على مجموعة من الأحداث المدرجة والمنصوص عليها بالعقد على وجه التحديد. ويؤدي تقديم قائمة توضيحية (غير حصرية) للأحداث التي تشكل حالة قوة قاهرة إلى تقليل عدم اليقين في العلاقة التعاقدية. بشكل عام، كما توضح بنود القوة القاهرة بالعقود أمثلة على الأحداث التي تعتبر قوة قاهرة لأغراض العقد. على سبيل المثال: في هذه الفقرة، تعني "القوة القاهرة" حدثًا خارج عن سيطرة السلطة والمشغل مما يمنع الطرف من آدائه لأحد التزاماته التعاقدية، بما في ذلك على سبيل المثال لا الحصر: (أ) عمل الله (مثل، الحرائق والانفجارات والزلازل والجفاف وموجات المد والفيضانات والكوارث الطبيعية)؛ ب) الحرب أو الأعمال العدائية (سواء تم إعلان الحرب أم لا) أو الغزو أو فعل الأعداء الأجانب أو التعبئة أو الاستيلاء أو الحظر. ج) التمرد أو الثورة أو الانتفاضة أو القوة العسكرية أو المغتصبة أو الحرب الأهلية ؛ (د) التلوث الإشعاعي لأي وقود نووي أو أي نفايات نووية ناتجة عن احتراق الوقود النووي أو المتفجرات السامة المشعة أو غيرها من الخصائص الخطرة لأي تجمع نووي متفجر أو مكون نووي في ذلك التجمع ؛ (و) أعمال الشغب أو الإثارة أو الإضرابات أو التباطؤ أو الإغلاق أو الفوضى؛ (ز) أعمال الإرهاب أو التهديدات وتعد النزاعات المسلحة من أكثر الأحداث التي يتم تضمينها بالعقود، كما يمكن أن تتضمن شروط القوة القاهرة إجراءات حكومية أو قانونية ، ولكن هذا غالبًا ما يكون محدودًا عند التعاقد مع كيان عام لمنع ذلك الكيان من إنشاء مطالبة قوة قاهرة. من المستحسن سرد أحداث معينة - مثل "الحرائق والانفجارات والزلازل والجفاف وموجات المد والفيضانات" لتقليل تقدير هيئة التحكيم في تفسير البند.
هذا والقوة القاهرة هي دفاع ضد المسؤولية التعاقدية وتنطبق في حالات كثيرة في القانون المدني الفرنسي الذي يميز بين مفاهيم "القوة القاهرة" و "الحدث العارض "، كما يعتد بالمعايير التقليدية للقوة القاهرة وهي: عدم القدرة على التنبؤ، والحتمية وتأثير كون أداء الالتزام التعاقدي مستحيلًا. وتحتوي العقود الدولية طويلة الأجل بشكل رئيسي على واحد من ثلاثة أنواع من شروط القوة القاهرة: فبعض البنود تحدد صراحة مفهوم القوة القاهرة، بينما البعض الآخر يشير إلى مصدر القانون الخارجي والبعض الثالث لا يحتوي على أي تعريف للقوة القاهرة.
وواضح أن أقوى أنواع شروط القوة القاهرة تؤكد ما يحدد بوضوح مفهوم القوة القاهرة. في بند "القوة القاهرة" بالعقد وهو ما يعني حدثًا أو ظرفًا استثنائيًا: (1) خارج عن سيطرة طرف، (2) لم يكن من الممكن تبينه أو التنبؤ بوقوعه بشكل معقول قبل أو وقت إبرام العقد، (3) لم يكن بإمكان هذا الطرف تجنبه أو التغلب عليه بشكل معقول، (4) لا يمكن إسناده بشكل كبير إلى الطرف الآخر. غالبًا ما تستبعد البنود التي تحدد مفهوم القوة القاهرة بعض المعايير التقليدية - غالبًا ما لا يمكن التنبؤ بها - وتطبق بشكل منهجي معيارًا أقل صرامة.

2.2 مفهوم «عمل الله»: (L'Acte de Dieu)

كما ذكرنا آنفاً، فإن مفهوم القوة القاهرة معترف به على نطاق واسع في دول القانون المكتوب (الصين ودول الاتحاد الأوروبي وولاية لويزيانا في الولايات المتحدة)، ولكنه نادرًا في دول قانون الشرع العام (المملكة المتحدة والولايات المتحدة)، ما لم يتم كتابته وتحديد أحداثه كشرط في العقد. وبعيداً عن توافر شرط القوة القاهرة في العقد، يمكن للمرء أن يجد في قانون الشرع العام الإنجليزي مفهوم قانوني آخر يسمى " عمل الله ... والقضاء والقدر" مشابهاً لظروف وهدف القوة القاهرة ولكن يختلف عنها في متطلباته. والتفسير القانوني ل "الكارثة الطبيعية"، في حدث غير مسبوق مثل تفشي وباء الكورونا فيروس يجب ان يحدده يحدده القانون الواجب التطبيق على العقد. وفي قانون الشرع العام نجد أن متطلبات مفهوم «عمل الله» الذي اتفق عليه كلا من الفقه الأنجلو ساكسوني والأنجلو أمريكي على عكس متطلبات «القوة القاهرة» كوسيلة متاحة للأطراف لإيقاف تنفيذ التزاماتهم التعاقدية مؤقتًا أو لإنهاء العقد كلية في الظروف القاسية مثل الكوارث الطبيعية، الأوبئة ... الخ والتي من شأنها أن تبرر بشكل مشروع عدم أدائهم لالتزاماتهم التعاقدية. ويعرف «عمل الله» عموماً بأنه:

"الفعل الناجم حصرا عن عنف الطبيعة دون تدخل أي عامل بشري". وليس هناك من شك، كما أوضحنا أعلاه، أن وباء الكورونا فيروس كان وسيظل له تأثير سلبي على الاقتصاد العالمي، فمع تعطل سلاسل التوريد، وتوقف السفر والسياحة والأعمال التجارية المحلية والدولية يتعذر على الأشخاص والشركات الوفاء بالتزاماتهم التعاقدية الحالية وبالتالي فهذا الحدث الجلل يمكن وصفه بأنه "كارثة طبيعية" بالمعنى الصحيح لهذا المفهوم. وقانون الشرع العام في الدول التي ترتكز عليه يعتبر وباء الكورونا فيروس «كارثة» لا دخل لأي عامل بشري في وقوعها وينتج عنها آثار من أهمها «استحالة» أداء الالتزامات التعاقدية من جهة الطرف المضرور الأمر الذي بؤكده اللورد الإنجليزي HOBHOUSE بقوله أن عمل الله في إنجلترا وويلز هو ظاهرة طبيعية ووسيلة للطرف المضرور لدرء النتائج المترتبة علي "كارثة طبيعية" لا يمكن التنبؤ بها ولا دخل لأي عامل بشري في وقوعها، ويؤثر هذا الحدث (الكارثة) علي الالتزامات التعاقدية لأحد الأطراف في العقد فيجعلها مستحيلة التنفيذ أو لا قدرة له علي تنفيذها.
وبالتالي فإذا كان من الممكن تفسير حالة القوة القاهرة على انها دفاع ضمني لأحد الأطراف استناداً الي قاعدة "الاستحالة" أو "عدم القدرة" على تنفيذ الالتزامات التعاقدية، فان "عمل الله" يؤدي الي تبرير عدم تنفيذ الأطراف لالتزاماتهم التعاقدية لظروف خارجة عن سيطرتهم لا دخل لأي عامل بشري بوقوعها ولا يمكن التنبؤ بها وقت ابرام العقد نظراً لأن هذا الحدث ونتائجه وراء التبصر ومهارات الطرفين عندما دخلوا في العقد على أساس معقول. ومع ذلك وبالنظر إلى الوضع العالمي الحالي، فمن المؤكد أن أي محكمة مختصة ستخلص إلى أن وباء الكورونا فيروس هو حدث غير متوقع خارج عن سيطرة أي من الطرفين، مما يجعل من المستحيل على أي طرف الوفاء بالتزاماته التعاقدية. وبالتالي، يؤدي "عمل الله" إلى تبرير قانوني لعدم تنفيذ الأطراف لالتزاماتهم مثل ما تمثله حالة الكورونا فيروس حالياً من تدني أو انعدام الطلب على المنتج أو الخدمة المرتبطة بانتشار الوباء في جميع أنحاء العالم، ومع ذلك يجب أن يبذل أحد الأطراف جهودًا معقولة لتجنب آثار الوباء.

وتجدر الإشارة إلى أن "الاستحالة" كذريعة لعدم تنفيذ الالتزامات التعاقدية ليست قاصرة على الاستحالة المطلقة بل تشمل كذلك الاستحالة العملية التي تنشأ بسبب صعوبات شديدة وغير معقولة. وبشكل عام، يجب أن يكون عمل الله حصريًا نتيجة لأسباب طبيعية ذات طبيعة استثنائية. هذا ويقترح الفقه القانوني أنه عندما يكون الحدث طبيعي وغير مسبوق يكون ذلك كافياً لتطبيق مفهوم «عمل الله» لذا فمن المؤكد أن تفشي الكورونا فيروس Covid-19 سيندرج ضمن أحداث هذا المفهوم لأنه يمثل حدثًا " طبيعياً وغير مسبوق " مع آثاره أيضًا "غير المسبوقة".

2.3. مفهوم « انقضاء الغرض من التعاقد » : (Frustration)

و أيضا يعرف نظام قانون الشرع العام مفهوم " انقضاء الغرض من التعاقد " ، وهو مفهوم أضيق من المفاهيم السابقة وينطبق علي الحدث عندما يكون الأداء الفعلي للعقد قد تغير الي شكل آخر مختلف جذرياعن ما يقصده اطرافه.
فاذا كان الحدث المعني لا يندرج تحت مفهوم القوة القاهرة (في دول القانون المكتوب) أو لم ينص علي هذا آلبند أساسا في العقد (في دول قانون الشرع العام) ووقع حدث يؤدي الي استحالة تنفيذ الأطراف لالتزاماتهم التعاقدية أو عدم قدرتهم علي الوفاء بها، فسيكون مفهوم « انقضاء الغرض من التعاقد » هو المسار القانوني الوحيد المتبقي للطرف المتخلف عن الوفاء بالالتزام لإنهاء العقد.
ونظرًا لأن العديد من الدول تطبق إجراءات وقيود وقائية لمكافحة وباء الكورونا فيروس (حظر السفر ، وتعليق الرحلات الجوية والبحرية والتنقل، والبقاء في المنزل) مما ترتب عليه صعوبة قصوي في الوفاء بالالتزامات التعاقدية سواء للأفراد أو الشركات والمؤسسات التجارية وقد يؤدي ذلك إلى وقف الأنشطة التجارية لطرف في عقد يحكمه قانون الشرع العام من خلال تطبيق مفهوم "انقضاء الغرض من التعاقد" الذي يسمح به هذا القانون.
هذا ويرتبط مفهوم " انقضاء الغرض من التعاقد" بالاستحالة أو عدم القدرة علي أداء الالتزام لطرف في العقد، حيث يظل الأداء ممكنًا ، ولكن يتم إعفاؤه في كل مرة يحدث فيها حدث يتسبب في فشل أو تدمير وانقضاء الغرض الأساسي من التعاقد. وهذا الموقف الجديد يتعاظم الآن بعد إلغاء وإنهاء العديد العقود المهنية بسبب الوباء حيث تم الآن انقضاء أو تأخير أو إلغاء "الغرض الرئيسي" من العقود التجارية في العديد من دول قانون الشرع العام . هذا وقد يستمر الطرف المتضرر في تجنب التنفيذ من خلال الجدل حول انقضاء العقد بسبب الكورونا فيروس خاصة عندما يكون هناك "تغيير في الظروف" يغير من طبيعة الحقوق والالتزامات التعاقدية ويجعل الأداء مستحيلا ومختلفا جذريا وأقل قيمة أو أكثر تكلفة ولم يكن بمقدور الأطراف التنبؤ بذلك أو توقعه بشكل معقول وقت إبرام العقد.
والأثر القانوني لهذا المفهوم والذي أطلق عليه الفقه القانوني (الخيار النووي لأطراف العقد) هو إنهاء العقد "تلقائيًا" و "تمامًا" وهو الأمر الذي يمثل مخالفة صارخة للمبدأ الأساسي في نظرية « قدسية العقود » .. «Pacta Sunt Servanda

3. الخاتمة:

مما سبق يمكننا أن نستنتج أن الموقف في قانون العقود يتعلق بتأثير وباء الكورونا فيروس على الالتزامات التعاقدية التجارية حيث أن استمرار تفشي هذا الوباء وتمديد المحظورات والقيود لعدة أشهر سيؤثر علي قدرة الشركات التجارية في جميع أنحاء العالم ليس فقط بسبب تعليق عملياتها ، ولكن أيضًا بسبب اضطرار موظفيها وعمالها إلى البقاء في المنزل لتجنب انتشار الفيروس الخطير، إلى جانب التأثير المأساوي لهذا الوباء على البشر، وبالتالي فإن العواقب وخيمة وواضحة في جميع قطاعات الأعمال والأوساط القانونية ونتوقع أن المفاهيم والمبادئ والمذاهب التي استعرضناها سابقا (القوة القاهرة ، وعمل الله ، وانقضاء الغرض من التعاقد) سيكون لها اثرا كبيراً على الالتزامات التعاقدية في كل من دول الفانون المكتوب ودول قانون الشرع العام وسيستمر الاحتجاج بها مع استمرار الوباء ، ويبدو لنا أن هذا الوباء سيكون السبب الأساسي وراء قضاء المحاكم بتلك الدول بإعفاء أطراف العقود من أداء التزاماتهم (المستحيلة او الغير مقدور علي تنفيذها) بالضوابط السابق تفصيلها.
ووفقًا لإعلان منظمة الصحة العالمية الصادر في 11 مارس 2020 والذي بموجبه يكون فيروس كورونا -19 هو وباء بسبب انتشاره العالمي السريع ، فقد تأثرت الأطراف في العقود، مما يؤكد أن تغيير الظروف (استحالة الأداء أو عدم القدرة علي الوفاء) هو السبب الرئيسي لانقضاء وتغير "الغرض الأساسي" للتعاقد حيث يعتبر العقد في هذه الحالة غير عملي عندما يؤثر حدث كبير كهذا الوباء علي الغرض الذي قصده الأطراف فيجعله مختلفاً كلية عن ما قصدوه من تعاقدهم وما هم ملتزمين به نتيجة هذا التعاقد.
وعلى عكس مفهوم " القوة القاهرة " في القانون المكتوب الذي ينطبق بشكل عام على الحالات التي يكون فيها تنفيذ العقد مستحيلًا ، تشير مذاهب "انقضاء الغرض من التعاقد" و "عدم القدرة علي الأداء" في دول قانون الشرع العام إلى غرض مختلف تماماً عما تم التفكير فيه في الأصل من قبل الأطراف، ومع ذلك لا ينبغي الافتراض بإمكانية الاستناد الي مفهوم الإكراه الموجود وفقاً للمبادئ العامة للقانون لتلافي الالتزامات التعاقدية المستحيلة التنفيذ أو المرهقة بالنسبة للعقود التي يحكمها قانون الشرع العام وذلك لوجود وسائل ومفاهيم قانونية أخرى لوقف أو إنهاء أداء الالتزامات التعاقدية التي يؤثر الكورونا فيروس علي آدائها مثل "عمل الله" أو "انقضاء الغرض من التعاقد" (المملكة المتحدة ، أستراليا ، الهند) أو "الاستحالة العملية" (الولايات المتحدة).

