Contracts and COVID-19

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Can we perform, must we perform?

One of the main concerns affecting everyone now is what happens to contracts negotiated and entered into **before** the COVID-19 pandemic spread across the world in the way it has.

Many will be asking the obvious questions: What are my duties under existing contracts? Are my rights still enforceable? Do I have to perform my obligations? Will I be liable in damages if I cannot perform due to the situation in Malta and the rest of the world?

This memorandum outlines the main issues from a Maltese law perspective.

Force majeure, unpredictable events, irresistible force, impossibility….

COVID-19 - Do you have a problem with your contracts?

We are entering into contracts all the time and each contract must be performed according to its terms. If we fail to perform our undertakings, on time, we can be forced to do so by the Courts, or we can be condemned to pay damages for the losses we cause as a result.

Sometimes overwhelming and unexpected things happen – like an earthquake - through no fault of ours. These are usually called Acts of God or force majeure. When these things happen the parties suddenly realise that the impact on their contracts is or can be very serious and damaging. The specific clauses in contracts and the laws of most countries come in to address the fallout.

Warning: A plethora of legal concepts on unexpected events which affect contracts

It is important to note that there are many different legal concepts which have been developed to cater for overwhelming and unexpected events occurring which result in burdening a party to a contract more, even substantially more, than was originally expected at the time when a contract was entered into.

Debtors not wishing to suffer losses usually claim force majeure, impossibility and similar notions which can delay their obligations. They may seek to get out of their

agreements by terminating them. Creditors, on the other hand, may make use of what are called “resolutive conditions” to trigger acceleration or termination when events which increase their risk occur.

Maltese law is civilian in nature and our Civil Code, based on the original French Code Napoleon, has not always been revised as happened in other civil law countries, like Italy or France, which share Codes like ours. Although English law has been absorbed in many areas of commercial law, not all legal concepts developed in English law apply in Malta.

Case law and academic writings in both Italy/France and England on force majeure and fortuitous events will be helpful and are used by our courts. However, some relevant concepts developed in other legal systems, to deal with a party to a contract being faced with unexpected and excessively burdensome obligations, due to changes in the circumstances, may not apply. Reference is, for example, to concepts such as ***rebus sic stantibus*** (broadly: one assumes contracts remain valid as long as the circumstances when they were entered into remain the same) and ***frustration*** (broadly: if external events outside the parties’ control change and undermine the commercial purpose of a contract, then the contract fails and comes to an end)***.***

Furthermore, some contracts are, ***by their very nature risky (aleatory contracts)*** and, in such cases, unexpected change and increase of the risk will not be a basis to free a person from respecting his undertakings.

Finally, there is the concept of ***lesion***, where a contract turns out to be very harmful to a party after it is entered into. This concept has been reduced in relevance after changes in the law many years ago but still applies to minors, subject to some conditions. Counter-intuitively article 1214(2) states that *“it shall* ***not be competent even to a minor*** *to sue for rescission [of a contract] on the ground of lesion where such lesion is the effect of a fortuitous and unforeseen event.”* All the more so for an adult!

A very comprehensive review of the law about these general concepts can be found in the judgement of the Court of Appeal *Farrugia et vs Masini* (7th January 2008) where many of these notions were reviewed and distinguished from force majeure and impossibility. In that case the contract was confirmed as binding.

In this note we focus on force majeure, fortuitous and unpredictable events.

Specific force majeure clauses in contracts

Sometimes our contracts deal with the overwhelming and the fortuitous through appropriate clauses. These have become standard in many types of contracts and have often been interpreted by the Courts. In such cases the argument is often whether particular events are covered by the clause or not. Often the exact event which

eventually occurs might not have been imagined, let alone included in the clause. Indeed, how often do parties think of epidemics or pandemics? However, since SARS hit the world, these events have found their way into standard clauses.

When contracts deal with overwhelming or unexpected events expressly, then one should focus on the clause and interpret it as that is what the parties would have agreed. Anything outside the clause is not necessarily excluded as there are rules of interpretation which help us interpret the intent of the parties anyway. These rules include natural extensions to similar events, for example. So one Act of God will be considered to include other natural events, but would not include events caused by people, for example, such as interruption due to strikes, as these are not similar.

In each country one will undoubtedly find many Court judgements on such clauses.

These cases will help one understand how the rules of interpretation outlined in the law operate in parallel with the intent of the parties to reach a fair outcome to the issue at hand.

