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THE IMPACT OF COVID-19 ON INTERNATIONAL COMMERCIAL CONTRACTS,

AS APPROVED BY POSTGRADUATE STUDIES COMMITTEE

by

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ABSTRACT

The Covid-19 pandemic had an immense negative impact across all industries and businesses in South Africa and internationally. The pandemic impacted many international commercial contracts, and this was due to the necessary precautionary measures and restrictions that were introduced and imposed by the South African governments, as well as governments around the world, to curb the spread of the virus. These measures included restrictions on domestic and international travel, quarantine measures and bans on imports and exports of goods and services, which severely restricted international trade. On a global level, the new precautionary regulations and measures imposed by various governments to curb the spread of the Covid-19 virus, has left many people, businesses and industries worldwide in a position where they are faced with numerous challenges, such as, being unable to carry out their daily functions and in particular being unable to perform their contractual obligations in terms of international commercial contracts. Failure to perform contractual obligations results in breach of a contract and undesired claims for damages. This research report will address the impact of Covid-19 on international commercial contracts, from a South African perspective, and will focus particularly on the performance of contractual obligations in international commercial contracts for the sale of goods. The research report will examine the consequences that arose, from the various actions that the governments around the world undertook and imposed to curb the spread of the Covid-19 virus. In addition, the research report will assess how the UN Convention on Contracts for the International Sale of Goods (CISG), which is the main legal instrument in harmonising and governing international commercial contracts, can assist parties who enter into international commercial contracts, as well as other legal instruments. Additionally, the research report will focus on whether contractual parties who enter into international commercial contracts can be exempt from liability in a situation where either contractual party fails to perform and breaches a contractual obligation, in light of the current pandemic. The report will also consider the *force majeure* and hardship clauses, as well as various other clauses and whether parties to a contract may rely on these clauses as grounds for non-performance of contractual obligations in international commercial contracts. Lastly, the research report will suggest what the impact of Covid-19 means for drafting future international commercial contracts and ways forward.

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1. INTRODUCTION

A contract arises when two or more parties enter into an agreement with a serious intention of creating legal obligations that will be binding.[1] Contract law provides a legal framework, for people to enter into contracts and agreements to reciprocate resources and conduct business, whilst providing reassurance to parties of a contract, that the law of contract will protect, uphold and enforce their contract and agreements when necessary.[2] Parties to a contract must respect the contract by performing his/her contractual obligations, in terms of the contract.[3] The "sanctity" of contracts comes from the doctrine of *pacta sunt servanda*, which is a universally accepted principle in contract law, that means "agreements must be kept".[4] It is also a fundamental principle of South African law.[5]

South African contract law is based on and has its roots in Roman Dutch law.[6] Whereas, international contracts are governed by the law chosen by the parties to a contract and if the choice of law by the parties is not expressed, the governing law will be determined by the private international law of the forum.[7] The "internationality" of a contract originates when parties in different countries enter into a contract and the contract comprises of one or more foreign components, which places the contractual agreement in proximity with one or more legal systems.[8] Examples of different types of international contracts include, international investment contracts, international multimodal contracts for the sale of goods and international contracts of sale.[9]

Unforeseen events, such as natural disasters, conflicts, riots, war, government measures or sanctions and pandemics, can occur which may interrupt the normal flow of business and daily activities.[10] Often these unforeseen events are outside the control of the parties to a contract,

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[1]Christie RH & Bradfield GB *The Law of Contract in South Africa* 6 ed (2011) 493. See also SJ Cornellus *Principles of Interpretation of Contracts in South Africa* 3 ed (2016) 295.
[2] Francois Du Bois *Wille's Principles of South African Law* 9 ed (2007) 3.
[3] Saloni Khanderia 'Transnational contracts and their performance during the Covid-19 crisis: reflections from India' (2007) 7 (3) *BRICS Law Journal* 53.
[4] Laura Maria Franciosi 'The effects of COVID-19 on international contracts: A comparative overview' (2020) *Wellington Law Review* 413. See also Hutchinson D, Pretorius CJ, Du Plessis J et al, *The Law of Contract in South Africa* 2 ed (2012) 496.

[5] Francois Du Bois op cite note 2 at 2.
[6] Annerine van Schalkwyk *The nature and effect of force majeure clauses in the South African law of contract* (unpublished LLM thesis, University of Pretoria, 2018) 6.
[7] Andrew T Guzman 'The design of international agreements' (2005) 16 *European Journal of International Law* at 579.
[8] Giuditta Cordero Moss *International commercial contracts* (2014) 7.
[9] Ibid. See also Renzo Cavalieri & Vincenzo Salvatore *An introduction to international contract law* (2019) 2.
[10] Marco Torsello & Matteo M. Winkler 'Coronavirus-infected international business transactions: a preliminary diagnosis' (2020) *European Journal of Risk Regulation* 397.

which makes the performance of a contract impossible or remarkably more burdensome for either one or both of the parties to a contract.[11]

In December 2019, the first case of Covid-19 (known as the 'corona virus'), which is an infectious respiratory illness caused by the SARS-COV-2 virus, was reported in Wuhan China, that later spread worldwide.[12] To curb and prevent the virus from spreading, governments around the world adopted various measures that restricted movement of persons and goods, by issuing mandatory and recommended quarantine measures, national lockdowns, nationwide curfews, closure of international borders, prohibition on exports, prohibition of international travel, and closing of workplaces, which in many cases limited and prevented people from being able to perform and carry out their day to day activities and obligations.[13] These prohibitions and restrictions implemented by governments, have caused severe interruptions to the global economy, supply chains and commercial relationships, as it hindered the performance of many international commercial contracts.[14]

Where businesses suspect that they would be incapable of complying with their contractual obligations, or doubt the ability of the other party to the contract, they are forced to find alternative options provided in terms of their contract or the relevant law to mitigate liability for failure to fulfil contractual obligations in international commercial contracts.[15] Therefore, the economic disruptions caused by various government measures to contain the outbreak of Covid-19, leaves open the question, on whether and to what extent parties to an international commercial contract will be held liable to pay damages for breach of contract or losses suffered due to circumstances which are beyond their control.