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ملاحظة: أصل هذه المقالة ومراجعها باللغة الإنجليزية ولا تزال قيد النشر.

L'IMPACT DE CORONAVIRUS-COVID-19 SUR LES OBLIGATIONS CONTRACTUELLES

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Depuis que le Coronavirus COVID-19 a été signalé pour la première fois à Wuhan, en Chine, en décembre 2020, des pays du monde entier ont cherché à imposer des interdictions de voyager, à mettre en quarantaine les citoyens et à isoler les personnes infectées afin de stopper la propagation du nouveau virus.

Dans le monde entier, l'impact total de l'épidémie et les mesures d'urgence qui en résultent sur le commerce international restent à voir, mais beaucoup des personnes ont signalé d'importantes perturbations commerciales et opérationnelles, notamment des fermetures de lieux de travail et de ports, des perturbations des canaux d'approvisionnement et de distribution, une pénurie de main-d'œuvre et un affaiblissement de demande régionale et internationale. Étant donné la nature inattendue de l'épidémie, l'attention s'est concentrée sur la perspective que les parties aux contrats commerciaux puissent invoquer la force majeure et d'autres concepts juridiques dans ces contrats afin d'excuser le retard ou l'inexécution de leurs obligations. De nombreuses réclamations de force majeure impliquant un acheteur ou un fournisseur ont déjà été rapportées dans les médias mondiaux et il semble probable que des réclamations de portée plus large suivront, car les effets d'entraînement de l'épidémie se répandront dans le monde entier. Tout contrat comportant une clause spécifique de force majeure peut faire l'objet d'une réclamation. Les contrats régis par un cadre de droit civil qui accorde des recours en cas de force majeure, qu'ils soient ou non inscrits dans le contrat, peuvent également faire l'objet de la réclamation. L'effet de l'épidémie sur les fournisseurs est évident. Les mesures d'urgence ayant une incidence sur les marchandises, les travailleurs et la logistique, de nombreux fournisseurs semblent incapables de remplir leurs obligations contractuelles dans les délais prescrits ou ne les ont pas du tout. Mais invoquer la force majeure peut également intéresser les acheteurs, soit parce que la prise de livraison dans le cadre du contrat a été impactée, soit en raison de perturbations sur les marchés.

1 - Position de l'Organisation Mondiale de la Santé (OMS):

En février 2020, l'Organisation Mondiale de la Santé a déclaré que l'épidémie de Coronavirus COVID-19 constituait une urgence de santé publique de portée internationale (USPPI), et le11 mars 2020 le Dr.Tadros Adhanom Ghebreyesus, directeur général de l'OMS, a déclaré lors d'une conférence de presse : "Coronavirus COVID-19 n'est pas seulement une crise de santé publique, c'est une crise qui touchera tous les secteurs, donc chaque secteur et chaque individu doit être impliqué dans les

combats". L'épidémie est devenue une menace mondiale et son impact dans le monde entier, signalant plus de 180 000 cas de coronavirus dans plus de 170 pays et territoires à travers le monde et le risque soutenu de nouvelles propagé. Les gouvernements ont commencé à mettre en œuvre des mesures drastiques pour atténuer la propagation de l'épidémie, notamment des confinements, quarantaines, fermeture des restaurants, des cafés, des centres commerciaux et des magasins, l'interdiction des rassemblements de masse, l'annulation d'événements et de conférences à l'échelle mondiale et l'interdiction stricte des voyages par air, mer, fer et sol. Il ne fait aucun doute que Coronavirus COVID-19 a eu, et continuera d'avoir, un impact négatif sur l'économie mondiale. Avec la perturbation des chaînes d'approvisionnement et des opérations commerciales internes et internationales, de nombreux particuliers et entreprises seront certainement incapables de remplir leurs obligations contractuelles existantes. Alors, comment les entreprises peuvent-elles considérer leurs contrats de secours?

2 - La Position Juridique Mondiale:

Dans le monde juridique, il existe de plusieurs concepts et doctrines juridiques dans les pays de droit civil et ceux de la common law qui peuvent être légalement appliquées à l'épidémie de COVID-19 pour dispenser les parties concernées dans un contrat de l'inexécution de leurs obligations contractuelles. Nous présenterons ci-dessous les trois principals concepts comme suit :

2.1. Notion de la Force Majeure:

Lorsque le Coronavirus COVID-19 provoque une interruption des activités de l'exécution des obligations contractuelles, la question est de savoir si une partie peut invoquer la force majeure comme un événement extraordinaire indépendant de la volonté des parties pour ne pas remplir leurs obligations, en particulier après les pays du monde ont imposé des interdictions de voyager et de tourisme, mettre en quarantaine les citoyens et isoler les personnes infectées afin de stopper la propagation de l'épidémie?

Le terme "force majeure" dérive du droit civil français (le code Napoléon) influencé par la civilisation roumaine et a été appliqué à plusieurs autres juridictions de droit civil. De nombreux systèmes juridiques ont des définitions législatives spécifiques de la force majeure qui s'appliquent, soit que le contrat contienne ou non une clause de force majeure. Le terme est codifié et apparaît dans de nombreux pays de droit civil (comme par exemple l'Italie, la France, l'Espagne, l'Allemagne, la Belgique, les Pays-Bas, la Danemark, la Suède, la Finlande, ...). Ainsi, les clauses de force majeure servent de précaution contre les risques posés par certains événements économiques, politiques et de catastrophes naturelles. En examinant attentivement la loi applicable et en rédigeant une clause de force majeure adaptée à l'accord, la clause de force majeure peut venir à la rescousse lorsque de tels événements se produisent. *La force majeure* est une clause courante dans les contrats qui dégage essentiellement les deux parties de toute responsabilité ou obligation lorsqu'un événement ou une

circonstance extraordinaire échappant au contrôle des parties, comme une guerre , une grève , une émeute , un crime, une épidémie ou un événement décrit par le terme juridique *"force majeure",* empêche l'une des parties ou les deux de s'acquitter de leurs obligations en vertu du contrat. *La force majeure* est généralement destinée à inclure des événements hors du contrôle raisonnable d'une partie, et *ne* couvre donc *pas* :

- Tout résultat de la négligence ou de la malveillance d'une partie, qui a un effet défavorable significatif sur la capacité de cette partie à remplir ses obligations.
- Tout résultat des conséquences habituelles et naturelles de la force extérieure: (a) si la cause est une pluie ordinaire prévisible, ce n'est probablement pas un *cas de force majeure; (b)* si la cause est une crue soudaine qui endommage le lieu ou rend l'événement dangereux pour y assister, alors il s'agit presque certainement d'un *cas de force majeure* , autre que lorsque le lieu était dans une plaine inondable connue ou que la zone du lieu était connue pour être soumis à des pluies torrentielles; (c) certaines causes pourraient être des cas limites discutables qui doivent être appréciés à la lumière des circonstances.
- Toutes les circonstances qui sont spécifiquement envisagées (incluses) dans le contrat, par exemple, si le contrat pour l'événement en plein air le permet ou l'exige spécifiquement en cas de pluie.

En droit international, il fait référence à une force irrésistible ou à un événement imprévu échappant au contrôle d'un État, ce qui rend matériellement impossible le respect d'une obligation internationale et est lié au concept d'état d'urgence. Les tribunaux présument que les contrats commerciaux internationaux sont rédigés avec une évaluation professionnelle des risques déjà incluse dans le contrat négocié. Ce sont donc les parties elles-mêmes qui doivent prendre des précautions contre la matérialisation du risque en incluant des clauses de force majeure soigneusement rédigées dans leurs contrats. Cela est particulièrement vrai lorsqu'il s'agit de contrats qui spécifient que la loi applicable est la loi d'une juridiction de common law, car il n'y a pas de notion de force majeure en common law. Au contraire, la force majeure est généralement traitée dans les juridictions de common law comme une créature du consentement, et en tant que tel, ne s'appliquera que lorsqu'une clause de force majeure est incluse dans un contrat. Cela reflète le point de vue selon lequel ces clauses sont utilisées pour répartir le risque si un événement donné se produit. En revanche, l'inclusion d'une clause de force majeure dans un contrat régi par la juridiction de droit civil, qui reconnaît généralement la doctrine de la force majeure, permet aux parties de contourner d'éventuelles limitations de la doctrine énoncée dans la loi applicable. Que la source des droits de force majeure soit la législation ou les termes du contrat, les régimes de force majeure fonctionnent généralement en excusant l'inexécution par une partie de ses obligations contractuelles lorsque l'inexécution est causée par un événement de force majeure défini. Recours autrement disponibles pour les parties lorsque le contrat devient impossible, difficile ou onéreux à exécuter en raison d'événements indépendants de la volonté de la partie concernée. Pour déterminer si un événement est un événement de force majeure, il faut normalement appliquer le critère objectif figurant dans la loi applicable ou écrit dans le contrat. Dans les concepts généraux de force majeure, un événement constitue un cas de force majeure est un événement ou une situation objective qui est :

(1) **imprévisible** au moment de la conclusion du contrat; (2) **inévitable** en termes d'occurrence ou d'impact; et (3) **impossible** surpasser. Il doit exister un lien de causalité entre l'événement de force majeure et le manquement de la partie concernée à ses obligations (c'est-à-dire que la partie affectée doit établir que l'événement de force majeure a causé l'inexécution). Un *cas de force majeure* peut également être la force écrasante elle-même, ce qui empêche l'exécution d'un contrat, il s'agit en fait des défenses d' impossibilité ou d' impraticabilité. L' importance de la clause de *force majeure* dans un contrat ne peut pas être surestimée car elle libère une partie d'une obligation en vertu du contrat (ou suspend cette obligation). Il est à noter que certains systèmes juridiques limitent la *force majeure* à un Acte *de Dieu* (comme les inondations, les tremblements de terre, ouragans, etc.) mais excluent les défaillances humaines ou techniques (tels que les actes de guerre, les activités terroristes, les conflits de travail, ou de l' interruption ou défaillance des systèmes d'électricité ou de communications). Le point consultatif est dans la rédaction du contrat pour faire une distinction entre l'*Acte de Dieu* et les autres formes de *force majeure.*

2.1.1. Force Majeure dans les Pays de Droit Civil :

La doctrine de la force majeure trouve son origine dans les systèmes de droit civil. Elle s'applique à l'inexécution d'un contrat, que le contrat contienne ou non une clause de force majeure. Cependant, comme l'a expliqué un auteur, «il existe des différences substantielles entre les législations nationales quant à la nature des événements qui se qualifient, qu'une impraticabilité extrême soit suffisante ou non, et la nature de la réparation, entre autres». On considère généralement que les dispositions de la force majeure ne sont pas d'ordre public dans les juridictions de droit civil. Par conséquent, une clause de force majeure dans un contrat peut s'écarter des exigences légales de la doctrine de force majeure prévue par le système juridique. Les pays de droit civil diffèrent souvent dans la pratique de la force majeure contractuelle. La force majeure contractuelle peut être, dans sa portée et ses recours, plus large ou plus étroite que les régimes de droit civil plus rigides, selon le pouvoir de négociation des parties au moment de la conclusion du contrat et la manière dont cela s'est traduit dans la rédaction du contrat en question. En règle générale, il sera plus facile de déposer une réclamation pour cas de force majeure si l'événement est répertorié (bien que les autres exigences du test objectif doivent toujours être remplies). Alors que les épidémies sont rares dans les temps modernes, la mémoire récente comprend le SARS, Ebola et diverses épidémies graves de grippe. Les épidémies surviennent assez fréquemment, bien que les parties aient pu spécifiquement inclure «épidémie» comme des événements de force majeure répertoriés ou elles peuvent être englobées dans des termes plus généraux tels que «maladie», «l'action gouvernementale»; «Ordre du gouvernement»; «Urgence nationale»; «quarantaine» ou «confinement».

Les critères traditionnels de force majeure sont l'imprévisibilité, l'inévitabilité et l'effet de rendre la performance impossible. Dans la clause de «force majeure», cela signifie un événement ou une circonstance exceptionnelle: (1) qui échappe au contrôle d'une partie, (2) contre laquelle cette partie n'aurait pas pu raisonnablement se prévaloir avant de conclure le contrat, (3) qui, ayant surgi, cette Partie n'aurait pas pu

raisonnablement éviter ou surmonter, et (4) ce qui n'est pas substantiellement imputable à l'autre Partie. Les clauses qui définissent le concept de force majeure excluent souvent certains des critères traditionnels - le plus souvent l'imprévisibilité - et appliquent systématiquement une norme moins rigoureuse. D'autres clauses de force majeure ne définissent pas la notion de force majeure mais font plutôt référence à une source externe telle que «causes de force majeure généralement reconnues» ou «cas de force majeure admis par la jurisprudence d'un tel pays».