When there are no specific clauses in contracts

Many contracts are not standard. Often contracts do not arise in contexts where the issues of force majeure or acts of God are even contemplated by the parties. In such cases, specific clauses on the subject are absent and the Civil Code comes in to fill the gaps with logical rules to rebalance the position between the parties and, usually, to protect the person unable to perform from actions, damages and other detriment which such events give rise to.

Articles 1133 and 1134 of the Civil Code state that:

> **1133**.
> The debtor, even though there has been no bad faith on his part, shall be liable for damages, where competent, both for the non-performance of the obligation as well as for the delay in the performance thereof, **unless he proves that the non-performance or delay was due to an extraneous cause not imputable to him .**
>
> **1134.**
> The debtor shall not be liable for damages if he was prevented from giving or doing the thing he undertook to give or to do, or if he did the thing he was forbidden to do, **in consequence of an irresistible force or a fortuitous event.**

The “debtor” referred to in the articles of the Code is anyone who has an obligation under a contract.

A cursory look at these provisions shows what the context must be. There must be **extraneous events not imputable to the debtor**, for if the debtor is at all involved in the cause which hinders the performance of the contract, he cannot himself benefit from that circumstance, no matter how impactful and serious it may be. Likewise, the events must be such that they constitute **an irresistible force or a fortuitous event**.

Each case must be seen on its own merits. Of course, when events such as these occur and the debtor has some protection, that leaves the creditor at a loss and therefore the Courts are very careful not to allow abuse of the defences. Indeed, the Courts have added other concepts akin to those stated in the law to ensure that the substantive intent of the law is observed.

We thus find tests, which some courts describe as “strict”, to ensure that the events are indeed **unexpected and unpredictable**, for example.

Who is the debtor?

As Malta is a very small place with limited local resources, many of the local operators are representatives or agents of larger foreign organisations. Although one might be dealing with the Maltese agency on a contract, it is very likely that the agent is only a representative and the counterparty is the foreign organisation. This creates a legal issue in terms of who one deals with when addressing force majeure situations. The Maltese agent, in some cases, may not be able to deal with the financial aspects of the problem.

Where the Maltese organisation or individual is the debtor, such as when for example a building contractor agrees to construct a house, then the issue is purely local. When the debtor is the foreign principal of a local agent, such as when a cruise line offers a cruise and is paid a deposit against a confirmation of a booking, then difficulties arise in practice as the local agent will not be able to decide on what to do, whether to terminate the contract, whether to re-book or refund the deposit and so on.

This is one of the issues which arose in a case (reported further on) involving SARS and is also the subject of legislative intervention noted below.

Two different outcomes may be relevant

Every contract is different.

There are contracts which are capable of being extended as a mere delay will not cause a problem and may even be supported by the parties, as each would normally benefit from the contract being preserved. The articles quoted above contemplate that scenario when they refer to a **delay**. In these cases, the variation of the date of performance would be a reasonable solution. Once the pandemic is over, for example, the contract can be performed.

On the other hand, some contracts will lose relevance if they are not performed as planned or will result in abuse and injustice if the status quo is preserved without the corresponding performance. In such cases, the parties, or one of them, will be seeking to terminate the contract as the intervening event makes it unfeasible to retain the contractual obligations in place which are not capable of being accommodated later.

We may find a complicating factor compared to the solution of a mere delay or an immediate termination, where no one has done anything yet. The complication is where there is already *partial performance*, or there is a deposit paid on account or as security for performance. In the latter case, we have the complication that partial performance will need to be paid for when one party has not received the benefit expected of the contract, and so will that party will naturally resist. Alternatively, if a deposit was provided as partial payment or as security, the person providing the same will want the deposit returned or the security released. We could find a situation where the counterparty would have already spent funds to prepare for the contract, or in its actual performance, so he or she will resist the refund of the deposit or release of security.

Termination of the contract in such cases is more deleterious and throws out more complex legal issues as ultimately the idea of the law is to be fair and just with all parties because of unpredictable and overwhelming supervening events.

When a contract is terminated, the usual outcome is that all parties revert to the situation before they entered into the contract, no gain and no loss; however, when works have been carried out and expenses incurred by one party, it is difficult to revert to the preceding situation without detriment on some part, so further analysis will be required.

The duty to minimise damages

These are circumstances where everyone must accept the situation and act in good faith, including by acting to minimise the damages. Parties do need to appreciate the balance the law is seeking to achieve between them. These provisions do not allow for abuse and require stringent compliance with basic tests before allowing a party not to perform the agreement. In one case *TCG Company Limited vs John Ibbotson* (decided on 22nd October 2004) the Courts explained that the debtor has an obligation to do his best by exercising due diligence to overcome the problems which are hindering performance. The defence of force majeure will **not be available** if this duty is not respected. Indeed, in that case, the defence of impossibility was rejected, confirming that the external event must be overwhelming and not merely inconvenient, giving choices the defendant may wish to take up.