This research report will look at the impact of Covid-19 on international commercial contracts. It will then discuss the impact of the consequences of Covid-19 and the associated regulations imposed by governments, to curb the spread of the virus, on international commercial contracts. This report will also discuss whether contractual parties who included the *force majeure* clause, or hardship clause into their commercial contracts, are able to rely on such clauses to mitigate

[11] Seng Hansen 'Does the Covid 19 outbreak constitute a force majeure event? A pandemic impact on construction contracts' (2020) *Journal of Civil Engineering Forum* 201.
[12] YP Wijerathna & BKM Jayasekera 'Legal implications of Covid-19: force majeure and contractual obligations in international sale of goods' (2020) *13th International Research Journal* 61.
[13] Ibid. See also Ljuben Kocev 'The impact of Covid-19 on the performance of international commercial contracts for the sale of goods -*force majeure* and hardship'(2020) *Economic and Business Trends Shaping the Future* 147.
[14] Namisha Choudhary 'Law and pandemic: commercial laws changed in India during Covid-19'(2021) 1 *Jus Corpus Law Journal* 533-534.
[15] Ibid. See also Ljuben Kocev op cit note 13 at 147.

or exempt them from liability due to non-performance of contractual obligations. The report will also consider the position where contractual parties fail to include the aforesaid clauses which may have enabled them to be exempt from liability for non-performance of contractual obligations. It will also assess other potential clauses that may be utilised or that may come into operation, by virtue of the governing law or international instruments, to assist parties with their liability that ensues from failure to perform due to an unforeseen event occurring. Lastly, the research report will conclude by looking at what the effect of the pandemic means for drafting future international commercial contracts.

2. THE IMPACT OF THE COVID-19 PANDEMIC ON INTERNATIONAL COMMERCIAL CONTRACTS

(a) The impact of Covid 19 on international commercial contracts

Covid-19 is known to be a communicable disease that is spread through human interaction, by way of respiratory droplets, that are inhaled or deposited on surfaces, where an infected person breathes, sneezes, coughs, or talks.[16] The Covid-19 virus is infamous for its ability to spread amongst individuals at a rapid pace.[17] Furthermore, individuals who contracted the virus, in the early stage of its inception, and prior to creation of the vaccination, were often hospitalised due to the severe complications associated with the virus.[18] At the inception of the virus and in the absence of a vaccine an unprecedented number of cases as well as death rates were reported from several countries on a daily basis.[19] Thus, Covid-19 directly impacted international commercial contracts as in the event where a supplier or his or her employees or a contractual party to a contract, contracted the virus, their performance in terms of the contract, such as, the delivery of goods and services would be severely inhibited as the virus had the effect of not only physically debilitating the affected person but also forcing them to isolate themself to prevent the spread of the virus.[20] Thus, contracting the Covid-19 virus would ultimately render performance of contractual obligations subjectively impossible as the affected person would not be able to perform or render services as per their contractual obligations.[21]

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[16] Saad I. Mallah, Omar K. Ghorab & Sabrina Al-Salmi et al 'COVID-19: breaking down a global health crisis' (2021) 20 (35) *National Library for Medicine*: *Annals of Clinical Microbiology and Antimicrobials* 1.
[17] Ljuben Kocev op cit note 13 at 147.
[18] Liz Pinnock 'Coronavirus, contracts and *force majeure*'(2020) 20 (3) *Without Prejudice* 8.
[19]The World Health Organization (WHO) 'WHO Director- General's opening remarks at the media briefing on Covid-19' The World Health Organization (WHO) Press Release 11 March 2020, available at *https://www.who.int/director-general/speeches/detail/who-director-generals-opening-remarks-at-the-media-breifing-on-covid19-11-march-2020*, accessed *on 28th May 2021*.
[20] Marco Torsello & Matteo M. Winkler op cit note 10 at 397.
[21] Peter Yeoh 'Covid-19 legal-economic implications of a pandemic' (2020) *Business Law Review* 74-75.

Resultantly, liability for non-performance of contractual obligations arose, however, this will be fully elaborated on later in this research report. Nevertheless, the rapid spreading pace of the Covid-19 virus urged governments worldwide to implement various regulations and measures that were directed towards curtailing the spread of the virus as well as minimising the effects thereof.[22]

(b) The impact of government regulations on international commercial contracts

The pandemic triggered the largest worldwide lockdown in history, as more than a third of the population worldwide was placed in lockdown.[23] In response to the world wide lockdown, the South African government also proceeded to take action and mitigate the spread of the Covid 19 virus, as on the 15th of March 2020, President Cyril Ramaphosa declared, the outbreak of Covid 19, as a National Disaster, and declared a "nation-wide lockdown" ("SA Lockdown") in South Africa, in terms of the Disaster Management Act 2002 (DMA Regulations).[24] The "nationwide lockdown" imposed restrictions on the operation of all non-essential businesses, restricted people from leaving their residence, prohibited public gatherings of more than 100 people, closed schools and restricted the sale of alcohol.[25] The DMA Regulations only allowed certain businesses that were recognized as providing "essential goods and service" to remain open and operative during the SA Lockdown.[26] The SA Lockdown and DMA Regulations, therefore, affected many businesses that were not recognized as providing essential services as all non-essential businesses were unable to operate.[27] The actions of the government to introduce these new regulations and measures directly impacted existing international commercial contracts, particularly, contracts whereby performance is required to occur and take place over a certain period of time, as well as contracts which provide for specific delivery dates and/or contracts where performance is required to begin at an unspecified time in the future.[28] Contractual parties had to abide by these new regulations, which made performance of contractual obligations subjectively impossible and to a certain extent unlawful as performance, such as, delivery of goods and services on behalf of non-essential businesses

[22] Annalise Kempen 'A serious reality for South Africa' (2022) *Servamus Community-based Safety and Security Magazine* 12.
[23] Laura Maria Franciosi op cit note 4 at 413-414.
[24]Jennifer Roeleveld 'Strategies and challenges amidst Covid-19 facing South Africa and neighbouring countries' (2020) *Covid 19 and Fiscal Policies* 776.
[25] Ibid. See also the Disaster Management Act 57 of 2002.
[26] Annalise Kempen op cit note 22 at 12.
[27] Peter Yeoh op cit note 21 at 76.
[28] Ibid. See also Ljuben Kocev op cit note 13 at 147.

would nevertheless constitute a violation of the mandatory regulations imposed by the respective government.[29] This impossibility of performance is said to last until governments elected to uplift the respective bans or prohibitions.[30] However, the inability of a party to perform their contractual obligations due to the government regulations and measures imposed in response to the pandemic has grave implications for the respective contracting party.[31]

3. CONSEQUENCES OF COVID-19 AND THE ASSOCIATED GOVERNMENT REGULATIONS ON INTERNATIONAL COMMERCIAL CONTRACTS

Covid-19 as well as the precautionary measures adopted by the government to impose stringent regulations and measures, to curb the spread of the Covid 19 virus, has led to many legal issues arising.[32] Parties to international commercial contracts would have found themselves in a position where performance of contractual obligations was either rendered impossible or more burdensome to fulfil timeously.[33] This may have been contrary to the terms of the contract that the contracting parties initially agreed upon.[34] Where a party to a contract cannot perform as originally agreed to in terms of the contract, the party will seek to be excused from performing its obligations in order to avoid liability for breach of contract, specific performance, damages or damages for cancellation.[35] However, where a party is not excused it would result in the party who was unable to perform in terms of their contractual obligations susceptible to claims for damages for cancellation, specific performance, damages or damages for breach of contract.[36] For instance, during the pandemic various disputes arose before arbitral tribunals and courts, pertaining to the liability of contractual parties who failed to perform in terms of their contractual obligation.[37] Nevertheless, the consequences that would have surfaced for international commercial contracting parties who failed to honour their contractual obligations,