2.1.2. Force Majeure et la Loi Applicable :

Il est important de noter que tous les systèmes juridiques du monde traitent de la notion de force majeure. Une distinction peut généralement être établie entre les pays de droit civil, dans lesquels la doctrine s'applique généralement, et les pays de la common law, qui n'ont généralement pas d'application générale du concept de force majeure (bien qu'il existe des variantes, comme dans certaines anciennes colonies anglaises), le concept du droit anglais de «frustration» et le concept du droit américain d '«impraticabilité commerciale»). Étant donné sa quasi-inexistence dans les systèmes de la common law, les parties souhaitant invoquer la force majeure n'ont d'autre choix que de définir le concept dans leurs contrats régis par le droit d'une juridiction de la common law. Par contre, l'un des principaux objectifs de l'inclusion d'une clause de force majeure dans un contrat régi par une juridiction de droit civil est que la clause permet aux parties de contourner les éventuelles limitations de la loi applicable. Les dispositions nationales peuvent être soit trop restrictives soit trop larges et ne reflètent pas nécessairement les intérêts et les intentions des parties concernant la répartition des risques. S'il est dans l'intérêt des parties d'élargir (ou de restreindre) la portée de la notion de loi applicable, la clause devrait être explicite à cet égard. Bien que le rôle de la loi applicable soit considérablement réduit lorsque les termes du contrat sont clairs et complets, les choix de loi peuvent encore jouer un rôle important dans l'interprétation de la clause de force majeure dans le contrat ou de la doctrine de la force majeure de manière plus générale.

2.1.3. Force Majeure dans les Pays de la Common Law :

Il lui reste à démontrer que le risque d'inexécution était imprévisible et ne pouvait être atténué et que la performance est vraiment impossible ou financièrement difficile. Ainsi, aucune des parties aux présentes ne sera responsable de tout manquement à l'exécution dû à des causes indépendantes de sa volonté, dont la survenance n'aurait pas pu être empêchée par l'exercice d'une diligence raisonnable, comme les cas de force majeure. Dans certains cas, la clause de force majeure peut mentionner spécifiquement une épidémie mondiale. Cependant, même si l'épidémie de Coronavirus- COVID-19 elle-même n'est pas considérée comme un événement de force majeure car elle n'est pas prévue dans une clause spécifique du contrat comme un événement de force majeure, ou si elle ne rend pas l'exécution impossible, les confinements, les quarantaines, les restrictions de voyage et les interdictions, les limitations aux activités commerciales normales imposées par les gouvernements constituent des actes «d'interdiction gouvernementale» valables excusant l'inexécution

des obligations contractuelles. Lorsque le contrat est régi par un système de la common law, les tribunaux compétents reconnaissent généralement la liberté des parties de convenir d'une réparation large ou étroite en cas de force majeure. Une complication est que le terme «force majeure» est également parfois utilisé pour faire référence à d'autres dispositions s'appliquant fréquemment à des événements de survenance exceptionnels tels que les clauses de «contrainte» et celles créant un cadre pour apporter des modifications au contrat en cas de changements importants de circonstances, ce qui constitue un cas de force majeure et le test objectif précis dépend du libellé spécifique de la disposition. Alors que les systèmes de la common law adoptent généralement une approche cohérente, des variations (certaines subtiles) persistent et il est important d'aborder l'interprétation de chaque clause de force majeure par rapport à la jurisprudence correspondante. Jusqu'à une date assez récente, les tribunaux anglais ont appliqué un critère d'imprévisibilité aux événements de force majeure et ils ont jugé que la partie concernée devait aussi généralement être «prête, disposée et capable» à exécuter le contrat, sauf en cas de force majeure. En règle générale, la partie concernée est dispensée de l'inexécution pertinente pendant que l'événement de force majeure (ou ses effets) persiste.
La common law anglaise n'applique pas automatiquement les principes de *force majeure* aux contrats. Parties aux contrats de droit commun anglais qui souhaitent avoir un *cas de force majeure* la réparation doivent préciser ce qui constitue un cas de force majeure dans le contrat lui-même. Le fait de ne pas le faire signifie qu'un événement de surveillance qui empêche l'exécution du contrat ne sera pas pris comme un événement de force majeure, de manière à fournir une dispense d'exécution parce qu'il n'a pas été désigné comme événement admissible dans le contrat. La force majeure a une large application dans les pays de la common law (Angleterre et Ecosse, Irlande, Etats-Unis sauf l'Etat de Louisiane, Canada sauf pour la région de Québec, ...) et est fréquemment utilisé dans les contrats commerciaux régis par de tels systèmes de la common law en raison des recours limités dont disposent autrement les parties lorsque le contrat de la common law devient impossible, difficile ou onéreux à exécuter en raison d'événements échappant au contrôle raisonnable de la partie concernée et ne pouvait pas avoir été prévu, ou, si l'événement aurait pu être prévu, est un événement inévitable.Tel qu'interprété par les tribunaux anglais et américains, l'expression "*force majeure"* a une signification plus étendue que «l'Acte de Dieu». Le point clé est que, bien qu'il soit inhabituel que la définition exige que l'événement pertinent (l'épidémie de Coronavirus COVID-19) soit imprévisible (étant donné que les événements de force majeure sont souvent prévisibles mais ne peuvent être évités), et au-delà du contrôle de la partie affectée.

2.2 Notion de l'Acte de Dieu :

Comme nous l'avons mentionné ci-dessus, la doctrine de la force majeure est largement reconnue dans les pays de droit civil (Chine et pays de l'UE et État de Louisiane aux États-Unis), mais rarement dans les pays de la common law (Royaume-Uni et États-Unis), sauf si elle est écrite en tant que clause dans le Contrat. Sans clause de force majeure dans le contrat, on peut trouver dans la common law anglaise un concept juridique dit de "l'Acte de Dieu" similaire à la force majeure dans son objectif

mais différent dans ses exigences. L'interprétation juridique d'une "catastrophe naturelle", dans un événement sans précédent comme l'épidémie de Coronavirus COVID-19, devrait être déterminée par la loi applicable du contrat. En common law, on peut trouver le concept de "cas de force majeure" qui avait été approuvé par la jurisprudence anglo-saxonne et anglo-américaine contrairement aux exigences de force majeure comme moyen pour les parties de faire une pause dans leur exécution ou de résilier le contrat dans des circonstances extrêmes comme des catastrophes naturelles, une épidémie ... etc., qui excuseraient légitimement leur inexécution du contrat. Un "cas de l'Acte de Dieu" généralement défini comme : "un acte causé exclusivement par la violence de la nature sans ingérence d'aucun agent humain". Il ne fait aucun doute, comme nous l'avons expliqué ci-dessus, que l'épidémie de Coronavirus COVID-19 a eu et continuera d'avoir un impact négatif sur l'économie mondiale. Avec la perturbation des chaînes d'approvisionnement, des voyages nationaux et internationaux et des opérations commerciales, de nombreuses personnes et entreprises ne seront pas en mesure de remplir leurs obligations contractuelles existantes. Alors, combien d'entreprises se tourneront vers leurs obligations contractuelles d'allégement? Les pays de la common law considèrent l'épidémie de COVID-19 comme une "catastrophe naturelle" au sens de la disposition, la partie affectée qui cherche à s'en prévaloir doit alors présenter les ***DEUX*** exigences suivantes: (i). Que l'épidémie de Coronavirus COVID-19 a rendu l'exécution de ses obligations contractuelles impossible, et (ii). Que l'évenement et ses conséquences dépassaient la prévoyance et les compétences raisonnables des parties au moment où elles ont conclu le contrat. Cependant, compte tenu de la situation mondiale actuelle, il est certain que tout tribunal compétent conclura que l'épidémie de COVID-19 est un événement imprévisible échappant au contrôle de l'une ou l'autre des parties, ce qui rend impossible pour une partie de remplir ses obligations contractuelles. Un Acte de Dieu en Angleterre et au Pays de Galles est un phénomène naturel imprévisible. Lord Hobhouse a décrit :"l'Acte de Dieu" comme un événement : i) qui n'impliquait aucune intervention humaine, ii) qui n'est pas réaliste de se prémunir, iii) qui est dû directement et exclusivement à des causes naturelles , et iv) qui n'aurait pas pu être empêché par un quelconque plan de prévoyance et de soins. Dans le droit anglais des contrats, un cas de force majeure peut être interprété comme une défense implicite en vertu de la règle d'impossibilité ou d'impraticabilité. Ainsi, l'Acte de Dieu devrait conduire à excuser l'exécution par les parties de leurs obligations en raison de "l'échec de la demande du produit ou du service lié au déclenchement d'une épidémie dans le monde entier", qui serait probablement invoqué dans les circonstances actuelles. (Coronavirus,COVID-19). De plus, l'événement de force majeure ou ses circonstances doivent être à l'origine de l'inexécution ou de la résiliation du contrat et qu'une partie doit avoir fait des efforts raisonnables pour éviter les effets de l'épidémie. Cependant, il convient de noter que «l'impossibilité comme excuse pour l'inexécution d'un contrat n'est pas seulement une impossibilité stricte, mais inclut l'impossibilité pratique en raison de difficultés extrêmes et déraisonnables…». Généralement, l'Acte de Dieu doit : a) être exclusivement la conséquence de causes naturelles"; b) être d'une nature extraordinaire. La jurisprudence suggère que lorsqu'un événement naturel est sans précédent, il doit être suffisant pour satisfaire cette définition. Il est certain que la propagation de l'épidémie de Coronavirus COVID-19 satisferait cette définition car

elle représente un événement «sans précédent», avec ses effets également «sans précédent».

2.3. Notion de la Frustration :

Le système de la common law reconnaît également le concept de la " frustration de l'objectif " , un concept plus étroit qui s'applique lorsque l'exécution réelle du contrat est radicalement différente de ce que les parties voulaient. Si un cas de force majeure n'a pas été prévu dans le contrat (ou que l'événement concerné ne relève pas de la clause de force majeure) et qu'un événement de survenance empêche l'exécution, il s'agira d'une rupture de contrat . La doctrine de la frustration sera le seul cours restant à la disposition de la partie en défaut pour mettre fin au contrat. Si l'inexécution du contrat prive la partie innocente de presque tous les avantages du contrat, ce sera une violation de la répudiation, autorisant la partie innocente à résilier le contrat et à réclamer des dommages et intérêts pour cette violation. répudiateur.

Alors que de plus en plus de 180 pays introduisent des mesures de protection et des restrictions (interdiction de voyager, suspension des vols, rester à la maison) afin de gérer l'épidémie de Coronavirus COVID-19, les entreprises peuvent constater qu'eux-mêmes ou leurs contreparties ont du mal à répondre à leurs obligations contractuelles. La cessation des activités commerciales pourrait permettre à une partie à un contrat régi par une loi de la common law, de se soustraire à ses obligations en invoquant soit une clause de force majeure ou le concept de "cas de force majeure" (comme nous l'avons expliqué précédemment), ou en appliquant la common law concept de «frustration». Cependant, les deux dernières voies ont de fortes chances de réussir dans les pays de la common law. Étroitement liée à l'impossibilité est le concept juridique de la frustration du but, où la performance reste possible, mais est excusée chaque fois qu'un événement fortuit survient pour entraîner un échec de la contrepartie ou pratiquement la destruction de la valeur attendue de la performance du contrat. C'est ainsi que la doctrine de la frustration est liée à la finalité lorsque «la finalité principale d'une partie est considérablement contrecarrée». Cette situation survient maintenant à la suite de l'annulation et/ou de la résiliation de nombreux contrats professionnels et en raison de l'épidémie où le "but principal" du contrat est désormais frustré, retardé ou annulé. Même si un contrat ne contient pas de clause de force majeure applicable, une partie affectée peut toujours chercher à éviter l'exécution en arguant de la frustration du contrat due à Coronavirus COVID-19. Un contrat est frustré lorsqu'il y a un «changement de circonstances» qui modifie la nature des droits et/ou obligations contractuels d'une manière que les parties n'auraient pas pu raisonnablement envisager au moment où elles ont exécuté le contrat.

En vertu de la «doctrine de la frustration», un contrat peut être résilié si, après sa formation, des événements (comme Coronavirus COVID-19) se produisent, rendant sa performance impossible, radicalement différentes; ou tout simplement moins pratiques et/ou plus chère. L'effet juridique de la frustration (option nucléaire) est la résiliation du contrat «automatiquement» et «totalement».

La doctrine de la frustration remet en question la validité, et l'applicabilité du principe fondamental de "Pacta Sunt Servanda" (caractère sacré des contrats).

3. CONCLUSION:

De ce qui précède, nous pouvons conclure que la position dans le droit des contrats liée à l'impact de l'épidémie de Coronavirus COVID-19 sur les obligations contractuelles commerciales, et à mesure que le déclenchement de cette épidémie se poursuit et que les interdictions et les restrictions seront prolongées pendant plusieurs mois. Toutes les entreprises du monde entier continueront d'être affectées, non seulement en raison de la suspension de ses opérations, mais également parce que ses employés et ses travailleurs ont été obligés de rester chez eux pour éviter la propagation du virus grave. Outre l'impact tragique de cette épidémie sur l'homme, les conséquences sont visibles dans tous les secteurs du monde des affaires et du droit et nous nous attendons à ce que les concepts, principes et doctrines (Force Majeure, Acte de Dieu, Frustration) et ses impacts sur les obligations contractuelles dans les pays de droit civil ou ceux de la common law continueront d'être invoqués au fur et à mesure que l'épidémie se poursuivra, et il nous semble que cette épidémie sera le raisonnement essentiel pour que les tribunaux dispensent les parties de l'exécution de leurs obligations. En l'absence de clause spécifique d'événements de force majeure dans les contrats, et selon la déclaration de l'OMS du 11 mars 2020 selon laquelle Coronavirus COVID-19 est une épidémie par sa propagation mondiale rapide, la partie affectée dans lesdits contrats peut confirmer que le changement de circonstances (impossibilité d'exécution) est la principale raison pour laquelle "l'objectif initial et principal" du contrat a été contrecarré. D'autre part, un contrat est généralement considéré comme «frustré» ou «irréalisable» lorsqu'un événement majeur rend l'exécution du contrat si différente de ce qui était envisagé à sa conclusion qu'il ne serait pas raisonnable de tenir les parties liées par celui-ci. Contrairement à la notion de «force majeure» en droit civil qui s'applique généralement aux situations où l'exécution du contrat est impossible, les doctrines de «frustration» et d'«impraticabilité» de la common law se réfèrent généralement à quelque chose de simplement différent de ce qui était initialement envisagé par les parties. Cela étant dit, il ne faut pas supposer qu'un concept de contrainte existe en vertu des principes de common law. Pour les contrats régis par la common law, il existe d'autres moyens de cesser et/ou de résilier l'exécution des obligations contractuelles dans lesquelles la partie affectée du l'épidémie de coronavirus COVID-19 pourrait demander réparation en vertu d'autres concepts et doctrines juridiques des pays de la common law comme «l'Acte de Dieu» ou la «Frustration» (Royaume-Uni, Australie, Inde) ou «l'impossibilité pratique» (États-Unis).