Any debtor must therefore do his or her best to find alternative ways to achieve performance, by seeking different supply sources, for example, if that is the problem; or by engaging different sub-contractors or employees who may be able to operate. Just wishing to avoid financial loss or stress is not a basis for not performing. Indeed that will be considered to be bad faith for which damages will be due.

Epidemics and Pandemics

One reported case had to deal with the effects of **SARS** on a cruise line booking. This is, today, very helpful in establishing whether we have a situation which falls within the provisions of the Civil Code.

In the case *Karl and Nadine spouses Pace vs. Peter J Sullivan et***. (**Civil Appeal Number: 907/2004/1) decided on 15th February 2006, the following facts arose:

- In April 2003, the plaintiffs paid a deposit on account of a cruise/flights they had booked in May of the same year;
- Subsequently, the plaintiffs cancelled their booking for what they thought to be valid reasons relating to the spread of SARS;
- The defendants, amongst their defences, claimed that the plaintiffs did not have a valid reason to cancel their holiday as the ports where the cruise liner in question was to visit where not hit by the SARS pandemic and, furthermore, in so far as the flights were concerned, it was noted that the airlines where taking all the necessary precautions to avoid danger of any passengers from contracting SARS.

On this point, the Court of Appeal stated:

> This Court has considered this matter at length and in its considered opinion the reason put forward by the plaintiffs, considered both objectively and also subjectively ….. represents a substantial and genuine presupposition of legitimacy in their decision, where in those particular circumstances of the happening of the epidemic occurring after the agreement, [they decided] to rescind the same agreement.
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> According to common experiences, there exist obstructive situations, as is the one at hand, and not imputable to a party, or is out of the control of a party …. which can be deemed to be justifiable in the light of the decision taken. Our law provides for this in Article 1134 of the Civil Code in the case of the non-execution of an agreement on the part of the party which is bound to execute …. In these circumstances this Court does not find a reason why the plaintiffs should not have the right to recover the deposit duly paid by them.

Here, the Court based itself upon Article 1134 of the Civil Code to allow an innocent party affected by an unpredictable event to terminate the contract and ordered the deposit paid to be refunded.

The COVID-19 pandemic, like SARS, is naturally an event which gives rise to this discussion. COVID-19 is even more serious due to the way it is spreading and due to the manner in which Governments in different countries are reacting to the event.

One can reasonably expect the Courts to use similar reasoning when the legal defence is appropriate. Having said that, there are now specific regulations in place which regulate package holidays, namely the **Package Travel and Linked Travel Arrangement Regulations (SL409.19)**. These will affect existing contracts.

Points to Note

The outcomes of such events are not always identical

The impact of this pandemic is so widespread it will undoubtedly affect thousands, if not millions, of persons and all their contracts. One **cannot** assume, however, that COVID-19 will **always** be considered by the Courts as such an event in relation to specific contracts. Most importantly, one needs to consider the level of awareness of the problem at the time when the contract was concluded, as awareness means the parties can address the possible event and its effects specifically.

When something is predictable one can and must plan for it and the law would not intervene in the same way (see note below on contracts concluded after March 2020).

These rules do not apply to all contracts in the same way and, sometimes, they do not apply at all

Likewise, one must not assume that accepting COVID-19 as force majeure will result in all contracts being affected **in the same way**. **There are different rules for different types of contracts**.

Some types of contracts may be noted as they are already creating issues in the Maltese market.

Rental agreements

Rental of property poses more difficult contexts as here we have property belonging to the creditor being in the possession of the debtor, who is using it.

The use of the property is not made impossible as a result of some fortuitous events such as COVID-19. It is not the same as the effects of a storm which destroy the thing leased or the premises and impede a tenant from using a house. So, these defences are not available. If the rent is a high amount and the tenant cannot afford it, he should seek an amicable agreement with the landlord. If the solution is to leave because of the non-affordability due to lack of income on the part of the tenant, then that should be documented as a termination which will release the tenant from future rents which would usually be due anyway, unless of course there is accommodation by the landlord and the rent is reduced to affordable levels during the crisis.

Tenants should not seek to use external events to get out of lease agreements unless the impact is direct and relevant to the ability of the tenant to pay the rent which may have been negotiated in different market conditions and where unpredictable events may actually provide lower rent opportunities in the market generally. In the case of

Ibbotson (referred to on page 6) the tenant was not allowed to terminate the agreement for alleged force majeure as he could still afford to pay the rent.