[29] Ashraf Booley and Conrad Potberg 'Can Covid-19 be classified as *Force Majeure* in South Africa' (2020) 20 (8) *Without Prejudice* 20.
[30] Ashraf Booley 'Covid-19 versus contractual obligations: case in point South Africa?' (2020) 20 (4) *Without Prejudice* 42.
[31] Jennifer Roeleveld op cit note 24 at 776.
[32] Peter Yeoh op cit not 21 at 74.
[33] Natalie Reyneke 'Covid-19:rethinking public sector tenders and contracts' (2021) *Construction Law* 47.
[34] Shannon Rose Selden, Joshua B Pickar & Samantha Lord Hill et al, 'Roundtable: contract enforceability in the age of Covid-19' (2020) 21 (3) *Business Law International* 226.
[35] E C Schlemmer 'Sovereign reliance on a state of necessity: always an acceptable defence: foreign judicial decisions' (2007) *South African Yearbook of International Law* 504-505.
[36] Natalie Reyneke op cit note 33 at 46.
[37] S Esra Kiraz & Esra Yildiz Ustun 'Covid-19 and force majeure clauses: an examination of arbitral tribunal's awards' (2020) 25 (4) *Uniform Law Review* 445.

is largely dependent on the contract itself and the relevant clauses that the parties included or failed to include into their contract.[38]

Therefore, the starting point is to consider the contract of the parties and asses the terms that were included thereto.[39] Party autonomy is a universally accepted contractual principle which affords parties to a contract the freedom to include into their contract any other provisions, relevant law, possibility for dispute resolution, penalty clauses for breach of contract and limitation of liability clauses, provided that these clauses are lawful.[40] By virtue of party autonomy contractual parties in international commercial contracts are free to include clauses such as *force majeure*, hardship, change in law and renegotiation clauses etc, to exempt and or curtail their liability on the happening of an unforeseen event, such as the Covid-19 pandemic.[41] On the other hand, in the absence of a limitation of liability clause, the parties may have to rely on the governing law and the remedies available in terms of the respective legal system that governs the contract.[42] Alternatively parties may rely on international treaties and conventions to as assist them.[43]

Therefore, it is imperative for contractual parties to review the terms of their contract and assess whether their contract makes provision for the exemption from liability due to unforeseen events, such as Covid-19.

4. INCLUSION OF CONTRACTUAL CLAUSES AND THE EFFECTS THEREOF

Where parties have included contractual clauses such as the *force majeure* and hardship clause, it may have provided relief to the affected contractual party to a certain extent, depending on whether the clause covered Covid-19.

(a) Inclusion of the force majeure clause in international commercial contracts

The first clause that parties could have looked out for in their contract is the *force majeure* clause. The term *force majeure* is defined as an occurrence of a situation, circumstance or

[38] Christian Twigg- Flesner 'A comparative perspective on commercial contracts and the impact of covid-19-change of circumstances, force majeure, or what?' in Pistor Katharina *Law in the Time of Covid-19* (2020) 224.
[39] Ibid.
[40] Matthias Lehmann 'Liberating the individual from battles between states' (2008) 41 (2) *Vanderbilt Journal of Transnational Law* 388-389.
[41] Larry A DiMatteo, Lucien Dhooge & Stephanie Greene et al 'The interpretative turn in international sales law:an analysis of fifteen years of CISG jurisprudence' (2004) 24 (2) *Northwestern Journal of International Law and Business* 309.
[42] Schwenzer I 'Force Majeure and Hardship in International Sales Contracts' (2007) 39 (4) *Victoria University of Wellington Law Review* 711.
[43] Ibid.

event, that is beyond the control of any one of the parties to a contract, and that occurs after the conclusion of a contract, which renders the contractual performance of either or both of the contractual parties impossible.[44] The *force majeure* clause is usually found in commercial contracts and allows a party to a contract to escape the usual consequences of late or non-performance of contractual obligations, due to unavoidable or unforeseeable events or circumstances.[45] The incorporation of a *force majeure* clause will postpone a party's performance of contractual obligations for as long as the *force majeure* event lasts.[46] The impossibility of performance is a requirement under the principle of *force majeure*.[47] Impossibility can be permanent or temporary in nature.[48] Generally, the *force majeure* clause stipulates and provides details of the different kind of events that will provoke the utilisation of the clause and is often based on previous occurrences that significantly impacted the performance of contracts.[49] The events that are presumed to commonly qualify as a *force majeure*, according to the International Chamber of Commerce (ICC), are:

> "(a) war (whether declared or not), hostilities, invasion, act of foreign enemies, extensive military mobilisation;
>
> (b) civil war, riot, rebellion and revolution, military or usurped power, insurrection, act of terrorism, sabotage or piracy;
>
> (c) currency and trade restriction, embargo, sanction;
>
> (d) act of authority whether lawful or unlawful, compliance with any law or governmental order, expropriation, seizure of works, requisition, nationalisation;
>
> (e) plague, epidemic, natural disaster or extreme natural event;
>
> (f) explosion, fire, destruction of equipment, prolonged break-down of transport, telecommunication, information system or energy; and

[44] Namisha Choudhary op cit note 14 at 535.
[45] Liz Pinnock op cit note 18 at 8.
[46] Namisha Choudhary op cit note 14 at 227.

[47] Peter Yeoh op cit note 21 at 76.
[48] Hossein Fazilatfar 'The impact of supervening illegality on international contracts in a comparative context' (2012) *Comparative & International Law Journal of Southern Africa* 158.
[49] Christian Twigg- Flesner op cit note 38 at 228.

(g) general labour disturbance such as boycott, strike and lock-out, go-slow, occupation of factories and premises".[50]

The *force majeure* clause does not however apply automatically to an event or circumstance that makes performance impossible.[51] The event or circumstance has to be specifically provided for in the contract in order for a party to rely on the *force majeure* clause to excuse his/her failure to perform his/her contractual obligations.[52] The affected party who wishes to rely on a *force majeure* clause must prove that the impediment is "(a) beyond the reasonable party's control; (b) the impediment could not have been reasonably foreseen at the time of the conclusion of the contract; and (c) the effects of the impediment could not have been reasonably avoided or overcome by the affected party".[53] All three conditions must be met for the affected party to be relieved from his/her contractual obligations.[54] However, if one of the specific events listed in paragraph (c) of the clause occurs, the first two conditions, (a) and (b), are considered to be met.[55] Thus, conditions (a) and (b) are presumed to have occurred in the case of listed events, whereas condition (c) must be proved by the affected party.[56]

The *force majeure* concept is accepted internationally and is used and referred to in civil law jurisdictions as well as in common law.[57] Additionally, the CISG and the UNIDROIT principles, which are international instruments, recognize *force majeure* and its effect on parties' contractual obligations to perform.[58] Parties usually include a *force majeure* clause in their contract to regulate their relationship and the consequences that arise as a result of non - performance, due to an unforeseen event.[59]