NB: L'originale de cet article et ses references sont en langue anglaise et en cours de publication.

THE IMPACT OF COVID-19 (CORONAVIRUS) ON CONTRACTUAL OBLIGATIONS

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Since the COVID-19 coronavirus was first reported in Wuhan, China, in December last year, countries around the world have sought to impose travel bans, quarantine citizens, and isolate the infected in an attempt to stop the spread of the new virus. The outbreak has developed into a global threat and on January 30th, 2020, the World Health Organization declared that the outbreak constituted a public health emergency of international concern.
Worldwide, the full impact of the outbreak and the resulting emergency measures on international trade remains to be seen but our clients have reported substantial business and operational disruptions, including closures of workplaces and ports, disruptions to supply and distribution channels, shortage of labor and weakened regional demand. Given the unexpected nature of the outbreak, attention has focused on the prospect that parties to affected commercial contracts may invoke force majeure and/or other legal concepts in those contracts in order to excuse delay or non-performance.

1 – The World Health Organization (WHO) Position **:**

On March 11th, 2020, the World Health Organization (WHO) declared COVID-19 a Pandemic and its impact worldwide, pointing to the over 180,000 cases of the coronavirus illness in over 170 countries and

territories around the world and the sustained risk of further global spread. Dr. Tadros Adhanom Ghebreyesus, General Director of WHO, said at a media conference: "This is not just a public health crisis, it is a crisis that will touch every sector, so every sector and every individual must be involved in the fights". The outbreak has developed into a global threat, and in February 2020, the WHO declared that the outbreak constituted a Public Health Emergency of International Concern (PHEIC). In the medical and scientific world, where the growing concern about the threat of COVID-19 to the world, a WHO's Scientific Report shows the situation in numbers as follows : Globally: 3.418.200 confirmed, 239.923 deaths, European Region: 1.411.476 confirmed, 137.587 deaths, African and Eastern Meditteranean Region: 74.347 confirmed, 3.976 deaths, Asia Region: 537.978 confirmed, 19.099 deaths, the North America Region: 1.227.657 confirmed, 71.926 deaths and the South America Region: 190.321 confirmed, 9.486 deaths. Among the infected persons of COVID-19 in the USA, the White House chief officer of medical services and in the UK, the Crown Prince Charles, and the PM Boris Jhonson. In addition to the humanitarian and public health dimensions of the outbreak, governments have begun implementing drastic measures to mitigate the spread of the pandemic, including quarantines, closure of restaurants and coffee shops, commercial malls and shops, bans on mass gatherings, cancel events and conferences on a global scale, and strict bans for air, sea and ground travels. There is no doubt that COVID-19 has had, and will continue to have, an adverse impact on the global economy. With the disruption to supply chains, internal and international business operations, many individuals and businesses will be surely unable to fulfill their existing contractual obligations. So, how may businesses look to their contracts for relief ?

2 – Action of the Congress, the Senate, and officials in the USA :

For the first time in history, the Congress and Senate in the USA, allow every US state and local government to use federal funds during the COVID-19 Pandemic.

On April 30th, 2020, in Washington the US intelligence community said : it had concluded that the novel coronavirus that has swept the globe originated in China but was not man-made or engineered.

3 – The Impact of COVID-19 on Commercial Contracts :

Numerous force majeure claims involving a Chinese buyer or supplier have already been reported in the world media and it seems likely that claims with a wider ambit will follow as the ripple effects of the outbreak spread globally. Any contract with a specific force majeure clause may be the subject of a claim. Contracts governed by a civil law framework that grants force majeure remedies, whether or not they are written into the contract, may also be the subject of the claim. Force majeure claims are particularly relevant for contracts with a long-term or ongoing supply and in the following markets:

- Commodity contracts (including iron ore, coal, and copper);
- Liquid Natural Gas (LNG) contracts;
- Shipbuilding contracts;
- Supply contracts for textiles, foodstuffs, and mechanical equipment;
- Contracts for electrical equipment and electronic components;
- Medical equipment manufacturing contracts.

The effect of the outbreak on suppliers is perhaps most obvious. With emergency measures impacting goods, workers, and logistics, many suppliers appear unable to fulfill their contractual obligations within the prescribed time or at all. But invoking force majeure may also be of interest to buyers, either because taking delivery under the contract has been impacted or due to disruptions in downstream markets.

The China government has acted on force majeure specifically, with the quasi-governmental China Council for the Promotion of International Trade (**CCPIT**) announcing on January 30th, 2020, that it would offer "force majeure certificates" to help companies deal with disputes with foreign trading partners arising from government control measures. To date, it has been reported that thousands of certificates have been issued purporting to shield

Chinese companies against liabilities for non-performance. These have been issued by the CCPIT to numerous Chinese companies in relation to the coronavirus outbreak as above. Typically, to obtain such a certificate, the affected party must provide the CCPIT with documents evidencing the occurrence of the relevant event. Typically, CCPIT issued certificates will only certify the occurrence of the event, which may qualify as a force majeure event under general circumstances but would usually refrain from certifying it as a force majeure event.

The purpose of these certificates is to facilitate the invoking of force majeure remedies where the contract requires the provision of such a certificate issued by a relevant government authority as a prerequisite to the bringing of the force majeure claim. Many commercial companies all over the world had seen the end of its days as a result of the COVID-19 Pandemic. As an example, in the tourist and airline sector, Flybe, UK's largest domestic airline, collapsed and ceased all operations due to all flights canceled since COVID-19 Coronavirus had increasingly affected travel. Airlines across the world and now in the USA have been slashing capacity to cope with cancelations tied to the pandemic which have worsened financial conditions for all carriers worldwide. In Far East China Airlines, JAL, Singapore Airlines, in the USA (American Airways, Delta, United, and Blue Sky), in the UK (British Airways and EasyJet), Ireland (Ryanair), Group of Air France and KLM, Star Alliance group, Egyptair, Air Cairo, NileAir, and many other Airlines. Also, Lufthansa Group announced that Germanwings, its low-cost subsidiary, would cease operations as a result of the COVID-19 crisis. British rail, French SNCF, Belgium, Spanish, and German rail reduced their operations to the minimum. According to many travel companies' assessment, it will take many months until the global travel restrictions are lifted and many years until the worldwide demand for tourists and air, sea, rail travel returns to pre-crisis levels.

4 – The World Legal Position :

We shall present below the different legal concepts and doctrines in both Civil Law and Common Law jurisdictions which can be legally applied to COVID-19 Pandemic to excuse the affected parties in a contract from the non-performance of their contractual obligations as follows :

4.1 Force Majeure *:*

Where coronavirus (COVID-19) causes business disruption from the fulfillment of contractual obligations, the question is whether any party can rely on force majeure as an extraordinary event beyond the control of the parties to non-perform their obligations, especially after the countries around the world imposed tourist and travel bans, quarantine citizens, and isolate the infected in an attempt to stop the spread of the Pandemic ?

The term "force majeure" derives from French Civil Law (the Napoleon Code) influenced by Romanian civilization and has been carried across to several other civil law jurisdictions. Many legal systems have specific legislative definitions of force majeure which apply whether or not the contract contains a force majeure clause. The term is codified and appears in many countries of Civil Law (Italy, France, Spain, Germany, Belgium, the Netherlands, Denmark, Sweden, Finland,.....). Unforeseeable and unavoidable events – such as the Ebola epidemic, a deadly virus in West Africa, the warehouse fire in Brazil, and the crash of Malaysian Airlines Flight 17 in Ukraine regrettably does occur and thus must be taken into consideration by parties. Thus, force majeure clauses serve as a precaution against the risks posed by certain economic, political, and natural disaster events. In short, contract drafters must expect the unexpected. By carefully reviewing the applicable law and drafting a force majeure clause that is tailored to the agreement, the force majeure clause can come to the rescue when – not if – such events take place. *Force Majeure* is a common clause in contracts that essentially frees both parties from liability or obligation when an extraordinary event or circumstance beyond the control of the parties, such as a war, strike, riot, crime, epidemic or an event described by the legal term *"force majeure"* prevents one or both parties from fulfilling their obligations under the contract. *Force Majeure* is generally intended to include occurrences beyond the reasonable control of a party, and therefore would *not* cover the following :

- Any result of the negligence or malfeasance of a party, which has a materially adverse effect on the ability of such party to perform its obligations.

- Any result of the usual and natural consequences of external force : (a) if the cause is ordinary predictable rain, this is most probably not *force majeure; (b)* if the cause is a flash flood that damages the venue or makes the event hazardous to attend, then this almost certainly is *force majeure*, other than where the venue was on a known flood plain or the area of the venue was known to be subject to torrential rain; (c) some causes might be arguable borderline cases (for instance, if unusually heavy rain occurred, rendering the event significantly more difficult, but not impossible, to safely hold or attend); these must be assessed in light of the circumstances.
- Any circumstances that are specifically contemplated (included) in the contract—for example, if the contract for the outdoor event specifically permits or requires cancellation in the event of rain.

Under international law, it refers to an irresistible force or unforeseen event beyond the control of a state making it materially impossible to fulfill an international obligation and is related to the concept of a state of emergency.

Tailored force majeure clauses also are important because international arbitral tribunals are as a rule reluctant to interfere with a contract without a specific contractual basis.9 Tribunals presume that international commercial contracts are drafted with a professional assessment of risk already included in the bargained-for contract. Thus it is the parties themselves that must take precautions against the materialization of risk by including carefully drafted force majeure clauses in their contracts. This is particularly true when dealing with contracts that specify that the applicable law is the law of a common-law jurisdiction, as there is no general law concept of force majeure in the common law. Rather, force majeure generally is treated in common law jurisdictions as a creature of consent, and as such will apply only when a force majeure clause is included in a contract. This reflects the view that these clauses are used to allocate risk should a given event occurs. By contrast, including a force majeure clause in a contract governed by civil law jurisdiction, which generally recognizes the doctrine of force majeure, allows the parties to circumvent possible limitations on the doctrine set forth in the applicable law. Despite the need for a carefully drafted force majeure clause, the full spectrum of such clauses is not known to most contract drafters because most long-term international contracts are confidential and most arbitral awards involving force majeure issues are not published

Force Majeure in any given situation is controlled by the law governing the contract, rather than general concepts of force majeure. The law of the contract often specified by a choice of law clause in the agreement, and if not is decided by a statute or principals of general law that applies to the contract.

Whether the source of force majeure rights is legislation or the terms of the contract, force majeure regimes typically operate by excusing non-performance by a party of its contractual obligations where non-performance is caused by a defined force majeure event. Remedies otherwise available to the parties when the contract becomes impossible, difficult or onerous to perform due to events outside the affected party's control. Determining whether an event is a force majeure event normally involves applying the objective test found in the relevant law or written in the contract. However, most force majeure regimes are "open" or inclusive in the sense that the event does not need to be **specifically** listed as a force majeure event, provided it meets the requirements of the objective test. In the general concepts of force majeure, an event constitutes a force majeure is an objective event or situation which is (1) **unforeseeable** (at the time of entering into the contract), (2) **unavoidable** in terms of occurrence or impact, and (3) **impossible** to overcome. There must be a causal link between the force majeure event and the affected party's failure to perform his obligations (i.e., the affected party must establish that the force majeure event has caused the non-performance). It's not necessarily required that the force majeure event must be the direct cause immediately resulting in the non-performance. If there are too many steps between the force majeure event and the non-performance it will be difficult for the affected party to satisfy causation.

Time-critical and other sensitive contracts may be drafted to limit the shield of this clause where a party does not take reasonable steps (or specific precautions) to prevent or limit the *effects* of the outside interference, either when they become likely to or when they actually occur. A *force majeure* may work to excuse all or part of the obligations of one or both parties. For example, a strike might prevent the timely delivery of goods, but not timely payment for the portion delivered.

A *force majeure* may also be the overpowering force itself, which prevents the fulfillment of a contract. In that instance, it is actually the impossibility or impracticability defenses.

In the military, *force majeure* has a slightly different meaning. It refers to an event, either external or internal, that happens to a vessel or aircraft that allows it to enter normally restricted areas without penalty. An example would be the Hainan Island incident where a U.S. Navy aircraft landed at a Chinese military airbase after a collision with a Chinese fighter in April 2001. Under the principle of *force majeure*, the aircraft must be allowed to land without interference.

The importance of the *force majeure* clause in a contract, particularly one of any length in time, cannot be overstated as it relieves a party from an obligation under the contract (or suspends that obligation). What is permitted to be a *force majeure* event or circumstance can be the source of much controversy in the negotiation of a contract and a party should generally resist any attempt by the other party to include something that should, fundamentally, be at the risk of that other party. For example, in a coal-supply agreement, the mining company may seek to have "geological risk" included as a *force majeure* event; however, the mining company should be doing extensive exploration and analysis of its geological reserves and should not even be negotiating a coal-supply agreement if it cannot take the risk that there may be a geological limit to its coal supply from time to time. The outcome of that negotiation, of course, depends on the relative bargaining power of the parties and there will be cases where *force majeure* clauses can be used by a party effectively to escape liability for bad performance.

Because of the different interpretations of *force majeure* across legal systems, it is common for contracts to include specific definitions of *force majeure*, particularly at the international level. Some systems limit *force majeure* to an *Act of God* (such as floods, earthquakes, hurricanes, etc.) but exclude human or technical failures (such as acts of war, terrorist activities, labor disputes, or interruption or failure of electricity or communications systems). The advisory point is in the drafting of the

contract to make a distinction between the A*ct of God* and other shapes of *force majeure*.

As a consequence, *force majeure* in areas prone to natural disaster requires a definition of the magnitude of the event for which *force majeure* could be considered as such in a contract. As an example, in a

highly seismic area, a technical definition of the amplitude of motion at the site could be established on the contract, based for example on the probability of occurrence studies. This parameter or parameters can later be monitored at the construction site (with a commonly agreed procedure). An earthquake could be a small shaking or damaging event. The occurrence of an earthquake does not imply the occurrence of damage or disruption. For small and moderate events it is reasonable to establish requirements for the contract processes; for large events, it is not always feasible or economical to do so. Concepts such as 'damaging earthquake' in *force majeure* clauses do not help to clarify disruption, especially in areas where there are no other reference structures or most structures are not seismically safe.