If the rental is of a speculative and commercial nature and we find that the market has disappeared, then we have a different situation as the tenant is not interested in using it for his own accommodation. It is evident that the fortuitous event of the COVID-19 pandemic is the cause of the loss of business; however, the premises are still in good condition and the problem is the market, not the premises.

Under normal market conditions, movements in the market are not a good excuse but may very well be in this extreme situation where commercial premises are under lockdown orders. Would the solution be to terminate the agreement or to suspend the rent for the period of lockdown (assuming the premises will be unused for that period)?

Clearly, the parties need to act in good faith and find a solution which is fair. For example, if the agreement is terminated early, then any improvements made by the tenant may go for the benefit of the landlord without any compensation, with the landlord not being obliged to compensate due to the same principles.

Article 1570 of the Civil Code gives the option of termination to the landlord in case of non-payment of rent, which is fairly obvious. Article 1571 of the Civil Code applies “if the thing is destroyed”, which is not the case when a pandemic hits a nation and people find difficulty due to interrupted earnings and cash flow:

> **1571.**
> (1) If, during the continuance of the lease, the thing let is totally destroyed **by a fortuitous event**, the lease is ipso jure dissolved; if it is destroyed only in part, the lessee may, according to circumstances, demand either an abatement of the rent or the dissolution of the contract.
> (2) The lessee may also, according to circumstances, demand ***an abatement of the rent or the dissolution of the contract***, if owing to **a fortuitous event**, the thing let has become unserviceable.
> (3) No compensation may be claimed in any of the cases mentioned in this article.

One can see how the concepts discussed in this paper float around in this provision and how it is evidently not applicable in rental cases due to the fact that the rented property is still intact. The Courts will have to apply the provisions which are clear; however, from the landlord perspective, it is clear that the tenant will quickly go bankrupt if he is made to pay the rent without having normal income and that we do have a fortuitous event in play together with lockdown orders, which must have some impacts on the obligation of the tenant to pay rent.

The situation becomes more complex where one has a tenancy in a multi-premises building (like a large shopping complex) with many tenants who all have the right to access their tenement, but where the landlord is unable to do so due to a public order intended to protect public health. In that case, clearly the tenant can suspend rental payments as the property can arguably be referred to as “unserviceable” although the article is referring to the impacts of destruction or physical damage. The landlord would probably not be able to enforce performance in these cases, but the same issues arise on whether the parties can terminate the agreement in view of the temporary nature of the pandemic.

A final point worth noting is where a lease of premises has been made for a very specific purpose, which purpose becomes impossible to achieve because of the pandemic. In that case, the very reason underlying the contract cannot be achieved and the balance the parties will need to find is between terminating the contract due to impossibility and the temporary nature of the obstacle to the contractual use. The law does not contemplate suspension of the rent for an indefinite time linked to the existence of the obstacle, but it stands to reason that sensitivity to the context is necessary for an equitable outcome.

Evidently, reasonable and fair thinking needs to prevail. The law cannot solve every problem!

Public procurement - Public contracts

Public contracts concluded with public contracting authorities as a result of an open, transparent and no-discriminatory competitive tender procedure are regulated by standard terms and conditions in the form of General Conditions issued by Malta's central Government authority for public procurement, the Department of Contracts.

The Department of Contracts regularly updates these standard terms and conditions and as of 12th December 2019 there are the following:

- General Conditions for Works Contracts version 4.0
- General Conditions for Services Contracts version 4.0
- General Conditions for Supplies Contracts version 4.0

These General Conditions all contain standard force majeure provisions. The definition for a force majeure provided in these General Conditions includes, specifically, epidemics and reads as follows:

The term "force majeure", as used herein shall mean acts of God, strikes, lock-outs or other industrial disturbances, acts of the public enemy, wars, whether declared or not, blockades, insurrection, riots, **epidemics,** landslides, earthquakes, storms, lightning, floods, washouts, civil disturbances, explosions, and any other similar unforeseeable events, beyond the control of either party and which by the exercise of due diligence neither party is able to overcome.

These events must materialise *after* the award or conclusion of the public contract and not before.

The General Conditions require the party, who wishes to avail of a force majeure event, to "promptly notify" the other party with details of the force majeure event, the probable duration and the likely effect of the circumstances on the contract. The contractor, who successfully shows that the performance of a contractual obligation has been prevented or delayed by the force majeure, might be able to benefit from the following:

- Extension of the time by which a contractual obligation is to be performed;
- Modification of the public contract (subject to detailed rules on their admissibility and approval);
- No forfeiture of the performance guarantee put up for the public contract; and
- No liability for damages or termination for default.