The *force majeure* concept is foreign to South African law.[60] However, South African common law makes provision for *vis major* ("major force") or acts of God, which are both encapsulated in the principle of supervening impossibility, and in which the *vis major* shares similar

[50] The International Chamber of Commerce (ICC) 'ICC force majeure and hardship clauses' (2020), available at https://iccwwbo.org/publication/icc-force-majeure-and-hardship-clauses/, accessed on 5th June 2021 at 3.
[51] Liz Pinnock op cit note 18 at 8.
[52] Ibid.
[53] ICC op cit note 50 at para 2.2. at 2.
[54] Ibid at 2.
[55] Ibid.
[56] Ibid.
[57] J Coetzee 'The case for economic hardship in South Africa: Lessons to learnt from international practice and theory' (2011) 36 (2) *Journal for Juridical Science* 9.
[58] Annerine van Schalkwyk op cit note 6 at 6.
[59] Veronica Vurgarellis & Musa Zimu '*Force majeure* during covid-19 lockdown'(2020) *Personal Finance* 14.
[60] J Coetzee op cit note 57 at 6.

characteristics to a *force majeure* clause.[61] The general rule of the principle of supervening impossibility is based on the maxim *impossibillium nulla obligatio est*, which means that no one can be forced to do the impossible.[62] In South Africa parties who enter into contracts may be excused and released from his/her performance of contractual obligations, if the performance is prevented by *casus fortuitous* ("accidental occurrence") or by a *vis major*.[63] In *Peters Flamman v Kokstad Municipality Respondents*, *vis major* was defined as "some force, power or agency which cannot be resisted or controlled by the ordinary individual and includes not only acts of God but also acts of man".[64] The court in *Peters Flamman* also defined *casus fortuitous* as "a species *vis major* which imports something exceptional and unforeseen and which human foresight cannot be expected to anticipate, or, if it can be foreseen, it cannot be avoided by the exercise of reasonable care or caution".[65] Additionally in *Bischofberger v Vaneyk*, the court held that, for a party to be excused and released from his/her performance of a contractual obligations, it will depend on the "nature of the contract, relationship of the parties to the contract, circumstances of the case, as well as the nature of impossibility".[66]

The principle of supervening impossibility sets out two requirements that need to be satisfied.[67] The first requirement is that performance of contractual obligations must have become objectively impossible, in which no one could perform, not only just a party or parties to a contract.[68] Thus, performance of contractual obligations must have become legally or physically impossible, and not just more burdensome, difficult or expensive to perform.[69] The second requirement is that the impossibility of performance must have not been reasonably foreseeable and avoidable by the party invoking the principle of supervening impossibility.[70] Therefore, where any event occurs that renders performance of contractual obligations impossible, without any party to the contract being at fault, the party is excused from failure to perform.[71]

[61] J Coetzee op cit note 57 at 6-7. See also Annerine van Schalkwyk op cit note 6 at 15.
[62] Asharaf Booley and Conrad Potberg op cit note 29 at 21.
[63] Francois du Bois op cit note 2 at 850. See also Christie RH & Bradfield GB op cit note 1 at 495.
[64] *Peters Flamman and Co v Kokstad Municipality* 1919 AD 427 p 434.
[65] Ibid. See also Asharaf Booley and Conrad Potberg op cit note 29 at 21.
[66] *Bischofberger v Vaneyk* (1981) 4 All SA 54.
[67] J Coetzee op cit note 57 at 6.
[68] SJ Cornellus op cit note 1 at 301.
[69] *Hersman v Shapiro & Co* 1926 TPD 367.See also Christie RH & Bradfield GB op cit note 1 at 495.
[70] J Coetzee op cit note 57 at 6.
[71] Asharaf Booley and Conrad Potberg op cit note 29 at 21

The consequences of the principle of supervening impossibility of performance are that the affected party would be exempt from performing his/her contractual obligations for as long as the performance remains impossible.[72] In addition, the counterparty's corresponding contractual obligations will cease and the counterparty would not be able to invoke the remedies for breach of contract and/or cancellation of a contract.[73] The counterparty may only be entitled to cancel a contract if performance of a contract is suspended for a prolonged period of time, making it unreasonable for the counterparty to continue with the contract.[74] However, this would be dependent on the nature of the contract and the surrounding circumstances.[75]

It has more or less become trade practice to incorporate a *force majeure* clause as a standard term and condition in most contracts.[76] The aim of the *force majeure* clause and the South African common law principle of supervening impossibility is to excuse the non-performance of contractual obligations of a party due to an unforeseen event.[77] Thus, having the effect of protecting the party from the consequences of breach of contract, in which the other party to the contract may claim cancellation of contract or damages.[78]

Parties to contracts in South Africa, often include a *force majeure* clause in their contract to modify or clarify the legal position as the principle of supervening impossibility in South Africa does not regulate the consequences further by securing relief and does not provide certainty about the parties contractual and legal position.[79] In addition, the South African common law adopted a strict approach in which non- performance of contractual obligations in certain cases that deal with *force majeure* will not be excused.[80]

For instance, in *Glencore Grain Africa (Pty) Ltd v Du Plessis NO & Others*, the court provided that only under the following instances, the *force majeure* or impossibility would be excused:

> "(a) the impossibility is objectively impossible, (b) impossibility is absolute as opposed to probable, (c) impossibility is absolute as opposed to relative, if it relates to something that can in general be done, but the one party seeking to escape liability cannot

[72] SJ Cornellus op cit note 1 at 301. See also Hossein Fazilatfar op cit note 48 at 183.
[73] Ibid.
[74] Hossein Fazilatfar op cit note 48 at 183. See also Annerine van Schalkwyk op cit note 6 at 10.
[75] Ibid.
[76] J Coetzee op cit note 57 at 6.
[77] The ICC op cit note 50 at 2.
[78] J Coetzee op cit note 57 at 6. See also Asharaf Booley and Conrad Potberg op cit note 29 at 21.
[79] Asharaf Booley and Conrad Potberg op cit note 29 at 21.
[80] Francois du Bois op cit note 2 at 850.

personally perform, such a party remains liable in contract, (d) the impossibility is unavoidable by a reasonable person, (e) it is not the fault of either party and lastly, the mere fact that a disaster or event was foreseeable, does not necessarily mean that it ought to have been foreseeable or that it is avoidable by a reasonable person".[81]

In the *Joint Venture between Aveng (Africa) (Pty) Ltd and Strabag International Gmbh v South African National Roads Agency SOC Ltd and Another*, the court held that the *force majeure* did not apply "(a) where the contract is entered into after the event, (b) to non-performance of monetary obligations, and/ or if the event occurs after the affected party delays performance".[82]