4.1.1. Force Majeure in Civil Law Jurisdictions :

Civil Law countries often differ in the practice of contractual force majeure. Contractual force majeure can be, in scope and remedies, either wider or narrower than the more inflexible civil law schemes, depending on the bargaining power of the parties at the time the contract was entered into and how that translated into the drafting of the particular contract. For example, many contractual force majeure provisions will include a list of force majeure events. Generally, it will be easier to bring a force majeure claim if the event is listed (although typically the other requirements of the objective test must still be met). While epidemics are uncommon in modern times, recent memory includes SARS, Ebola, and various severe flu outbreaks. Epidemics arise frequently enough though that the parties may have specifically included "epidemic" or "pandemic" as listed force majeure events or they may be subsumed within more general terms such as "disease" or "illness". Similarly, emergency measures to address or contain an outbreak may be listed or covered under general terms such as "government action"; "government order"; "national or regional emergency" or "quarantine."

It's also common, particularly in certain markets, to include in contractual force majeure a (potentially long) list of excluded force majeure events. Depending on the drafting, if the event, or potentially one of the multiple events, causing the non-performance is excluded, force majeure remedies may be precluded. Both buyers and suppliers will often use this type of drafting to allocate risk to the affected party of events which are outside their control and might otherwise technically meet the definition of a force majeure event but are generally seen as attendant risks of doing business in that market, such as economic downturns and other financial hardships. Finally, the affected party's obligation to mitigate the effects of the force majeure event has been expressed as a "best efforts" obligation implied under the third limb of the above test. If the affected party fails to utilize its best efforts to overcome the impact of the force majeure event on its non-performance it may not invoke the force majeure.

The doctrine of force majeure originated in civil law systems. It applies to the non-performance of a contract, irrespective of whether the contract contains a force majeure clause. However, as one author has explained, "there are substantial differences among national laws as to the nature of events that qualify, whether or not extreme impracticability is sufficient, and the nature of relief among other things."It is generally considered that force majeure provisions are not "d'ordre public" (mandatory provisions) in civil law jurisdictions. Therefore a force majeure clause in a contract may deviate from the legal requirements of the force majeure doctrine provided for in the legal system. The more detailed the clause is, the less margin of discretion courts or arbitral tribunals will have.

4.1.2. List of Force Majeure Events :

International arbitrators have a tendency to construe force majeure clauses narrowly. Drafters thus need to use very clear language when

defining the events that will excuse performance and explicitly state whether the conditions apply to all events or only to a specifically enumerated set of events. Providing an illustrative (non-exhaustive) list of events that constitute force majeure accordingly reduces uncertainty in the contractual relationship. Force majeure clauses generally list examples of events that are considered force majeure for purposes of the contract. For example: In this Clause, “Event of Force Majeure” means an event beyond the control of the Authority and the Operator, which prevents a Party from complying with any of its obligations under this Contract, including but not limited to: (a) act of God (such as, but not limited to, fires, explosions, earthquakes, drought, tidal waves, and floods); (b) war, hostilities (whether war be declared or not), invasion, the act of foreign enemies, mobilization, requisition, or embargo; (c) rebellion, revolution, insurrection, or military or usurped power, or civil war; (d) contamination by radioactivity from any nuclear fuel, or from any nuclear (e) waste from the combustion of nuclear fuel, radio-active toxic explosive, or other hazardous properties of any explosive nuclear assembly or nuclear component of such assembly; (f) riot, commotion, strikes, go-slows, lockouts or disorder, unless solely restricted to employees of the Supplier or of his Subcontractors; or (g) acts or threats of terrorism. Natural disasters and armed conflicts are the most frequently included events. Force majeure clauses can include governmental or judicial actions, but this often is limited when contracting with a state-owned entity to prevent that entity from creating a force majeure claim. Furthermore, depending on the contract, it might be beneficial to clarify whether the non-performance by third parties (such as subcontractors) constitutes force majeure. It is advisable to list specific events – such as “fires, explosions, earthquakes, drought, tidal waves and floods” in the example above – to minimize an arbitral tribunal’s discretion in interpreting the clause. Moreover, when a laundry list approach is used, drafters should be sure to include words such as “including but not limited to,” or otherwise a strict interpretation may be adopted. To obviate the concern of a limited interpretation should the event not fall in the listed categories in the clause, drafters occasionally use a force majeure clause that lists “effects” rather than events.

Other events that are candidates for *force majeure* in civil law countries are hurricanes and earthquakes. *Force majeure* is a defense against liability and is applicable throughout French civil law in which both notions of "f*orce majeure"* and "*cas fortuit"* are distinct.

4.1.3. Drafting a Force Majeure Clause :

The traditional criteria of force majeure are unforeseeability, unavoidability, and the effect of rendering performance impossible. Long-term international contracts predominately contain one of three types of force majeure clauses: some clauses expressly define the concept of force majeure, others refer to an external source of law and still others contain no definition at all. The most robust types of force majeure clauses expressly define the concept of force majeure. In the Clause of "Force Majeure", it means an exceptional event or circumstance: (1) which is beyond a Party's control, (2) which such Party could not reasonably have provided against before entering into the Contract, (3) which, having arisen, such Party could not reasonably have avoided or overcome, and (4) which is not substantially attributable to the other Party. Clauses that define the concept of force majeure often exclude some of the traditional criteria – most often unforeseeability – and routinely apply a less rigorous standard. For example, many force majeure clauses do not require performance to be absolutely impossible. Instead, these clauses merely require that performance be "hindered," "delayed," or "negatively affected." Moreover, the criteria often are conditioned by "reasonableness," mostly applied either to unforeseeability or unavoidability. Other force majeure clauses do not expressly define the concept of force majeure but rather reference an external source such as "generally recognized force majeure causes" or "cases of force majeure admitted by the case-law of [insert country". However, caution must be taken when using vague formulations; for example, the former phrasing does not specify by whom the force majeure causes are "generally recognized". In addition, where a clause references the definition of force majeure in a specific law, drafters should ensure that it is the same law of the contract; otherwise, it later might create a difficult conflict of laws issues for an international arbitral tribunal. In ICC arbitration case no. 11265, the clause in the contract did not expressly define force majeure and instead merely referred to a list of events qualifying as force majeure.

The arbitral tribunal considered that the force majeure clause in the contract should be read in light of the UNIDROIT Principles, which contain a general definition of force majeure. Based on that definition, the tribunal concluded that the respondent's failure to perform did not constitute force majeure. Finally, the least common type of force majeure clause is one that contains no definition. For example: If, as a result of Force Majeure, any Party is rendered unable, wholly or in part, to carry out its obligations under this Agreement…then [inclusion of a description of consequences]. Under this clause, the law applicable to the contract ordinarily will determine whether the criteria for force majeure have been satisfied. As explained above, it, therefore, is recommended that contract drafters carefully research the law applicable to the contract before including a force majeure clause in a contract, especially if the clause contains no definition. But note that some domestic courts and international arbitral tribunals may try to give effect to the force majeure clause in accordance with the parties' reasonable intentions, regardless of the law applicable to the contract.

4.1.4. Force Majeure Clause with Definition:

Canada (Quebec's region) : The Quebec Civil Code (Article 1470) contains one of the more detailed force majeure provisions in domestic law. Not only does it mention the doctrine, but it also defines it as follows: "A person may free himself from his liability for injury caused to another by proving that the injury results from superior force unless he has undertaken to make reparation for it. Superior force is an unforeseeable and irresistible event, including external causes with the same characteristics".

4.1.5. Force Majeure Clause without Definition:

In several civil law jurisdictions as in France, the Netherlands, and Several Arab Countries, the force majeure concept is expressly mentioned in the legislation but is not defined. For example, the French Civil Code (Art.1148) provides:

"No claim for damages arises when a debtor was prevented from transferring or from doing that to which he was bound, or did what was forbidden to him, by reason of force majeure or a fortuitous event". For an affected party to invoke *force majeure* in French law, the event proposed as *force majeure* must pass the three following tests :

1). Externality : The affected party must have nothing to do with the event's happening.

2). Unpredictability : If the event could be foreseen, the affected party is obligated to have prepared for it. Being unprepared for a foreseeable event leaves the affected party culpable. This standard is very strictly applied : *On* April 9, 1962, "Chais d'Armagnac": The Council of State adjudged that, since a flood had occurred 69 years before the one that caused the damage at issue, the latter flood was predictable; and Administrative Court of Grenoble, on June 19, 1974, in "Dame Bosvy" case held that : An avalanche should be judged predictable since another had occurred around 50 years before.

3). Irresistibility : The affected party cannot by any means overcome the consequences of the event.

The Dutch Civil Code (Article 6.75), the Algerian Civil Code (Article 127), the Egyptian Civil Code (Article 165), the Lebanese Code of Obligations and Contracts (Article 341), and the United Emirates Civil Code (Article 273) similarly refer to the force majeure doctrine without defining it. Although these provisions do not define the concept of force majeure, the doctrine is well established in the case law. It largely is accepted that three elements need to be present for an event to qualify as force majeure: the harm causing the event needs (1) to be external; (2) unforeseeable; and (3) irresistible. These elements generally are considered to be cumulative. Similar doctrines can be found in Germany, Italy, and Switzerland and other civil law countries have concepts that are similar to force majeure. For example, the

German law concept of "contractual impossibility" is composed of two distinct doctrines : The first doctrine is referred to as "the collapse of the bases of the contract" and is similar to the doctrine of "hardship"; The other is the doctrine of "objective impossibility," which is codified in the German Civil Code (Article 275) and is similar to the French law concept of force majeure. The German civil law does differentiate between ''**vis major**'' (***höhere Gewalt***) and ***casus fortuitus*** (***Zufall***) but, like English, tends to lump them together under *höhere Gewalt* which seems conceptually synonymous with the common law interpretation of force majeure, comprehending both natural disasters and events such as strikes, civil unrest, and war. However, even in the event of force majeure, liability persists in the face of default by debtor circumstances in which "objective impossibility" is recognized are limited. Similarly, the doctrine of "supervening impossibility" in the Italian Civil Code (Article 1256) and the doctrine of "impossibility of performance" in the Swiss Code of Obligations (Articles 97 and 119) allow a party to a contract to be excused from non-performance when such performance has become permanently impossible. In Argentina, force majeure (*Fuerza mayor* and *caso fortuito*) is defined by the Civil Code of Argentina (Articles 512 and 513) by the following characteristics :

- an event that could not have been foreseen or if it could, an event that could not be resisted. Thus, it can be said that some acts of nature can be predicted, but if their consequences cannot be resisted it can be considered force majeure.
- externality: the victim was not related directly or indirectly to the causes of the event, e.g., if the act was a fire or a strike
- unpredictability: the event must have been originated after the cause of the obligation.
- irresistibility: the victim cannot by any means overcome the effects.

Also, in Argentina, the "Act of God" concept can be used in Civil Responsibility regarding contractual or noncontractual obligations.

4.1.6. Force Majeure and the Applicable Law :

As a preliminary matter, it is important to note that all legal systems address the notion of force majeure. A distinction generally can be drawn between civil law jurisdictions, in which the doctrine generally applies, and common law jurisdictions, which largely do not have a general law application of the concept of force majeure (although variations exist, such as in some former English colonies, the English law concept of “frustration,” and the US law concept of “commercial impracticability”). Given its virtual non-existence in common law systems, parties wishing to rely on force majeure have little choice but to define the concept in their contracts governed by the law of a common-law jurisdiction. By contrast, one of the main purposes of including a force majeure clause in a contract governed by a civil law jurisdiction is that the clause allows the parties to circumvent possible applicable law limitations. Domestic provisions either may be too restrictive or too broad and do not necessarily reflect the parties’ interests and intentions regarding risk allocation. If it is in the parties’ interests to broaden (or narrow) the scope of the applicable law notion, the clause should be explicit in that respect. Although the role of applicable law is greatly reduced when the terms of the contract are clear and complete, choices of law still may play an important role in interpreting the clause of force majeure in the contract or the force majeure doctrine more generally. Therefore it is important for contract drafters to understand whether, and if so how, the potential applicable laws provide for and define the doctrine of force majeure. For example, in Niko Resources Vs. Bangladesh Petroleum Exploration & Production Co., the respondent argued that a 2005 injunction constituted a force majeure event precluding it from paying for gas delivered under a 2006 contract. The respondent’s force majeure defense was based on Article 56 of the Bangladesh Contract Act 1872, which provides: "A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful". The arbitral tribunal, however, concluded that the 2005 injunction was not a force majeure event because “events prior to the conclusion of the contract, known to the parties and thus ‘‘foreseeable’’, do not qualify as force majeure and are no excuse for non-performance. The tribunal reasoned that since the 2005 injunction had been in place before the 2006 contract was concluded, “there can therefore not be a question

whether the Parties could foresee a future injunction preventing payment to Niko; the Parties were fully aware of this impediment".

4.1.7. Force Majeure in Common Law Jurisdictions :

''Common Law'' differs from "Civil Law" jurisdictions. In Common Law, force majeure is not defined, either in statute or under case law. And the term force majeure will not be implied into a contract governed by Common Law, meaning that the parties can only rely on the event of force majeure if its events are expressly or explicitly mentioned in the contract, for the clause to be invoked. That creates a grey area for Pandemics as COVID-19, epidemics, and quarantines, which are new territory less commonly included. A clause of force majeure events in the contract will depend entirely on the words that the parties have used (particularly the non-exhaustive list of events that are included in a force majeure clause). Even if a party can show COVID19 Pandemic or its effects are covered by the clause at issue, it still has the task of demonstrating that the risk of non-performance was unforeseeable and could not be mitigated and that performance is truly impossible and/or financially difficult. So, neither party hereto shall be liable for any failure of performance due to causes beyond its reasonable control, the occurrence of which could not have been prevented by the exercise of due diligence, such as ''Acts of God''. In some cases, the force majeure clause may mention a global pandemic specifically. However, even if the COVID-19 Pandemic outbreak itself is not considered a force majeure event because it is not provided in a specific clause in the contract as a force majeure event, or if it does not make performance impossible, the quarantines, travel restrictions and bans, limitations on normal business imposed by governments constitute a valid "Governmental prohibition" acts excusing the performance of contractual obligations. The contract in common law jurisdictions that creates the force majeure clause. Where the contract is governed by a common law system the relevant courts will

generally recognize the parties' freedom to agree wide or narrow force majeure relief. Generally, force majeure clauses are interpreted by focusing on the actual language used with the result that each particular case rests on its own contractual language and set of facts. Another complication is that the term "force majeure" is also sometimes used to refer to other provisions frequently applying to exceptional supervening events such as "hardship" clauses and those creating a framework for making amendments to the contract for material changes in circumstances. What constitutes a force majeure event and the precise objective test depends on the specific wording of the provision. As noted above, the definition of force majeure is generally inclusive but some clauses are exhaustive instead. If the contract provides that a force majeure event must "prevent" performance, the affected party must generally demonstrate that its performance has become legally or physically impossible and not merely more difficult or more expensive. By contrast, if the clause refers to the event "hindering" or delaying" performance then the threshold will generally be lower and force majeure may be satisfied if performance remains possible but has become substantially more onerous. While common law systems generally take a consistent approach, variations (some subtle) persist and it's important to approach the interpretation of each force majeure clause with regard to the corresponding case law.