If the force majeure lasts for a period of 180 days, then either party may seek to terminate the public contract by giving a further 30 days' notice.

Similar force majeure provisions are also typically found in public concession contracts and PPP contracts.

There are a few reported cases where a force majeure clause was invoked by a contractor in a public contract. Of note is *Bonnici Brothers Limited and others v. Department of Contract,* decided by the Court of Appeal on 29th April 2015. In that case, the Court overturned an arbitration award which held that the increase in price of materials used by the contractor was a force majeure, and therefore, the contractor ought to have been compensated. The claimant contractor had successfully persuaded the arbitral tribunal that the increase in price of bitumen, thin fuel oil, heating oil, hydraulic and lubricating oil and cement was a force majeure in this case since it was significant. The Department of Contracts appealed from this arbitration award before the Court of Appeal and argued that an increase of price was not one of the force majeure events agreed to in the definition in the General Conditions (substantially the same as that quoted above).

The Court of Appeal upheld this argument and held that the parties had specifically agreed to a list of force majeure events and an increase in price of materials was not one of those events; therefore, the arbitral tribunal went, in this respect, beyond the four corners of the public contract in its award. The Court of Appeal also remarked that the increase in price of the materials in question, despite the fact that it was "phenomenal", was far from being unforeseeable.

On a final note, companies who have participated in competitive tender procedures in the past few months and are still waiting for their conclusion, should be aware that contracting authorities are entitled to cancel that procedure in cases where "exceptional circumstances or force majeure render normal performance of the project impossible". Having said that, a recent circular issued by the Department of Contracts sent a clear message that public procurement is to continue as smoothly as possible during this time.

Loan agreements

The situation with financial agreements, loan agreements in particular, is governed by specific rules and the issue there is that all debts have to be paid and force majeure never cancels a debt or interest. In crisis situations, we sometimes see interest and capital moratoria being extended voluntarily by the lenders, who recognise the problem and wish to help their debtor cope. Sometimes we see moratoria being imposed by the law.

When a debtor is unable to pay because of a massive impact of an external event, the rule we see in play is that relating to acceleration of the debt and any time limits which

may have been agreed for repayment are lost by contract terms or by operation of law, based on the changing financial condition of the debtor. If the debtor is liquid and able to pay, a financial crisis will have no effect at all. The lender will, however, even in such cases, probably have the right to accelerate the obligation when there are material changes in circumstances on the basis that the lender considers an increased risk underlying the debt or the security granted has diminished in value. These rights are usually covered by specific clauses in the contracts.

In this context, we see the operation of what are called resolutive conditions, which can be expressed or implied. These operate to the effect that if a debtor fails to perform, the contract terminates and all sums become due immediately.

This is a principle which applies to all contracts but is very common to find in discussion on financial agreements because they are really less complex, involving only the advance and repayment of sums of money.

1067.
Where the resolutive condition is expressly stated in the agreement, such agreement shall, upon the accomplishment of the condition, be dissolved ipso jure, and it shall not be lawful for the court to grant any time to the defendant.

1068.
A resolutive condition **is in all cases implied in bilateral agreements** in the event of one of the contracting parties failing to fulfil his engagement:
Provided that in any such case, the agreement shall not be dissolved ipso jure, and it shall be lawful for the court, according to circumstances, to grant a reasonable time to the defendant, saving any other provision of law relating to contracts of sale.

1069.
(1) Where the resolutive condition, whether express or implied, relates to any case in which one of the parties fails to fulfil his engagement, the party who is the creditor in the undischarged obligation may, at his option, upon the accomplishment of the condition, either demand the dissolution of the contract, or compel the other party to perform the obligation, if this is possible.
(2) In either case the defendant may be condemned in damages.

Financial agreements are, most of the time, commercial in nature and the following applies in virtue of the Commercial Code:

> **117.**
> In commercial contracts, the implied resolutive condition referred to in article **1068** of the Civil Code produces the dissolution of the contract ipso jure, **and it shall not be lawful for the court to grant to the defendant a time for clearing the delay:**
> Provided that this article shall not apply to contracts of letting of immovable property or to contracts of emphyteusis or to contracts the dissolution whereof, in the event of failure by one of the parties to fulfil his engagements, is specially regulated by law.

So, in financial agreements, we see that debtors are faced with a different dynamic to the general context and unpredictable events tend to result in stronger rights for the creditor to recoup what he is owed and even to enforce his security.

> **1079**.
> A debtor **can no longer claim the benefit of time** if he has become insolvent, or if his condition has so changed as to endanger the payment of the debt, or if by his own act he has diminished the security which under the agreement he had given to the creditor, or if he has failed to give the security agreed upon.