Thus, it is evident that *force majeure* events must make the performance of contractual obligations for either one or both parties to the contract impossible.[83] The impossibility of performance of contractual obligations may have arisen where either of the contracting parties contracted the virus or as a result of the various governments proceeding to take action and pass new regulations and measures, such as the DMA Regulations and SA Lockdown, to curb the spread of the Covid-19 virus.[84] Where a contract allows for an event such as Covid-19, the affected party must prove that as a result of the existence of the Covid-19 pandemic the performance of contractual obligations became impossible, either due to contracting the virus or due to the new regulations and restrictions imposed, which made performance impossible or unlawful.[85]

For instance, where one of the contracting parties contracted the virus and was forced into isolation it would render performance impossible as the affected party will not be able to deliver.[86] Thus, an affected party wanting to invoke the *force majeure* clause as a result of the Covid-19 pandemic, will have to first consider whether the *force majeure* clause in the contract makes provision for an epidemic or pandemic.[87] Additionally, the unforeseen restrictions and measures imposed by the governments to close businesses and prohibit all public transport, makes performance of contractual obligations impossible as performance will be rendered

[81] *Glencore Grain Africa (Pty) Ltd v Du Plessis NO & Others* (2007) JOL 21043 (O).
[82] *Joint Venture between Aveng (Africa) (Pty) Ltd and Strabag International Gmbh v South African National Roads Agency SoC Ltd and Another* (2019) 3 All SA 186 para 146.
[83] Brunner Christoph *Force Majeure and Hardship Under General Contract Principles: Exemption of Non-Performance in International Arbitration* (2009) p 78.
[84] Ibid. See also Asharaf Booley op cit note 30 at 42.
[85] Annalise Kempen op cit note 22 at 12.
[86] Christine van Zyl 'Doing business during Covid-19' (2020) *P& C Review* 12.
[87] Veronica Vurgarellis & Musa Zimu op cit note 59 at 14.

illegal and unlawful.[88] Therefore, a non-performing party affected by the regulations passed may be able to rely on the *force majeure* clause, where acts of government authorities are provided for.[89]

(b) *Whether or not Covid-19 is covered under a force majeure clause*

The Covid-19 pandemic could not have been foreseen by contracting parties in international commercial contracts.[90] The invocation of a *force majeure* clause based on a particular event, will depend on the wording of the *force majeure* clause in the contract, such as, whether the event which hinders the performance of a contract is listed in the clause of the contract.[91] In the situation of the Covid-19 pandemic, a *force majeure* clause that expressly provides for "pandemics" will be applicable and may be triggered by the Covid-19 pandemic.[92] However, where a contract does not particularly and expressly use the term "pandemics", a party may have to rely on another event stated in the clause.[93] The ICC *Force Majeure* clause 2003 is the most applicable clause in many international commercial contracts, in preference to the 2020 version, which includes the term " epidemics" and not "pandemics" in the list in the contract that is considered to be a *force majeure* event.[94] However, a pandemic is a type of epidemic at a larger worldwide level, in which the *force majeure* clause may still be invoked.[95] Events that include "prolonged breakdown of transport" may invoke the *force majeure* clause, such as, when goods supplied in terms of the contract rely on airfreight and due to airports being shut down because of the pandemic, will allow for the *force majeure* clause to be applicable on that ground.[96] Some contracts may incorporate a "catch- all" clause in a similar manner, such as, "any other event beyond the control of the parties", which may cover the Covid-19 pandemic and the changes in legislation that occur due to the promulgation of lockdown regulations.[97]

[88] Asharaf Booley op cit note 30 at 42.
[89] *Nogoduka-Ngumbela Consortium (Pty) Ltd v Rage Distribution (Pty) Ltd t/a Rage* [2021] ZAGPJHC 568 para 33.
[90] Shannon Rose Selden , Joshua B Pickar & Samantha Lord Hill et al op cit note 34 at 221.
[91] Christian Twigg- Flesner op cit note 38 at 3.
[92]Ashraf Booley and Conrad Potberg op cit note 29 at 42.
[93]Ibid. See also Christian Twigg- Flesner op cit note 38 at 3.
[94]Ibid.
[95]Peter Yeoh op cit note 21 at 76.
[96]Christian Twigg- Flesner op cit note 38 at 3.
[97]Liz Pinnock op cit note 18 at 8.

Moreover, it is vital to prove that a causal link exists between the trigger event and a party's capability to perform the contractual obligations as agreed to in terms of the contract.[98] A *force majeure* clause that lists an event that occurs will only suffice if there is an impact on the party's ability to perform his/her contractual obligations.[99] Thus, it is mandatory for a party who cannot perform to show that the reason is due to the trigger event.[100] If, for example, the event depends on the clause that provides for "pandemics", then the reason for the party being unable to perform must relate to the pandemic. An example of this includes the restrictions on non-essential business activities and social distancing which makes it impossible to perform contractual obligations during the period when the restrictions were enforced.[101] Lastly, the party seeking to rely on the *force majeure* clause would have to prove that there are no available or alternative reasonable steps which can be undertaken to avoid the consequences of the trigger event or even to alleviate its effect, for instance, to locate goods from a different supplier.[102]

Where a *force majeure* clause can be used successfully, the specific consequences will depend on the outcome that the clause allows for.[103] The *force majeure* clause may solely suspend performance of contractual obligations, in which either party will not incur liability for non-performance or absolve a party from any liability for non-performance of contractual obligations or terminate the contract.[104] Therefore, both the ICC *force majeure* clause 2003 and 2020 versions limit relief from performance and liability for non-performance to the duration of the hindrance.[105]

(c) *Inclusion of the hardship clause in international commercial contracts*

Hardship is associated with something that involves or causes suffering or deprivation.[106] In legal phraseology, hardship is considered as a change in a circumstance or situation that occurs after a contract has been concluded and is outside the control of the parties to a contract, making

[98] Christine van Zyl op cit note 86 at 12.
[99] Namisha Choudhary op cit note 14 at 227.
[100] Liz Pinnock op cit note 18 at 8.
[101] Ibid. See also Christian Twigg- Flesner op cit note 38 at 3-4.
[102] Thato Mashishi 'The convergence of Covid-19 and *force majeure*' (2020) 10.
[103] Liz Pinnock op cit note 18 at 8.
[104] Christian Twigg- Flesner op cit note 38 at 4.
[105] The ICC op cit note 50 at 2.
[106] Ljuben Kocev op cit note 13 at 153.

the performance of either or both of the parties more cumbersome, however not impossible.[107] South African common law does not address issues relating to changed circumstances (hardship) as it only considers the objective impossibility of performance or where contractual parties have provided for these changed circumstances in their contracts.[108] However, the changed circumstance or hardship clause is recognised in some other legal systems as a ground for exempting affected contractual parties to a contract, terminating a contract or allowing for renegotiation of contractual terms and conditions.[109]

In terms of the CISG, similarly to the *force majeure* concept, hardship is not explicitly mentioned.[110] In contrast, the UNIDROIT Principles are often applied to augment the gaps within the CISG, and it includes a detailed article pertaining to hardship.[111] Article 6.2.2 of the UNIDROIT Principles, provides that hardship occurs when a situation or event "fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished".[112] Furthermore, Article 6.2.2 of the UNIDROIT Principles, sets out four requirements for hardship to be invoked, namely,