Until fairly Recently, English courts applied a test of unforeseeability to force majeure events and while there is the authority that this is no longer the case, other common law courts may still impose such a requirement. Hong Kong and Singapore courts have tended to follow the English courts' approach. Conversely, English courts have found that the affected party must also generally have been "ready, willing, and able" to perform the contract but for the force majeure event. English courts have also tended to take a dim view of claims that a change in economic or market circumstances affecting the profitability of a contract may be a force majeure force majeure

event. Certain New York courts have tended to interpret force majeure provisions narrowly, reflecting the terms of the agreement and the intent of the parties, though there is also authority that "known practices within the industry" is important, particularly in specialist industries like oil and gas. This may depend on the drafting, place additional emphasis on the specific list of force majeure events as a whole as a New York court might decline relief if an unlisted event is not of the same kind or nature. Some New York courts have interpreted force majeure clauses even more narrowly by requiring that the event be listed and that the event be unforeseeable, although authorities to the later proposition appear mixed. Force Majeure clauses commonly contain a notification requirement, which can operate as a "condition precedent" precluding relief if the relevant notice is not given in the necessary timeframe. Such clauses are generally enforceable, and so complying fully with all notice requirements will be important for parties seeking to declare force majeure.

Force Majeure clauses commonly require the claiming party to show that is has taken all reasonable endeavors to avoid or mitigate the event and its effects (a high fact-sensitive inquiry). In some markets, it's common practise to exclude changes in the relevant market or demand. This can increase the challenge for a buyer who wishes to claim force majeure but cannot show it was unable to accept delivery of the supply, particularly if it has taken advantage of falling prices and already sourced the supply from elsewhere. These are a matter of drafting and need to be sufficiently certain to be enforceable. Typically, the affected party is excused from relevant non-performance while the force majeure event (or its effects) persist. Again, depending on the drafting, this can take effect as an extension of time or general suspension of the affected party's obligations. If non-performance caused by the force majeure event is prolonged (or permanent) then the drafting may provide for termination of the contract with the financial consequences for the parties set out in the clause. Where such termination right is mutual, the affected party may need to consider carefully whether to invoke force majeure at all,

especially if preserving the economic benefit of the contract is more valuable than losing the contract. Long-term supply contracts may provide for more complex scenarios, with some contracts requiring supplies to be made at a later date to maintain total quantities while others effectively cancel the affected supply (leaving the supplier with the headache of a quantity it may be unable to sell in circumstances where prices have fallen). Aside from the typical force majeure clauses outlined above, the affected party may have alternate remedies, depending on the governing law of the contract as follows :

- For English law contracts, the affected party might claim relief under the doctrine of frustration, which permits parties to cease performing contractual obligations where it becomes impossible to do so in circumstances entirely beyond the remit of the parties. While frustration tends to have limited application and is even more difficult to establish where the contract does contain force majeure clauses, this could be a potential avenue for relief where emergency measures have made the supply permanently unavailable or the necessary skilled labor to perform a contract became unavailable due to travel restrictions or illness.
- For China law contracts, the doctrine of "change of circumstances [situation]" may apply where a force majeure remedy is not available. The doctrine operates where (1) there is an unforeseeable and material adverse change to the fundamental assumptions upon which the parties relied when they entered into the contract; (2) the change is outside the sphere of regular commercial risks; and (3) such change would make a continued performance of the contract on its original terms egregiously inequitable to the affected party. While the judicial process is more complex than for a force majeure claim, the affected party may apply for the contract to either be terminated or modified (something not generally available for a force majeure claim based on the civil law).

English common law does not automatically apply *force majeure* principles to contracts. Parties to English common law contracts who wish to have *force majeure* relief must spell out what constitutes force majeure in the contract itself. Failure to do so means that a supervening event that prevents the performance of the contract will not be caught as a force majeure event, so as to provide relief from performance because it has not been named as a qualifying event in the contract. Determining whether an event is a force majeure event that normally involves applying the objective test found in the relevant law or a written clause in the contract.

Nevertheless, force majeure is of wide application in Common Law countries (England and Scotland, Ireland, the USA except for the state of Louisiana, Canada except for the region of Quebec,.....) and is frequently used in commercial contracts governed by such common law systems because of the limited remedies otherwise available to the parties when the common law contract becomes impossible, difficult or onerous to perform due to events outside the affected party's reasonable control and could not have been foreseen, or, if the event could have been foreseen, is an unavoidable event. Whether the source of force majeure rights is legislation or the terms of the contract, force majeure regimes operate by excusing non-performance by a party of its contractual obligations where non-performance is caused by a defined force majeure event.

As interpreted by English and American courts, the phrase *force majeure* has a more extensive meaning than "Act of God". Judges have agreed that strikes and breakdowns of machinery, which though normally are included in *force majeure.* (However, in the case of machinery breakdown, negligent lack of maintenance may negate claims of *force majeure*, as maintenance or its lack is within the owner's sphere of control). The term cannot, however, be extended to cover delays caused by bad weather, football matches, or a funeral: the English case of *Matsoukis Vs. Priestman & Co* (1915) held that "these are the usual incidents interrupting work, and the defendants, in making their contract, no doubt took them into account.... The words "force majeure" are not words which we generally find in an English contract. They are taken from the famous "Napoleon Code", and they were inserted by this Romanian gentleman or by his advisers, who were no doubt familiar with their use on the Continent." In *Hackney Borough Council Vs. Dore* (1922) it was held that "The expression means some physical or material restraint and does not include a reasonable fear or apprehension of such a restraint".

In *Dharnrajmal Gobindram Vs. Shamji Kalidas* [All India Reporter 1961 Supreme Court (of India) 1285], it was held that "An analysis of ruling on the subject shows that reference to the expression is made where the intention is to save the defaulting party from the consequences of anything over which he had no control".

Even if a force majeure clause covers the relevant supervening event, the party unable to perform will not have the benefit of the clause where performance merely becomes : (1) more difficult; (2) more expensive; and/or (3) less profitable. For example, parties in the United States have used the COVID-19 Coronavirus Pandemic as a force majeure in an attempt to escape contractual liability by applying the following elements : (1) unforeseeable event; (2) outside of the parties' control; that (3) renders performance impossible or impractical.

However, most force majeure regimes are ''open'' or inclusive in the sense that the event does not need to be specifically listed as a force majeure event, provided it meets the requirements of the objective test (the affected party must notify the counterparty of the force majeure event promptly or in a timely manner stating its claim for an exemption of liability and providing proof of the existence of the force majeure event and its impact on the affected party's non-performance). The drafting of the force majeure clause can lead to excusing the claiming party from relevant non-performance of his contractual obligations or to the termination of the contract where the essential purpose of the contract cannot be realized as a result of the event of force majeure with the financial consequences for the parties set out in the contract. The key point is that while it would be unusual for the definition to require that the relevant event (COVID-19 Pandemic) is unforeseeable (given that force majeure events are often foreseeable but cannot be prevented), the event must be one that is beyond the control of the affected party as a result of the government's actions worldwide (travel bans, individual isolations, and quarantine citizens....etc.).

The doctrine of force majeure is alien to common law systems. In these systems, courts may refer to related, yet distinct doctrines, such as "Act of God" or "frustration" (United Kingdom, Australia,

India) or “impracticability” (United States). A contract generally is deemed “frustrated” or “impracticable” when a supervening event renders the performance of the contract so different from what was contemplated at its conclusion that it would not be reasonable to hold the parties bound by it. Unlike the civil law concept of force majeure that generally applies to situations where the performance of the contract is impossible, the common law doctrines of “frustration” and “impracticability” generally refer to something merely different from what was originally contemplated by the parties. That being said, one should not assume that a concept of hardship exists under common law principles. The case law clearly demonstrates that the notion of frustration, for example, “operates within rather narrow confines".

For the contracts governed by Common Laws, there are other ways to cease and/or terminate performing contractual obligations in which the affected party from the COVID-19 Coronavirus Pandemic might claim relief under other legal concepts and doctrine in common law as ''ACT of GOD'' or ''FRUSTRATION''.

4.2 ‘’Act of God’’ *:*

As we mentioned above, force majeure is a widely recognized doctrine in civil law systems (China and EU countries and State of Louisiana in the USA), but rarely in common law jurisdictions (UK and USA) unless it is written as a clause in the contract. Without a force majeure clause in the contract, we can find in the English common law a legal concept so-called "Act of God" similar to force majeure in its objective but different in its requirements. The legal interpretation of an "Act of God", in an unprecedented event as COVID-19 Pandemic, should be determined by the Governing Law of the contract.

In Common law jurisdictions, we can find the concept of "Act of God" which had been approved by the Anglo-Saxon and Anglo-American Jurisprudence in contrast to the requirements of force majeure as a way for the parties to take a break in their performance or to terminate the contract

in extreme circumstances like natural disasters, pandemic, epidemic...etc., which would legitimately excuse their performance of the contract. An "Act of God" generally defined as : "an act occasioned exclusively by the violence of nature without the interference of any human agency". There is no doubt, as we explained above that COVID-19 Pandemic has had, and will continue to have, an adverse impact on the global economy. With the disruption to supply chains, domestic and international travel, and business operations, many persons and businesses will be unable to fulfill their existing contractual obligations. So, how many businesses will look to their contractual obligations for relief ? Countries of Common law consider COVID-19 Pandemic an "Act of God" within the meaning of the provision, the party seeking to rely on it must then shows the following TWO requirements : (i).That COVID-19 Pandemic has made the performance of his contractual obligations impossible or impractical, and (ii). That the outbreak and its consequences were beyond the reasonable foresight and skill of the parties at the time they entered into the contract. In other words, the party claiming the benefit of the concept "Act of God" must show that he cannot perform his contractual obligations due to unforeseeable, extraordinary circumstances beyond his control. However, given the current state of affairs, it is likely that any competent court will find that a COVID-19 Pandemic is an unforeseeable event outside the control of either party which makes it impossible for a party to fulfill his contractual obligations.

The treatment of COVID-19 Pandemic, particularly in the global context of a public health crisis evolving daily will confirm that the obligations under a contract have become impossible and/or impractical to perform by intervening and unforeseeable events. California law does not require parties to attempt the impossible. "A condition in a contract, the fulfillment of which is impossible or unlawful, or which is repugnant to the nature of the interest created by the contract, is void" (Refer to California Civil Code art. 1441). Traditionally, impossibility was measured objectively such that increases in cost or difficulty in performance were insufficient. More recent cases before the State of California Superior Court has brought some subjectivity to the analysis, recognizing impracticability due to excessive and unreasonable difficulty or expense (Refer to Christin v Cal. Superior Court, 9C.2d 526, 533 (1937). Moreover, the Act of God defense has been codified and expanded upon in the California Civil Code, Section 1511 provides, in the relevant part: Cal. Civil Code art. 1511 Causes excusing performance of an obligation, or of an offer of performance, in whole or in part, or any delay therein, is excused by the following causes, to the extent

to which they operate : (i) When such performance or offer is prevented or delayed by the act of the creditor, or by the operation of law, even though there may have been a stipulation that this shall not be an excuse; (ii) When it is prevented or delayed by an irresistible, superhuman cause, or by the act of public enemies of this State (California) or of the United States unless the parties have expressly agreed to the contrary. The common Law made the difference between the "man-made" political events in which the human being interred (force majeure) and the natural hazard event which outside human control for which no person can be held responsible (Act of God). So, an Act of God is an exception to liability in contracts (The idiom dom on December 30, 2009) under The Hague Visby rules in which Art. 17\2 provides that: " Neither the carrier nor the ship shall be responsible for loss damage arising resulting from: …(d) Act of God". An Act of God in England and Wales is an unforeseeable natural phenomenon. In the case of Transco Plc Vs. Stockport Metropolitan Borough council before the English court, Lord Hobhouse described the Act of God as an event: i) which involved no human agency, ii) which is not realistically possible to guard against, iii) which is due directly and exclusively to natural causes, and iv) which could not have been prevented by any amount of foresight plane and care. And in the case of Tannat Vs. Earl of Glasgow (1864 2M) before the English court, the Act of God, has been described as : ‘’Circumstances which no human foresight can provide against, and of which human prudence is not bound to recognize the possibility, and which when they do occur, therefore are calamities that do not involve the obligation of paying for the consequences that may result from them".

In the English common law of contracts, an Act of God may be interpreted as an implied defense under the rule of impossibility or impracticability. If so, the promise is discharged because of unforeseen occurrences, which were unavoidable and would result in insurmountable delay, expense, or other material breaches. Act of God is implied under English common law and will only arise in contracts where the parties have specifically agreed to govern their contract by English law. So, the Act of God should lead to excusing the performance by the parties of their obligations due to "failure of demand for the product or service relating to the outbreak of a pandemic worldwide", that would likely be invoked in the current circumstances (COVID-19). However, the outbreak of the pandemic would fall within the contemplated use of the Act of God concept.

In addition, the Act of God event or its circumstances must be causative to the non-performance or the termination of the contract and that a party

must have used reasonable endeavors to avoid the effects of a pandemic as COVID-19. Based on the above and which can be drawn from California case law, the Jurisprudence and Lawyers consider that it can be argued that COVID -19 in principle, comes with the definition of "Act of God ".