This is always subject to the terms of the contract and the provisions of law, the application of which may occur due to the very crisis at hand and based on public policy considerations.

Of course, the need for good faith, mutual support and reasonableness applies in these cases as well. The debtor owing a sum of money will remain a debtor even after the

pandemic is over and it is in the interest of all creditors to ensure that the good relationships of the past are extended into the future.

When Governments intervene through law, they hinder the operation of these rules

One must also keep in view that, in cases such as these, the Governments of different nations **are intervening legislatively** and changing the way some types of existing contracts operate, at least for a period of time, so as to maintain stability, especially as COVID-19, like SARS, is considered to be a temporary crisis which will pass.

The Maltese Government has issued a few of these laws already. You may wish to access our COVID-19 legal updates hub, which page is continuously being updated with information about these type of measures.

Of note in this regard are the following Legal Notices which entered into force since the COVID-19 hit our shores:

- Suspension of Legal Times relating to Promise of Sale Agreements, Notarial and other related matters (Epidemics and Infectious Disease) Order, 2020[1]

This order suspends the running of all the legal terms imposed on Notaries Public by law to:

- Register any deed, will, act or private writing;
- Any period within which a Notary Public is required by law to pay taxes collected in the exercise of his functions;
- Any term related to fiscal benefits, incentives or exemptions; or
- Any period within which a Notary Public is to submit any information or documentation to any Authority or regulator pursuant to notarial activity.

The order also suspends the expiration of any term of a promise of sale agreement duly registered with the Commissioner for Revenue provided the order for the closure of the Courts remains in force, without the need of any signatures or formal renewals by the parties, and is further suspended for an additional 20 days following the repeal of such order.

This order was amended to clarify that "such order shall suspend", which we understand was intended to clarify the fact that the order for suspension of the legal time limits was tied to the order for the closure of the Courts.

[1] Legal Notice 75 of 2020 (which repealed Legal Notice 43 of 2020 as amended by Legal Notice 64 of 2020), as amended by Legal Notice 90/2020

- Epidemics and Infectious Disease (Suspension of Legal and Judicial Times) Order, 2020[2]:

This order suspends the running of any legal and judicial times and of any other time limits including peremptory periods applicable to proceedings or other procedures before the said Courts.

The order clarifies that this means that if the last day of any legal or judicial time or other time limit expires during the time the order mentioned in this regulation is in force, the running of the times shall be suspended until 7 days from when the Superintendent repeals the order for the closure of the Courts.

The order also specifies that this does not prejudice the power of any Court to order the opening of its Registry, the hearing of any case and anything consequential and incidental thereto in urgent cases or where it deems that the public interest in hearing the case should prevail.

The order was amended by Legal Notice 84 of 2020, clarifying that the suspension applies also to prescription in criminal and civil matters.

- Package Travel and Linked Travel Arrangement (Amendment) Regulations, 2020[3]

These regulations refer to a travel organiser's obligation to refund an amount paid by a traveler due to cancellation of the contract under regulation 11(2) (termination by a traveler due to an event of unavoidable and extraordinary circumstances) and termination by the organiser due to unavoidable and extraordinary circumstances (in addition to those already mentioned in the existing law) which cancellation occurs between the 1st of March 2020 and end of May 2020 (both days included) have been extended from 14 days to 6 months from the date when the package travel contract is terminated.

[2] Legal Notice 61 of 2020 as amended by Legal Notice 84 of 2020
[3] Legal Notice 80/2020 amending the Package Travel and Linked Travel Arrangement Regulations

Special agreements assuming risk and post COVID-19 contracts

Sometimes parties are prepared to assume risks which may arise. In such cases, the defences discussed in this paper will naturally not be available. This would also be the case where contracts are entered into now, after the effects of the COVID-19 pandemic are easily predictable.

No one agreeing to do something in this context will be able to get out of the obligation to perform, or the damages if he or she fails to perform, as now the factors to be assessed in taking the risk under the contract are clear and, therefore, can be addressed in the terms of the agreement or the price demanded.

How one must act

To act in good faith, you must **immediately advise the counterparty** of the situation which you are facing so that both you and the counterparty can see how best to deal with the outcomes. You must seriously consider adopting any means available to you to perform your contract and to minimise the damages as much as possible. If the situation creates an impossibility to perform, on time or ever, then both parties will know about it and can take action to protect themselves from the most likely outcome - being a delay, an indefinite suspension of performance, compensation or refunds, a termination or a mix of all.