> "(a) the event must have occurred or become known to the disadvantaged party after the conclusion of the contract; (b) the event could not have been reasonably taken into account by the parties at the time of the conclusion of the contract; (c) the event is beyond the control of the disadvantaged party and (d) the risk of the event was not assumed by the disadvantaged party".[113]

(d) Whether or not Covid-19 is covered under a hardship clause

Examples of hardship includes abrupt increases in prices in a fairly stable market, the imposition of duties, immoderate tariffs or quotas for certain products, and a rapid increase in currency exchange rates that goes beyond a certain margin.[114]

The hardship clause may have been utilised by parties during the Covid-19 pandemic, where parties expressly provided and included a hardship clause in their contract and where one of

[107] Ljuben Kocev op cit note 13 at 153.
[108] Christie RH & Bradfield GB op cit note 1 at 772-443.
[109] Annerine van Schalkwyk op cit note 6 at 17.
[110] Andre Janssen & Christian Johannes Wahnschaffe 'Covid-19 and international sale contracts: unprecedented grounds for exemption or business as usual?' (2020) 24 (4) *Uniform Law Review* at 479.
[111] Ljuben Kocev op cit note 13 at 149.
[112] UNIDROIT Principles of International Commercial Contracts 2016, Article 6.2.2. (UNIDROIT).
[113] Ibid at Article 6.2.2.
[114] Schwenzer I op cit note 42 at 711.

the party's costs increased because of the changed circumstances. Hardship may have occurred due to the increased costs associated with performing business operations for many industries during the Covid-19 pandemic, as the closure of several businesses resulted in a supply shortage which in turn resulted in price hikes, thus satisfying the requirements for hardship.

An additional clause that may have been utilised by international commercial contracting parties to limit contractual liability includes, a renegotiation clause, which provides that parties may modify and amend the terms and conditions of their contract which they previously agreed to rather than terminating the entire contract when a dispute arises during the course of business.[115] Therefore, parties may have relied on a renegotiation clause during the Covid-19 pandemic, whereby parties may have agreed to amend the terms of their contract to allow performance of contractual obligations to take place at a later stage when the regulations imposed by the governments were eased or uplifted.[116]

5. EXCLUSION OF CONTRACTUAL CLAUSES AND THE EFFECTS THEREOF

(a) Role of the governing law

Where parties fail to include clauses that may ameliorate their contractual liability due to non-performance of contractual obligations parties may resort to the governing law of the contract to ascertain whether any remedies are available to assist parties with their contractual liabilities that arise due to the unforeseen event.[117]

The governing law of the contract or choice of law clause determines what law will be used to interpret the contract and the jurisdiction that will oversee the enforcement of its terms and conditions.[118] For instance, where a contract is governed by English law, parties may rely on the "doctrine of frustration".[119] The doctrine of frustration was established in the case of *Taylor v Caldwell*.[120] However, the doctrine of frustration cannot be utilised if the contract expressly includes a *force majeure* clause as the *force majeure* clause will be considered as the chosen allocation of risk between the parties of the contract.[121]

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[115] Sontonye Frank 'Stabilisation clauses and foreign investment: presumptions versus realities' (2015) *Journal of World Investment* 89 -90. See also Zeyad A. Al Qurashi 'Renegotiation of international petroleum agreements' (2005) 22 (4) *Journal of International Arbitration* 262-263.
[116] Peter A Alces & Michael M Greenfield 'They can do what !? Limitations on the use of change in terms clauses' (2010) 26 (4) *Georgia State University Law Review* 1099.
[117] Andre Janssen & Christian Johannes Wahnschaffe op cit note 110 at 479.
[118] Ibid.
[119] Andrew A. Schwartz 'Contracts and Covid 19' (2020) 73 *Stanford Law Review Online* 54.
[120] *Taylor v Caldwell* (1863) 3 B & S 826 at para 826.
[121] Christian Twigg- Flesner op cit note 38 at 5.

The doctrine of frustration will be applicable if:

> "(i) the underlying event is not the fault of any party to the contract; (ii) the event or circumstance occurs after the formation of the contract and was not foreseen by the parties; and (iii) it becomes physically or commercially impossible to fulfil the contract or transforms the obligation to perform into a radically different obligation from that undertaken initially".[122]

The doctrine of frustration ineluctably results in the entire contract being terminated, in which parties to the contract are no longer bound to perform their contractual obligations, in terms of the contract.[123] Due to the sudden and striking consequences of frustration of a contract, the threshold to prove frustration is much higher than most *force majeure* clauses, as frustration of a contract necessitates that it must be shown that the contractual obligations impacted by a situation or event is essential to the contract.[124]

The doctrine of frustration may be applicable to the Covid-19 pandemic on the basis that the contractual obligations was not the fault of either of the parties to the contract. Furthermore, the pandemic was unforeseeable by either of the parties and occurred after the contract was concluded. Lastly, the pandemic and the regulations imposed by the government rendered performance physically and commercially impossible. Thus, satisfying the requirements for the doctrine of frustration.

In South Africa, non- performance of contractual obligations will only be excused where it is objectively impossible to carry out one's contractual obligations.[125] Due the stringent requirements of impossibility of performance required in South African common law, there have been instances where courts in South Africa have resorted to the English doctrine of frustration.[126]

(b) Role of international treaties and conventions

Where the parties failed to expressly provide for any of the aforesaid clauses, such as , *force majeure,* hardship etc or where parties are unable to attain relief from the governing law, the

[122] United Nations Conference on Trade and Development 'Covid-19 Implications for Commercial Contracts: International Sale of Goods on CIF and FOB Terms' (2021) at 18.(UNCTAD).
[123] Andrew A. Schwartz op cit note 119 at 54.
[124] Ibid.
[125] *Unibank Savings & Loans Ltd (formerly Community Bank) v ABSA Bank Ltd* 2000 (4) SA 191 (W) at para 198.
[126] Ibid. See also Andrew Hutchinson 'The doctrine of frustration: a solution to the problem of changed circumstances in South African contract law'(2010) 127 *South African Law Journal* 86.

next solution would be to consider what available remedies are available in terms of international treaties and conventions.