4.2.1 How has the "Act of God" been defined by the Common law courts ?

Unlike States of civil law; States of common law as in the UK and USA, apply since 1946 the "Act of God" principle broadly (ref. Pacific Vegetable Oil Corp. Vs. C.S.T.Ltd, 29 Cal. 2d 238 (Cal.1946). As such, one could argue in the common law states that while the Coronavirus (COVID-19 Pandemic) is surly not have been man-made, the spread of the virus and the resulting epidemic is certainly manmade, and therefore not an Act of God in the traditional meaning. However, the analysis in California state is totally different. In the Golden Bear State, the test for whether a force majeure and/or Act of God event is present is ‟whether….there was such an insuperable interference…as could not have been prevented by the exercise of due diligence‟. California courts have held that both force majeure and Act of God are the equivalent of the common law defense of impossibility and/or frustration of purpose : performance of a contract is excused when an : unforeseeable event; outside of the parties control; renders performance impossible or impractical (ref. Citizen of Humanity, LLC Vs. Caitac Int'l Inc, no. B215233, 2010 WL 3007771, Cal. Ct. App. August 2, 2010). Moreover, Califonia court held that the disruption of different supply chains and other vendors shutdowns may also contribute to an inability to perform due to the „‟nature of the thing being done‟ (ref. El Rio Oils, Canada, Ltd Vs. Pacific Coast Asphalt Co. (1949) 95 Cal. App. 2d 186). However, it must be noted that ‟impossibility as an excuse for non-performance of a contract is not only strict impossibility but includes impracticability because of extreme and unreasonable difficulty…..‟ (ref. Autry Vs. Productions (1947) 30 Cal.2d 144). There are a number of cases where the "Act of God" has been considered in common law countries. Act of God' is mainly considered in the context of : (1) the statutory exemption of "Act of God" given to common carriers (i.e. in a shipping context); or (2) Act of God as a defense to claims of negligence, rather than in the context of a force majeure clause. From those cases that do consider the meaning of "Act of God", it is broadly defined in California state Jurisprudence as follows: "An "Act of God" must: a)- be exclusively the consequence of

natural causes: In a case of common law, Nugent Vs. Smith (1876) was found to mean that the act in question must involve "elementary forces of nature unconnected with the agency of man or other cause"; b)- be of an extraordinary nature. Case law suggests that where a natural event is unprecedented, it is to be sufficient to satisfy this limb of the definition. It is likely that the COVID-19 Pandemic would satisfy this limb of the definition as it represents an "unprecedented" pandemic, with its effects being similarly "unprecedented"; c)- such that would not be anticipated or provided against by the party seeking to rely on it. There is case law suggesting that a party cannot be expected to provide against an unprecedented event. In many cases, it was found that, although the defendant could have prevented loss through protective measures, he could not reasonably be required to prepare for an "unprecedented" event.

4.3 Frustration :

Common law recognizes also the concept of the frustration of purpose, a narrower concept that applies when the actual performance of the contract is radically different from what the parties intended. When force majeure has not been provided for in the contract (or the relevant event does not fall within the scope of the force majeure clause), and a supervening event prevents performance, it will be a breach of contract. The doctrine of frustration will be the sole remaining course available to the party in default to end the contract. If the failure to perform the contract deprives the innocent party of substantially the whole benefit of the contract it will be a repudiatory breach, entitling the innocent party to terminate the contract and claim damages for that repudiatory breach.

As more and more than 180 countries introduce protective measures and restrictions (travel ban, suspension of flights, staying at home) in order to manage the Coronavirus (COVID-19 Pandemic) outbreak, businesses may find that they or their counterparties struggle to meet their contractual obligations. The cease of business activities could enable a party to a contract governed by California law, to avoid its obligations by invoking either a force majeure clause or the concept of "Act of God" as we previously explained, or by applying the common law concept of "frustration". However, both last routes have a high bar to success in common law countries, especially in the UK, New York state, and California state. Closely related to impossibility is the legal concept of the frustration of purpose, where, "performance remains possible, but is excused

whenever a fortuitous event supervenes to cause a failure of the consideration or practically destruction of the expected value of the performance‟ (ref. to the case of Lloyd Vs. Murphy, 25 Cal. 2d 48, 54, 153 P.2d 47,50 (1944), enumerating the frustration of purpose doctrine when ‟a party's principal purpose is substantially frustrated‟). This situation is now arising as a result of the cancellation and/or termination of numerous trade shows and other similar events due to the Pandemic, where the ‟principal purpose‟ of the contract is now frustrated, delayed, or canceled altogether. Even if a contract does not contain an applicable force majeure clause, an affected party may still seek to avoid performance by arguing frustration of contract due to COVID-19. A contract is frustrated when there is a ‟change in circumstances‟ that alters the nature of the contractual rights and/or obligations in a way that the parties could not have reasonably contemplated at the time they executed the contract. Under common law, contractual obligations were deemed sacrosanct, so failure to honor a contract could lead to an order for specific performance. In 1863, this harsh rule was softened in the UK by the case of Taylor Vs. Caldwell in which introduced the doctrine of frustration of contract, which provided that "where a contract becomes impossible to perform and neither party is at fault, both parties may be excused their obligations". In this case, a music hall was burned down by an Act of God before a contract of hire could be fulfilled, and the court deemed the contract "frustrated". A contract will terminate automatically when a frustrating event occurs, i.e... one which is : (1) unexpected: (2) beyond the parties‟ control; and (3) makes performance impossible or radically different from that which the parties contemplated at the time of entering into the contract. The frustrating event must “significantly change the nature of the outstanding contractual rights or obligations”.

4.3.1 How to Apply the Doctrine of Frustration ?

Consider whether COVID-19 Pandemic has made performance actually impossible/radically different or just less convenient and/or more expensive. For example, if the contract requires delivery of service or payment goods on a specific date that is now made impossible due to local lockdown measures, that will be a frustrating event. A contract for airline services that are now subject to a flight ban could be considered a frustrating event. The effect of frustration is the automatic termination of the

contract. Parties can recover amounts paid under the contract before it was frustrating (less the other party‟s expenses). Parties should also consider other options. For example, if COVID-19 Pandemic means that a business must halt operations, production or miss a payment/delivery date, a moratorium could be requested since frustration is a "nuclear" option to approach with caution, particularly given the current forecasts of how long COVID-19 Pandemic will disrupt normal business. The doctrine of Frustration challenges the validity of the fundamental principle of "Pacta Sunt servanda". The common law Jurisprudence argues that the applicability of the fundamental principle of ‟Pacta Sunt Servanda‟ in the contract law is limited by the "Doctrine of Frustration‟. The principles of the law of contracts find their very origin from the theories of "offer and acceptance". Thus, the very scope of an agreement that is to be is determined by the offer, its acceptance, and the promise to fulfill the obligations of such an offer. In common law, it is a well-settled principle that "to create a contract there must be a common intention of the parties to enter into legal obligations". Thus, if we analyze both parties to contract should have the intention to fulfill the legal obligations to be imposed, thereby giving effect to the principle of ‟Pacta Sunt Servanda‟ which means agreements must be kept". But it poses a serious contradiction when we compare this point of law with the principle of the frustration of contract which implies that the intention of the parties when they entered into the contract cannot be materialized.

Our essay here intends to compare and contrast the two legal principles of the law of contract in common law jurisdictions as the UK and the USA and how they contradict.

4.3.2 Concept of ‘’Pacta Sunt Servanda’’ and ‘’Doctrine of Frustration’’ :

To conclude that any agreement shall have the force of law, the parties to the agreement shall agree to perform their legal obligations. This same reasoning is embedded in the principle of ‟Pacta Sunt Servanda‟, which means the parties have the legal obligation to fulfill the promise made, and to this extent, the agreement shall be binding on them.

The sacred principle of the classical law of obligations was the idea of "Pacta Sunt Servanda" (sanctity of contracts), which means that contracts

are binding on any conditions. According to the classical theory of contracts, each reasonable person has the freedom to enter into a contract upon terms determined by that person and to be certain that a contract concluded voluntarily will be subject to judicial enforcement and binding on the parties. Thus, unilateral denunciation of a contract was, therefore, in general, excluded. It was a general rule of law of contract before 1863 that a person was bound to perform the obligation undertaken by him without claiming the excuse of the subsequent impossibility of performance of the obligation.

4.3.3 Development of Doctrine of "Frustration":

Under the "doctrine of Frustration", a contract may be discharged if after its formation events occur, making its performance impossible. This doctrine comes into play in two types of situations, firstly, where physical performance becomes Impossible, and secondly, where the center object of the contract fails. In the well-known judgment of Krell Vs. Henry, an English court of common law was held that the object of the contract was frustrated by the non-happening of a specific event. Explaining the concept of "frustration of contract", Judge Lord Wright stated that: "the word frustration is here used in a technical legal sense. It is a sort of shorthand: It means that a contract has ceased to bind the parties because the common basis on which by mutual understanding it was based has failed. It would be more accurate to say not that the contract has been frustrated but that there has been a failure of what in the contemplation of both parties would be an essential condition or purpose of the performance. The abovementioned definition can say to be the most convincing definition so as to understand the concept of frustration. The frustration of a contract is either affected by the destruction of subject matter or non-existence of it, death or incapacity of a party to perform the obligation, non-occurrence of events in cases of contingent contracts, and finally, if the performance is rendered illegal by any legislation. The legal effect is that the contract is terminated automatically and totally.

4.3.4 Challenging the Validity :

As already discussed above, both legal principles have stood the test of time in the common law of contracts, but if the concepts of these two

doctrines are compared, it can be comprehended that the fundamentals of the two contradict : On the one hand, the principle of ‟Pacta Sunt Servanda‟ emphasizes parties to be bound by the contract, and on the other, the doctrine of ‟frustration‟ provides for circumstances under which the parties shall not be bound by the contract.
To understand the contradiction clearly, it is important to discuss the limitations of Pacta Sunt Servanda and the theories that have been developed to justify frustration as follows :

4.3.5 Limitations of Pacta Sunt Servanda :

The principle of ‟Pacta Sunt Servanda‟ has always had its limits. Even if it is logically understood if the basis or the subject matter is destroyed, the legal effect renders nullified. Even the Roman law provides that, no contract was absolutely binding or binding under all circumstances, unilateral dissolution of the contract was permissible if a party failed to perform its contractual obligations (e.g. in the case of leases, mandates, or contracts of sale). Such an exception has to considered to bring the principle to its logistic effect. Historically, the principle of ‟Pacta Sunt Servanda‟ has been prejudiced by the principle known as the doctrine of "clausula rebus sic stantibus". According to that doctrine, a contract is binding only in so far as the circumstances remain the same as at the time of the conclusion of the contract. In modern theory, fundamental views have changed in common law countries. For English jurisprudence, the modern contract law cannot be based on the positions of classical contract law anymore since those positions have inevitably become inappropriate in the light of the developments as also provided for in the theory of Radical change which substantially puts forth the same argument. The others argue that since the scope of contract law does not limit itself to the sale of goods etc., its principles have to be modified according to the length and breadth of its dimensions. In other words taking into consideration the economic, social, and fundamental problems, the rigidity of the principle of ‘’Pacta Sunt Servanda’’ cannot be maintained. Regardless of different approaches to the binding nature of contracts, the study of legal grounds for exemption from contractual obligations has become very important in modem times.

4.3.6 Theories of "Doctrine of Frustration" :

The principles of this doctrine were guided by the judgment laid down in the case of Krell Vs. Henry, a case arising out of the coronation of King Edward VII of England. Despite the fact that there was no mention of the coronation ceremony in any of the parties' written correspondence, the English court held the contract frustrated in purpose by the cancellation of the coronation. Various theories were laid down to justify this principle that a contract would come to an end by the "impossibility" of the event. The first theory being the theory of implied term explained by Lord Lorebum in the case of Tamplin Steamship Co. Ltd Vs. Anglo-Mexican Petroleum Products Co.Ltd, in these words: "the court can and ought to examine the contract and the circumstances in which it is made not of course to varying, but to explain it, in order to see whether or not from the nature of it, the parties must have made their bargain on the footing that a particular thing or state of things would continue to exist. And if they have done so, then a term to that effect will be implied, though it is not expressed in the contract". This means that the parties have implicitly agreed on certain conditions, and if such conditions cease to exist, the contract can be frustrated. Second, the Theory of Just and Reasonable Solution was an attempt to explain this doctrine through a different perspective by Denning LJ. He explained that the court has inherent Jurisdiction and power to do what is just and reasonable in a given situation. He justified it by saying "the day is done when we can excuse an unforeseen injustice by saying to the sufferer : It is your own folly". Third, the Theory of Disappearance of the foundation of contract answers the question in a very logistic manner with the support of general principles of contract. The basis of this theory is that the contract cannot have the force of law if the subject matter on which the parties consented to contract itself has disappeared. Fourth, the Theory of Radical Change in Obligation recognizes that law should provide for a situation when the contract can be incapable of performance without the fault of either of parties.The juristic basis of the doctrine has evolved over a number of years.

The English courts have over time rejected the notions of "just solution", "foundation of the contract, "failure of consideration" and "implied term", and instead adopted the test of a "Radical Change in Obligation", which is currently regarded by leading commentators as the preferred approach. In the case where "Frustration" is found, the decision is arbitrary and automatic in that frustration renders the contract terminated forthwith. In Chandler Vs. Webster (1904), the English court relieved the parties from

all future contractual obligations from the date when the supervening event first arose and, as Lord Radcliffe rightly pointed out in the Davis case : "....it can categorically be said that once a contract is found to have been frustrated, the bargain between the parties is at an end".

5. CONCLUSION :

Based on the above study of the position in the law of contract related to the impact of COVID-19 on commercial contractual obligations, and as the outbreak of COVID-19 Pandemic continues and the bans and restrictions will be extended for many months, all business and companies all over the world will continue to be affected, not only because of the suspension of its operations but also because its employees and workers were asked to stay at home to avoid the spread of the serious virus. Aside from the tragic human impact of COVID-19, the consequences are being seen throughout all sectors of the business and legal world and we expect that the concepts, principals, and doctrines (Force Majeure, Act of God, Frustration) and its impacts on the contractual obligations either in Civil law or Common law countries will continue to be invoked as the outbreak continues, and it seems to us that this pandemic will be the essential reasoning for the courts to excuse the parties from the performance of their obligations. In the absence of specific clause of force majeure events in the contracts, and according to the WHO's declaration on 11th March 2020 that COVID-19 is a Pandemic through its fast worldwide spread, the affected party in the said contracts, has the possibility to invoke both Act of God concept and Frustration to avoid performance of its contractual obligations and to terminate the frustrated contract due to the change in circumstances that alters the nature of the contractual rights and obligations in a way that the parties could not have reasonably contemplated at the time they executed the contract.