Amicable agreements are very possible if parties are reasonable as this is effectively a temporary crisis of extreme effect. With the passage of time, it will diminish and then things will slowly revert in stages. If parties are reasonable, they can contemplate a solution which works for both.

If, for example, there is an agreement on a temporary suspension of contractual obligations or any other form of relief in favour of the debtor, it is very important that **this is documented clearly in writing.**

Do time limits apply to claiming force majeure?

In case of written contracts, one must review the relevant clauses.

However, generally there does not appear to be a time limit for one to notify a force majeure event. Whilst one should, as a rule, raise the issue **as early as possible** to give the parties good time to reasonably deal with the issue before it becomes extreme,

and to avoid any suggestion of waiving the right to raise the defence, it is often the case that the debtor tries to deal with the performance of the contract for as long as possible before giving in and admitting that performance has become impossible.

This will undoubtedly run parallel to other events like staff absenting themselves due to illnesses, Governmental actions imposing limitation of services, eventually lockdown and the growing sentiment of the population in the face of development. Naturally, the later one raises it, the less one can go backwards in time to claim its effects, that is why early communication is suggested.

Some contracts, like promises of sale for land, have typical time limits. The temporary Covid19 laws have addressed these contexts, through suspending the relative time limits. Legal advice should be sought when time limits apply as the drafting of the legislation may not be wide or specific enough to apply to the particular case.

Does the notice have to be in writing?

We come across a number of contracts where to invoke force majeure, one would **require to give notice in writing** to the other party once a force majeure comes into play **as a formal notification that a debtor is invoking such clause**. Where this is not required by contract, such notice does not appear to be necessary but in, any case, advisable as it will establish evidence of the communication and the date it was given.

Naturally this will not give a *carte blanche* to the debtor to stop honouring his obligations, but it will simply serve as a notice to the creditor of the debtor's concerns and possible intentions.

The creditor may accept this or may elect to contest it, in which case the parties would usually have to make recourse to dispute resolution methods, including negotiation, mediation, arbitration or other more formal court proceedings. It is suggested that in these cases one should adopt speedy solutions, if not resolve matters amicably, as keeping disputes open means that economic activity cannot restart, costs are incurred and the outcomes are even worse.

It should be appreciated that the burden of proof that a force majeure event has taken place resulting in the application of legal effects to the contracts is **on the debtor**[4].

When no such clauses are found in a contract, as previously stated, the law on this subject will apply. Our law does not set out an obligation to notify another party of his

[4] In *Major Alfred Briffa et vs The Golden Shepherd Group Limited et*, decided on the 31stOttubru 2013 the Court stated: "In cases of non-performance of contracts, the plaintiff must prove that he was the creditor of a contractual obligation and that the debtor was in breach of that obligation. **In this kind of action, it is the defendant debtor who has the more difficult burden of proof in that he has to justify the contractual breach and prove that such breach was the result of factors over which he had no control**."

intention to invoke force majeure. However, on the basis of the 'good faith principle' in the interpretation and implementation of contracts, and to a certain extent the duty to minimise damages, it is highly recommended that this notice be given and possible solutions discussed.

It is very possible that the property of one party is in possession of the other and this property needs to be handled, preserved or returned to avoid greater losses taking place.

What this defence is NOT

This defence is not a way out of a deal which now looks bad in new economic conditions. Should the circumstances be such that it is evidently problematic to perform a contract, then again one must approach the other party to see what flexibility could be achieved, at least for some time.

In legal terms, this is down to a test of cause and effect. If the difficulty or impossibility to perform is not attributable to the pandemic, then the pandemic shall not serve as a defence mechanism against damages resulting from non-performance.

Can circumstances be cause for termination of a contract?

In some circumstances, it may be possible to argue that the whole context makes it **impossible** to continue to perform a contract and, in such cases, one can suggest that there is cause **for termination** of a contract due to supervening events.

Termination is a final closure of the issue while in many of these situations we may see a delay or interruption and suspension of duties as more feasible. It is important for the parties to be clear on what the status is. This again is a valid reason for a written agreement dealing with the issue.

However, this would not apply across the board and one must assess circumstances on a case by case basis.