The United Nations Convention on Contracts for the International Sale of Goods (CISG) is an international treaty that provides standardised rules regarding the international sale of goods.[127] The CISG is also sometimes referred to as the Vienna Sales Convention and contains rules that may be used to regulate buyers and seller's rights in contracts regarding the international sale of goods.[128]

The CISG is developed for contracts between private businesses, concerning the international sale of goods and excludes the sales to consumers and services.[129] Thus, the CISG is a multilateral instrument that aims to harmonise and assist contracting parties to an international sale agreement.[130] Where a party is a national to a signatory state that has ratified the CISG and where the contractual parties have not expressly excluded the application of the CISG in international sale agreements and/or contracts, the CISG may apply in terms of Article 1(1) of the CISG, which provides that "the CISG applies to contracts of sale of goods between parties whose place of business are in different states (a) when the states are contracting states, or (b) when the rules of private international law lead to the application of the law of a contracting state". [131] The CISG may also be applicable by means of the party's choice.[132] However, the application and scope of the CISG is subject to certain limitations in terms of Article 2 of the CISG, such as, "consumer sales, auction sales, sales of aircrafts and ships and forced or judicially mandated sales" which are excluded.[133]

Contracting parties whose contract is governed by the CISG may rely on Article 79 (1) of the CISG, which provides that:

> " a party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the

[127] Joseph Lookofsky *Understanding the CISG: (Worldwide) Edition* (2017) ch1 p1.
[128] Ibid at p1.
[129] Ibid at p2.
[130] Larry A. DiMatteo, Lucien Dhooge & Stephanie Greene et al op cit note 41 at 309.
[131] The United Nations Convention on Contracts for the International Sale of Goods 1980 (CISG), Article 79 Article 1 (1) (a) & Article 1 (1) (b).
[132] Ibid, Article 79(3).
[133] Ibid, Article 2.

time of the conclusion of the contract or to have avoided or overcome it, or its consequences".[134]

Additionally, Article 79 (3) of the CISG stipulates that the exemption provided by Article 79 is on a temporary basis, thus, the temporary impediments will only temporarily exempt the party of the contract, who was the promisor, for the duration in which the impediment lasts.[135]Article 79 of the CISG provides that, to determine whether a situation or circumstance can be classified as an "impediment", the contractual risk allocation must be considered as well as the trade usages and the area of control of the party in breach of contract.[136] Additionally, the impediment must have not been foreseeable by a reasonable person at the time the contract was concluded, in which the objective standard is applied.[137] Lastly, the affected party to the contract must have taken reasonable steps and measures to avoid or overcome the impediment, such as, by attempting to find an alternative source of goods during the pandemic or by acquiring an alternative means of transport, determined by the contractual allocation of risk.[138]

Moreover, it is imperative to note that Article 79(2) of the CISG requires the affected party depending on the exemption to provide a notice, within a reasonable period, to the other party of the contract to avoid being liable for the subsequent damages.[139] In addition, Article 77 of the CISG provides that parties to a contract are obliged to take reasonable measures to alleviate damages caused by the affected party's breach of contract or alternatively the affected party in breach of contractual obligations can claim deduction in damages.[140]

However, since South Africa is not a signatory to the CISG, South African international contracting parties cannot rely on the aforesaid provisions of the CISG. Nevertheless, the UNIDROIT Principles of International Commercial Contracts (UPICC) may prove to be more beneficial for South African international contracting parties.

The UPICC is another instrument used in the harmonisation of international commercial contracts as it is one of the most renowned international organisations that promotes the unification of private law on a global level.[141] The UPICC can assist affected parties in

[134] CISG supra note 131, Article 79 (1).
[135] Ibid, Article 79 (3).
[136] Ibid, Article 79.
[137] Ibid.
[138] Ibid.
[139] Ibid, Article 79 (2).
[140] Ibid, Article 77.
[141] The UNIDROIT Principles of International Commercial Contracts (UPICC) , Statute, Article 1. (UPICC).

international commercial contracts as Article 7.1.7 of the UPICC provides that a party will be excused if he/she could not perform his/her contractual obligations if non-performance was "due to an impediment beyond its control".[142] Which is subjected to the provision that the party who had not performed "could not reasonably be expected to have taken the impediment into account at time of the conclusion of the contract" or have alleviated the impediment or its ramifications.[143] Additionally, Article 6.2.2 of the UPICC, which concerns hardship, applies "where the occurrence of events fundamentally alters the equilibrium of the contract," due to the cost of performance increasing or the value of the performance decreasing.[144] Thus, the event

> " (i) must have occurred or become known after the contract was concluded; (ii) could not reasonably have been taken into account before the contract was concluded; (iii) is beyond the control of the party suffering hardship; and (iv) must be one in respect of which the party suffering hardship did not assume the risk".[145]

In light of the above, parties should remain cognisant of the fact that the UPICC Model clauses:

> "… merely allow them to indicate more precisely the way they wish the UNIDROIT Principles to be used during the performance of the contract or when a dispute arises. Therefore, even if parties decide not to use these Model Clauses, judges and arbitrators may still apply the UNIDROIT Principles according to the circumstances of the case as they have been doing so far". [146]

It is apparent that there are not many remedies available to international contracting parties, where express mention was not made for the exclusion of liability for unforeseen events that occur. The remedies available in terms of the governing law may be limited. Furthermore, the CISG is only applicable to nationals of signatory States. Moreover, the UPICC, merely acts as a guiding mechanism. Therefore, in future it is best to expressly include clauses that will limit or curtail a contractual party's liability should an unforeseen event occur.

[142] UPICC supra note 141, Article 7.1.7 (1).
[143] Ibid, Article 7.1.7 (1).
[144] Ibid, 6.2.2.
[145] Principles of European Contract Law 2002, Art. 6:111 & Art.8:108.
[146] UPICC supra note 141, Article 1.

6. THE IMPACT OF THE PANDEMIC ON THE DRAFTING OF FUTURE INTERNATIONAL COMMERCIAL CONTRACTS

The Covid-19 pandemic will not be the last pandemic that makes performance of contracts impossible or more burdensome than expected.[147] Pandemics have occurred in the past and would most probably occur in the future, such as floods, earthquakes, hurricanes, war etc.[148] The *force majeure* clause in any contract concluded now will not be applicable to future consequences of Covid-19 or to any future waves of Covid-19, since the consequences and various waves are now foreseeable.[149]

Due to the Covid-19 pandemic, the risks of other pandemics have become important and certain contractual parties have started adding in terms such as "pandemic", "epidemic", "acts ,or orders from government authority", "disruptions of supply chains" or "catch all phrases to causes beyond the control of contractual parties" to *force majeure* clauses in future international commercial contracts.[150] However, it may be merely impossible to include all disasters, which makes performance of a contract more burdensome or impossible, as a *force majeure* event which may materialize in the future.[151] Therefore, it is suggested that a prompt solution which may be applicable to many other future pandemic cases, would be to allow for suspension of contractual obligations for a period of time to ensure that either party to a contract is not held liable or penalised.[152] Thus, performance of contractual obligations must be "frozen" until it becomes feasible to ease restrictions and allow for commercial activity to recommence.[153]

In addition, it is suggested that due to the government authorities adopting new regulations and measures, parties to contracts must revise their contracts regularly.[154] Contracting parties should provide an inventory on their contracts to determine which contracts are likely to be impacted by the pandemic and to categorise these contracts based on their importance, to ensure that key contracts are assessed first.[155] It is also imperative for parties to identify who will have