Frustration occurs where a situation (like COVID-19) has arisen for which the parties made no provision in the contract and the performance of the contract becomes "a thing radically different from that which was undertaken by the contract". Much like in force majeure context performance of the contract must be impossible, or significantly more difficult even still possible to perform. Th affected party due to COVID-19 Pandemic can confirm that the change in circumstances (impossibility to performance) is the main reason that the "original and principal purpose" of the contract has been frustrated, and it would be "impracticability" unjust

and unfair for the affected party to be bound to the contract under the existing circumstances in which its performance became impossible and/or unreasonably expensive due to the COVID-19 Pandemic the proximate cause of the inability to perform the contractual obligations like most of the worldwide contractual affected parties which can be excused under impossibility and impracticability defense and the concept of frustration.

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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."); and art. 79/4 ("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 non-receipt."); see also ICC Force majeure Clause 2003, at art. 7 ("A party invoking this Clause is under an obligation to take all reasonable means to limit the effect of the impediment or event invoked upon the performance of its contractual duties."); see also ICC Force Majeure Clause 2003, at art. 8 ("Where the duration of the impediment invoked under paragraph 1 of this Clause or of the listed event invoked under paragraph 3 of this Clause has the effect of substantially depriving either or both of the contracting parties of what they were reasonably entitled to expect under the contract, either party has the right to terminate the contract by notification within a reasonable period to the other party.").

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(31) Timothy S. Taylor & Allison O. Kahn, Force Majeure: Risk Allocation for Unforeseeable Events, 15(2) Contract Construction Litigation Committee 7, 7 (2006) (citing Westinghouse Elec. Corp. Uranium Contracts Litig., 517 F. Supp. 440-459 (E.D. V.A. 1981), where a US court stated that "the risk of contingency that affects performance is presumed to rest on the promisor. However, the parties may agree to shift a particular risk to the promise, or to allocate the various risks between them as they see fit."); see also Joni R. Paulus & Dirk J. Meeuwig, Force Majeure, Beyond Boilerplate, 37(2) Alb. L. Rev. 302, 311 (1999) ("When considering the appropriate consequences of the invocation of force majeure, the draftsperson should ensure that the consequences of force majeure are allocated between the parties clearly and in a manner consistent with the parties' intentions. It is a question of appropriate risk allocation. Force majeure clauses, like other clauses in contracts, may rightly represent a negotiated agreement between the parties as to allocation of risk between them.").

(32) Quebec Civil Code, art. 1470; French Civil Code, art. 1148; Dutch Civil Code, art. 6.75 ("A non-performance cannot be attributed to the debtor if he is not to blame for it nor accountable for it by virtue of law, a juridical act or generally accepted principles (common opinion)."); German Civil Code, art. 275(1)-(3) ("(1) A claim for performance is excluded to the extent that performance is impossible for the obligor or for any other person. (2) The obligor may refuse performance to the extent that performance requires expense and effort which, taking into account the subject matter of the obligation and the requirements of good faith, is grossly disproportionate to the interest in the performance of the obligee. When it is

determined what efforts may reasonably be required of the obligor, it must also be taken into account whether he is responsible for the obstacle to performance. (3) In addition, the obligor may refuse performance if he is to render the performance in person and, when the obstacle to the performance of the obligor is weighed against the interest of the obligee in performance, performance cannot be reasonably required of the obligor."); Swiss Code of Obligations, art. 97(1) ("An obligor who fails to discharge an obligation at all or as required must make amends for the resulting loss or damage unless he can prove that he was not at fault."); art. 119 ("1. An obligation is deemed extinguished where its performance is made impossible by circumstances not attributable to the obligor. 2. In a bilateral contract, the obligor thus released is liable for the consideration already received pursuant to the provisions on unjust enrichment and loses his counter-claim to the extent it has not yet been satisfied. 3. This does not apply to cases in which, by law or contractual agreement, the risk passes to the obligee prior to performance."); Italian Civil Code, art. 1256 ("The obligation is extinguished when, for reasons not attributable to the debtor, the performance becomes impossible…If the impossibility is temporary, the debtor, as long as it lasts, is not responsible for the delay. However, the obligation is extinguished if the impossibility persists until, in relation to the title of the obligation or the nature of the object, the debtor can no longer be considered obligated to perform the contract or the creditor no longer has an interest in achieving it."); Algerian Civil Code, art. 127 ("Save for a legal or contractual obligation, a person is relieved from the obligation to repair damages if he proves that said damages were caused by external factors, such as a fortuitous event, a force majeure, the victim's fault or a third party's fault."); Egyptian Civil Code, art. 165 ("In the absence of a provision of the law or an agreement to the contrary, a person is not liable to make reparation, if he proves that the injury resulted from a cause beyond his control, such as unforeseen circumstances, force majeure, the fault of the victim or of a third party."); Lebanese Code of Obligations and Contracts, art. 341 ("The obligation is extinguished when, since it was created, the performance which is its object has become impossible, either naturally or judicially, without the debtor's fact or mistake."); UAE Civil Code, art. 273 ("(1) In contracts binding on both parties, if force majeure supervenes which makes the performance of the contract impossible, the corresponding obligation shall cease, and the contract shall be automatically canceled. (2) In the case of partial impossibility, that part Endnotes White & Case 7 Expecting the Unexpected: The Force Majeure Clause of the contract which is impossible shall be extinguished, and the same shall apply to temporary impossibility in continuing contracts, and in those two cases it shall be permissible for the obligor to cancel the contract provided that the obligee is so aware.").

The question of whether all three criteria need to be verified has been debated both in the case law and in the scholarship. For instance, French and Quebec courts have qualified as force majeure those events that could be deemed internal to the sphere of activity of the party who invokes the doctrine (e.g., a sudden strike of employees). Some authors have used this case law to argue that the external element was no longer necessary.

(33) Zeyad A. Al Qurashi, Renegotiation of International Petroleum Agreements, 22(4) J. Int'l Arb 261, 284 (2005) ("International arbitrators are extremely reticent when it comes to varying contracts without a specific contractual basis.") and ("Arbitrators presume that parties engaged in such contracts are knowledgeable about their transactions and aware of the risks that such transactions may pose. They generally interpret party silence about possible future contingencies as a concise decision to assume the risk of such eventualities.") p. 285.; see also, Klaus Peter Berger, supra note 20, at 7 ("The basis of this approach is the presumption of professional competence of international businessmen and the ensuing high level of responsibility for the contents and conduct of their legal relationships. This principle has been continuously emphasized by international arbitral tribunals over the past decades.").

(34)"Force majeure" and "Fortuitous event" as circumstances precluding wrongfulness: Survey of State practice, international judicial decisions, and doctrine - study prepared by the Secretaria. Yearbook of the International Law Commission. 1978. Retrieved 16 September 2015.

(35) The model force majeure clause promulgated by the International Chamber of Commerce (ICC in Paris) in 2003. See ICC Force Majeure Clause 2003, International Chamber of Commerce, ICC Publication 650 (2003), ICC case no. 11265.

= *JUDICIAL CASES :*

1. Hong kong Fir Shipping Co. Ltd. Vs. Kawasaki Kisen Kaisha Ltd. [1962] 2 QB 26 at 69-70
2. ArcelorMittal statement on operations in Liberia, ArcelorMittal, Aug. 8, 2014, http://corporate.arcelormittal.com/news-and-media/press-releases/2014/aug/0808-2014.
3. Brazil's Cosan declares force majeure to some sugar clients, Reuters Africa, Aug. 5, 2014, http://af.reuters.com/article/commoditiesNews/ id AFL2N0QB0PA20140805.
4. Shell declares force majeure on Ukraine exploration project, Reuters Africa, July 31, 2014, http://af.reuters.com/article/energyOilNews/ id AFL6N0Q63VX20140731.
5. Trade and Transport Inc Vs. Iino Kaiun Kaisha Ltd [1973] 1 WLR 210 at 224 to 227; cf Channel Island Ferries Ltd Vs. Sealink United Kingdom Ltd [1988] 1 Lloyd's Reports 323.
6. Niko Resources (Bangladesh) Ltd. Vs. Bangladesh Petroleum Exploration & Production Co. Ltd. & Bangladesh Oil Gas & Mineral Corp., ICSID Case Nos. ARB/10/11 and ARB/10/18, Decision on the Payment Claim, Sept. 11, 2014.
7. Hess Corp. Vs. Eni Petroleum US, LLC & Eni USA Gas Marketing LLC, 435 N.J. Super. 39 (App. Div., Jan. 9, 2014). In Hess, the parties had entered into a contract for the sale of natural gas that did not require that the gas be produced from a specified field or be transported to the delivery point via a specified route. In 2008, a leak in a pipeline resulted in the seller being unable to ship gas from its production fields in the Gulf of Mexico to the delivery point via the pipeline. The seller claimed force majeure on the basis that the contract included as a force majeure event an interruption and/or curtailment of firm transportation by a pipeline transponder. The buyer disputed the force majeure claim, and the US court ruled that the seller's performance should not be excused by force majeure because nothing in the contract obliged the seller to ship the gas to the delivery point via a specific route, or for the gas to have been produced from a specific source. The delivery point itself was unaffected and alternative sources of natural gas were available at the delivery point at such time. The court reasoned that there was nothing in the contract that prevented the seller from purchasing natural gas from other sources and supplying it to the buyer at the delivery point.
8. Under English law (Common Law), clauses that refer to performance being "prevented"; "hindered"; or "delayed" by force majeure may be subject to different interpretations; cf Tennants (Lancashire) Ltd. Vs. C.S. Wilson & Co. Ltd. (1917) A. C. 495.
9. ACT OF GOD § 13. 2 Horsemen's Benevolent & Protective Ass'n Vs. Valley Racing Ass'n, 4 Cal. App. 4th 1538, 1564-65, Cal. Ct. App. 1992, (quoting Pacific Vegetable Oil Corp. Vs. C.S.T., Ltd., 29 Cal. 2d 228, 238 (Cal. 1946)); see also Watson Labs., Inc. Vs. Rhone-Poulenc Rorer, Inc., 178 F. Supp. 2d. 1099, 1109–10 (C.D. Cal. 2001) quoting Perlman Vs. Pioneer Limited Partnership, 918 F.2d 1244, 1248 (5th Cir. 1990) ("The language in the force majeure clause … is unambiguous and its terms were specifically bargained for by both parties. Therefore, the [common law] 'doctrine' of force majeure should not supersede the specific terms bargained for in the contract.").
10.Route 6 Outparcels Vs. Ruby Tuesday, 931 N.Y.S.2d pp.436-438 (App. Div. 3d Dep't 2011) ("Defendant made a calculated choice to allocate funds to the payment of its debts rather than to perform under the subject lease. Economic factors are an inherent part of all sophisticated business transactions and, as such, while not predictable, are never completely unforeseeable; indeed, 'financial hardship is not grounds for avoiding performance under a contract"); but see In re-Old Cargo, 452 B.R. 100, 119–20 (Bankr.S.D.N.Y. 2011) (excusing performance after 2008 financial crisis under force majeure clause that explicitly included "change to economic conditions" as a force majeure).
11. While one might think that force majeure clauses only "complement" the applicable law, such clauses can be considered "self-sufficient" if they are clear and unambiguous. This argument was developed in the ICC case National Oil Company Vs. Sun Oil Company of Libya (Case No. 4462/AS, Award dated May 31, 1985). The tribunal, in that case, accepted the respondent's contention that the force majeure clause in the contract could not be interpreted "independently" from the contract's governing law. However, the tribunal considered that the clause was ambiguous.
12. Oosten Vs. Hay Haulers Dairy Employees & Helpers Union, 45 Cal.2d p.784; 291.2d pp.17–21 (1955); see also Butler Vs. Nepple, 54 Cal.2d 589, 6 Cal. Rptr. 767, 772-73, 354 P.2d 239, 244-45 (1960) (affirming Oosten rule that party must take reasonable steps to ensure performance); accord, San Mateo Community College District Vs. Half Moon Bay Ltd. Partnership, 65 Cal.App.4th 401, 409–13 (1st Dist.1998).

13. Toyomenka Pac. Petroleum Vs. Hess Oil Virgin Is. Corp., 771 F. Supp. 63, 66-67 (S.D.N.Y. 1991).
14. Nissho-Iwai Co., Ltd. Vs. Occidental Crude Sales, Inc., 729 F.2d 1530, 1540 (5th Cir. 1984) ("the California law of force majeure requires us to apply a reasonable control limitation to each specified event, regardless of what generalized contract interpretation rules would suggest."); Valley Racing, 4 Cal. App. 4th at 1565.
15. Rexing Quality Eggs Vs. Rembrandt Enterprises, Inc., 360 F. Supp. 3d pp.817-822 (2018).
16. Rembrandt Enterprises Vs. Dahmes Stainless, No. 15-cv-4248, 2017 WL 3929308, at *2, *12 (N.D. Iowa September 7, 2017) ("In the spring of 2015, an epidemic of Avian Flu hit the Midwestern United States. The outbreak was notorious and engendered a large amount of media coverage and government intervention;" the flu devastated a poultry farmer's egg production operations and he was forced to shutter plans to build a new location; farmer sought to cancel its order of a commercial dryer for that canceled location, as a result of the purported force majeure; the court refused, reasoning that the effects of the avian flu did not affect the ability of the supplier to build and deliver the dryer); (The court reasoned that a jury might find that both parties fully understood the purpose of the contract – to expand the egg production operations to meet new orders – and that the new equipment would be worthless due to cancellation of order due to the flu.).
17. Harriscom Svenska, AB Vs. Harris Corp., 3 F.3d 576, 580 (2d Cir. 1993) (holding force majeure clause which included "governmental interference" excused performance when the government forbade shipping orders to Iran); 18. Duane Reade Vs. Stoneybrook Realty, LLC, 882 N.Y.S.2d 8, 9 (App. Div. 1st Dep't 2009) (A New York appellate court applied a force majeure clause that included "governmental prohibition" to excuse performance interrupted by a judicial restraining order. The court reasoned that a judicial order, though not specifically enumerated, fit into the category of governmental prohibition.).
19. FPI Development, Inc. Vs. Nakashima, 231 Cal. App. 3d 367, 398 (Ct. App. 1991) (citing Restatement (Second) of Contract (citing Restatement (Second) of Contracts § 266 (2)).
20. Emelianenko Vs. Affliction Clothing, 2011 WL 13176615, at *27 (C.D. Ca., 2011) ("The common law force majeure defense is similar to the defense of impossibility.").
21. D & A Structural Contractors Vs. Unger, 25 Misc.3d 1211(A). 901 N.Y.S.2d 898 (N.Y. Sup. Ct. 2009).
22. Pac. Gas & Elec. Co. Vs. G.W. Thomas Drayage & Rigging Co., 69 Cal.2d 33, 37 (1968)