When other laws apply to your contract

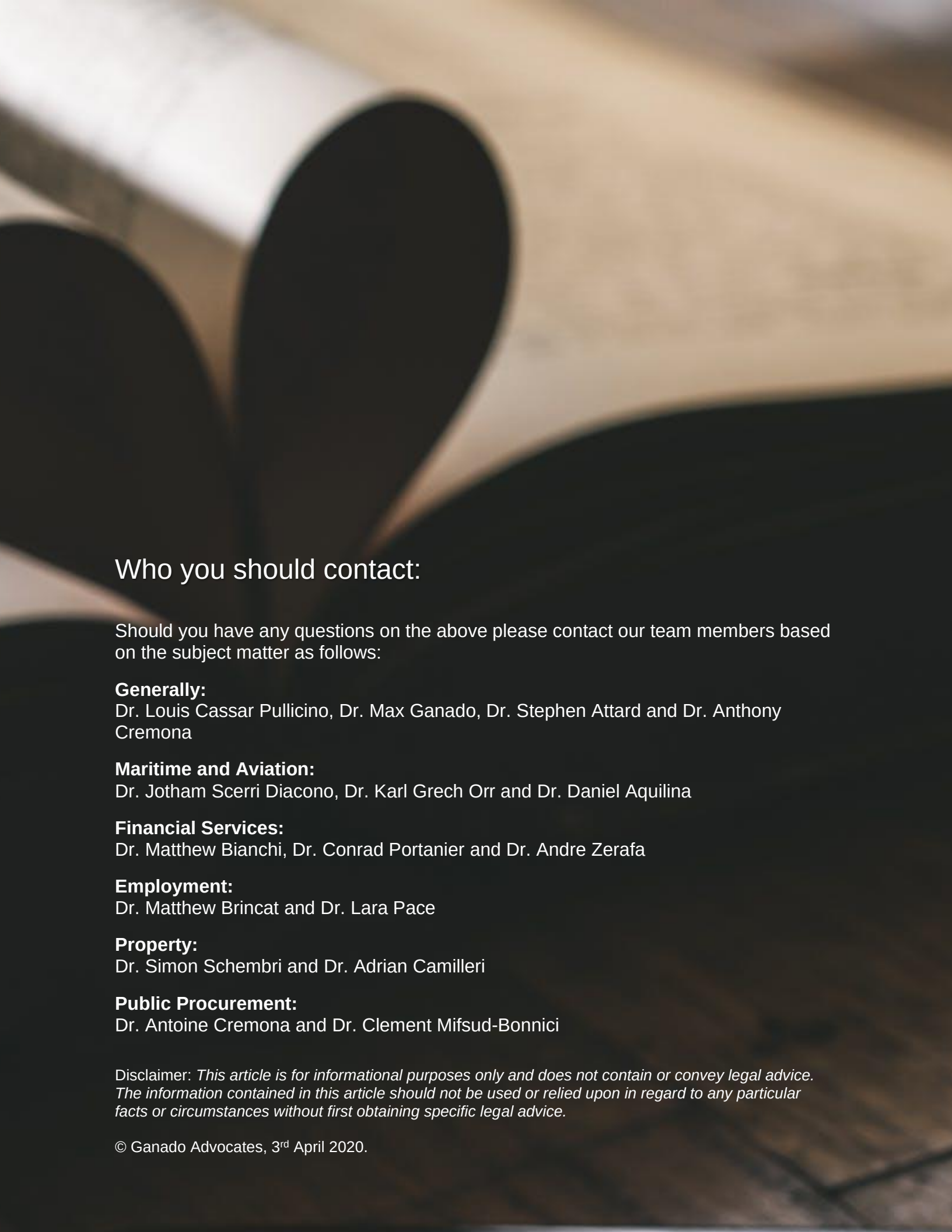
As we are increasingly part of a smaller inter-connected world, our contracts may be governed by other laws and the rules under those laws can be different from ours, although there is a very broad parallel between legal systems. Ultimately, they all seek a just, fair and reasonable outcome between the parties reflecting the impact of the unexpected events.

Countries where the system is Civil law, like Italy, France, Spain, China and others, would broadly be similar to ours in contexts where we have not adopted English laws as part of our system, as in the latter cases the statutory outcomes may be regulated differently for historical reasons. This may be the case in shipping and aviation for example, where English law is very influential, although contract law in general is necessarily governed by the Civil Code.

Where the system is Common law, as in England, USA, Australia, Israel and others, there could be rules which differ from ours, as one does not generally find Codes of law with provisions on the subject, but rather one follows judicial precedents which lay down the law in particular cases. These have become very stable and so advice can be given to any party to a contract for his specific case based on the facts.

You need to know if another law applies in your case and, if so, seek appropriate advice from foreign lawyers. We shall be glad to assist you in reaching out to foreign expert lawyers in the relevant subject matter areas.

This paper was prepared by Dr. Max Ganado, Dr. Adrian Camilleri, Dr. Clement Mifsud-Bonnici and Dr. Antoine Cremona, with the contribution of other lawyers from different practice areas of the firm.



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