[147] Andrew A Schwartz op cit note 119 at 58-59.
[148] Ibid.
[149] Christian Twigg Flesner op cit note 38 at 9-10.
[150] Andrew A Schwartz op cit note 119 at 58-59.
[151] Ibid.
[152] Christian Twigg Flesner op cit note 38 at 9-10.
[153] Ibid at 10.
[154] Ibid. See also Ljuben Kocev op cit note 13 at 150.
[155] Tom Duncan, Myfanwy Wood & Ed Davies 'Covid-19 and beyond: drafting future pandemics and dealing with the fallout from this one' (2020) *InfraRead* 8-9.

difficulty in fulfilling their contractual obligations that would result in a breach of contract.[156] Key subcontractors and suppliers who are difficult to replace should also be identified and their susceptibility should be evaluated by contracting parties.[157] Additionally, specific clauses in contracts that may be impacted or put into effect by Covid-19 should be reviewed, such as *force majeure*, change in law, material adverse effect or change, suspension and renewal etc., and available remedies for non-performance of contractual obligations should be considered to safeguard contractual rights.[158] Parties to existing contracts should assess ways to mitigate or reallocate risks of non-performance of contractual obligations as well as communicate and collaborate with their contractual partner to encourage long-term relationships.[159]

It is recommended that future contracts entered into, should incorporate a Covid-19 clause, in which parties to a contract should formulate generic clauses for other future pandemics that deal with the present consequences of Covid-19, in respect to the impact on performance of contractual obligations.[160] Parties to contracts would benefit as there would be certainty regarding how Covid-19 and the measures adopted in respect to it may impact parties' rights and obligations.[161] Parties may consider working out or limiting liability that is associated to the pandemic, which may include damage arising from incapability of performance of contractual obligations due to imposed government regulations and measures.[162] Additionally, the other party to the contract may withstand the above-mentioned exclusion and limitations on liability and provide that the burden of the pandemic must be apportioned between the parties.[163] Alternatively, parties may choose to include a co-operation clause in which parties agree to work with each other to find solutions to solve the interference of contracts due to a pandemic.[164] Parties may want to carefully determine an applicable standard for co-operation, such as optimum efforts and reasonableness and whether such co-operation should be limited to specified areas as well as the consequences the parties may face for breach of such co-

[156] Captain Jason M. Floyd 'Love in the time of Covid: rethinking the DoD's position on excusable delays in contingency contracting' (2021) *Army Lawyer Practice Notes* at 31-32.
[157] Tom Duncan, Myfanwy Wood & Ed Davies op cit note 155 at 9.
[158] Christian Twigg Flesner op cit note 38 at 9-10.
[159] Andrew A. Schwartz op cit note 119 at 58-59.
[160] Ibid.
[161] Ibid. See also Christian Twigg Flesner op cit note 38 at 9-10.
[162] Tom Duncan, Myfanwy Wood & Ed Davies op cit note 155 at 9.
[163] Ibid.
[164] Captain Jason M. Floyd op cit note 156 at 32.

operation.[165] Moreover, parties may want to determine the extent to which they may be required to alleviate damages and to presume the related expenses and costs.[166]

In addition, there are certain contractual provisions that parties may want to consider and incorporate into new contracts within the Covid-19 circumstances, when entering into contracts requiring performance during this tempestuous time.[167] These contractual provisions include:

i. Type of relationship clauses - where parties to a contract may want to consider whether operating risks should be shared equally, if both parties' interests are at risk;
ii. Performance standard clauses - parties may want to determine how shortcomings can be rectified and what discount mechanisms or punitive actions can be used to form and enable performance;
iii. Time clauses - due to the unpredictable times, a shorter contractual term may be more relevant as this may enable parties of a contract to renew pre-determined terms and conditions of the contract and to provide and ensure additional flexibility, in respect of the timing to perform contractual obligations when certain conditions are satisfied;
iv. Temporary suspension clauses - due to the disruptions that are likely to occur, parties to a contract may wish to precisely describe the conditions which would invoke the temporary suspension of performance of contractual obligations, instead of terminating the contract as a whole and having to face the consequences that result thereafter;
v. Termination clauses - parties may want to revise all fundamental terms and conditions of the contract regarding the termination of the contract, this includes whether a party for convenience purposes should have a right to terminate a contract, which events would provoke failure to fulfil contractual obligations as well as the times that should be allocated for giving notice of termination and allow for period of restoration;
vi. Change procedure clause - parties to a contract may look to incorporate a comprehensive change arrangement procedure, instead of the parties having to find a solution later on;
vii. Dispute resolution clause – parties may wany to include a dispute resolution clause especially in long-term contracts where disputes need to be solved promptly to prevent the hinderance of the performance of a contract; and a

[165] Christian Twigg Flesner op cite 38 at 9-10.
[166] Ibid.
[167] Captain Jason M. Floyd op cit note 156 at 32.

viii. Hardship clause - parties may want to renegotiate the terms and conditions of the contract, should the equilibrium of the contract be inherently changed and one of the parties become excessively burdened.[168]

Therefore, in future it is safer for parties in international commercial contracts to expressly include clauses in their contracts that enables parties to a contract to be exempt from liability for non-performance of contractual obligations when an unforeseen event occurs. It is also important that contractual parties consider and incorporate the above-mentioned clauses in their contracts as well drafted clauses could protect and safeguard contractual parties from liabilities that may arise from unforeseen events, which are beyond their control, and such clauses could assist parties in maintaining their contractual relationships in an amicable manner during these challenging times. Lastly, these clauses give parties to a contract the power to protect themselves as much as possible from prospective future failure of contractual performances and if more time and effort is spent now drafting contracts, less time will be spent on trying to resolve disputes in the future.

7. CONCLUSION

In light of the above, it is apparent that Covid-19 and the government regulations imposed as a response to the pandemic had a significant impact on international commercial contracts. International contracting parties were faced with several consequences that ensued as a result of them being unable to perform their contractual obligations in terms of their contract. However, the extent to which parties were liable for breach of contract was highly contingent upon the clauses that were included in the contract and the relief that was attainable from the insertion of such clauses, prior to the happening of Covid-19. Where parties failed to include contractual clauses to exempt or mitigate their contractual liability, they could nevertheless turn to the governing law of the contract or international treaties and conventions for relief. The extent of the relief provided for in terms of the governing law or international treaties and conventions may not have been as fruitful as that of expressly including a clause to negate contractual liability. Therefore, in future it is suggested that international contracting parties

[168] Tom Duncan, Myfanwy Wood & Ed Davies op cit note 155 at 9. See also Thomas J. Timmins, ' Redrafting your force majeure clause in the era of covid-19' (2020), available at https://gowlingwlg.com/en/insights-resources/articles/2020/re-drafting-your-force-majeure-clause-in-the-era of-covid-19/ accessed on the 23 June 2021.

expressly include clauses that would negate contractual liability for non-performance of contractual obligations due to unforeseen events.

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