# CAN COVID-19 BE PERCEIVED AS AN EVENT OF *FORCE MAJEURE* IN A CIVIL OBLIGATION? - (MALTA)

***Joint article by: Dr Natalino Caruana De Brincat and Dr Joseph Calleja***


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Over the past weeks, the number of public and business functions such as conferences, weddings and other social gathering events that have been cancelled in Malta run into hundreds. The same is expected to happen for the months to come. Reference can be made to the famous St Patrick`s Day celebrations in St Julians and the Catholic celebration of St Joseph's traditional feast, as well as several other sporting and cultural events, all of which have been called off. Undoubtedly, in connection with these events, organisers would have already forked out money in various deposits to secure and order the required supplies. On a larger scale, mention could also be made of industrial activity and production chains that all have been disrupted for one reason or other that is attributable to the infamous Covid-19.

From a legal standpoint, a question that might be asked is who is to shoulder the responsibility for damages. The clause of *force majeure*, which is often overlooked in commercial contracts, might prove to come in handy in scenarios that involve a defaulting party. Its reference as a defence plea in our Law Courts is certainly expected to increase in the weeks to come.

*Force majeure* might be described as an irresistible force or as an unforeseen circumstance that is completely beyond one's control. At law, this might be analysed from two facets: it could be either a party defaulting on a contractual obligation resulting in damages to the other party, or else an event might cause a party to suffer damages from another party's action or inaction consequent to a *force majeure*, without there being a predetermined agreement between them.

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Going to the very roots of this defence, we find that since the ancient Roman days (circa 35 B.C.) they had already developed the principle: major casus est, cui humana infirmitas resistere non potest, meaning that no one shall be liable for events which could not be foreseen, were nonetheless unavoidable.

Later, during the same Roman period, the term vis major was coined and referred to in codified texts of law. Since those times, in order to successfully plead vis major, two cumulative elements had to exist: the 'inevitability' and the 'unpredictability' of the event. Interestingly, in the Justinian's Digest with respect to the contract of letting and hiring, we find that the hirer was entitled to a remission of rent in case of a cause that classifies as a vis major that does not allow him to enjoy the property. Nonetheless, good years had to be set off against bad ones, and if the landlord had remitted the rent and subsequent years were productive, the hirer might face a claim for reimbursement from the landlord.

Nowadays, we find the word force majeure as being a clause that is often inserted in commercial contracts but is very rarely resorted to. Sometimes we also find other particular scenarios listed such as circumstances where the contract cannot be executed due to an order, request or measure of any Governmental, local or other competent authority or any person purporting to represent any of these, wars, hostilities, public disorders, sabotage, parliament acts and others.

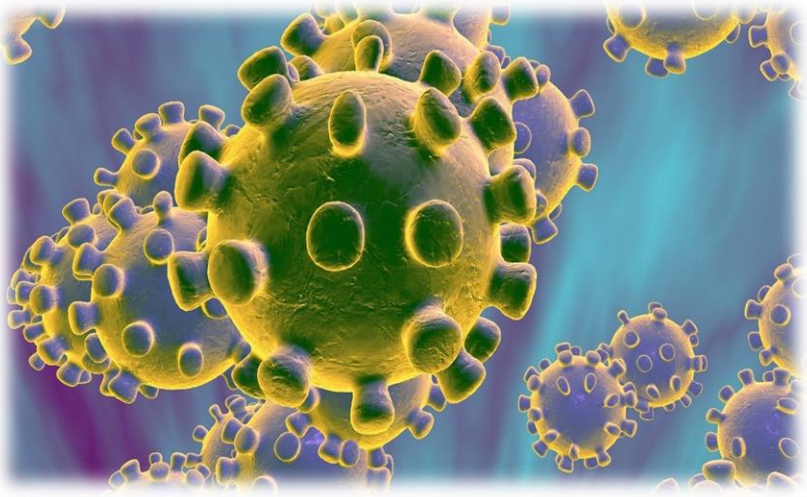
In Malta, Article 1134 of Chapter 16 provides that 'The debtor shall not be liable for damages if he was prevented from giving or doing the thing he undertook to give or to do, or if he did the thing he was forbidden to do, in consequence of an irresistible force or a fortuitous event'. This implies that the person who was obliged to do something under a contract may raise the plea that due to a fortuitous event, owing to an external third-party extraneous element and being an irresistible force, makes such obligation impossible to be performed. In the absence of a contractual relationship, it is likewise worth referring to article 1029 of our Civil Code which provides, 'Any damage which is produced by a fortuitous event, or in consequence of an irresistible force, shall, in the absence of an express provision of the law to the contrary, be borne by the party on whose person or property such damage occurs.'

The Maltese Courts delved into this notion and provided a threefold test to be considered for the applicability of article 1134, these are: (i) the impossibility of performance, (ii) the act must involve a third person unrelated to the person that is to execute the obligation under the contract, and (iii) the act must be supervening (the irresistible force), meaning that it must have occurred after the obligation as it cannot be something which had already come into existence before signing to the obligation.

Impossibility of performance was explained as tantamount to the impossibility of executing the obligation, and not merely a difficulty. Thus, the impossibility of non-performance must not be relative or subjective, but absolute. Similarly, an increase in costing or an economic crisis are not a qualifying factor to raise the plea of force majeure.

The case ***Albert Farrugia Vs Michael Attard pro et noe***, decided on 28th April 1998, by the Court of Appeal presided by Justice Joseph Said Pullicino, delved into the notion of force majeure. The plaintiff had bought a car from the defendant which turned out to be defective.

Defendant offered to repair the car for free, since it was him who had imported the defective car thus, and therefore it was his obligation to repair it.



The repair took an inordinate amount of time (seven weeks). Defence pleaded *force majeure* as the reason for having failed to repair the plaintiff's car within the stipulated time was because the manufacturer had failed to deliver the parts they had ordered. The court however held that this third-party company was directly related to the defendant, as they were the importers of the make of the car. Therefore, the Court implied that the act (which led to the impossibility) was not due to a third person who had no relation to the defendant.

The Court also delved into the notion of *force majeure* in the case of ***Earthcare Company Limited Vs Kunsill Lokali Valletta,*** decided on 7th November 2008, by the Court of Appeal presided by Justice Philip Sciberras. In this case, the plaintiff company entered into a contract with the defendant Local Council to clean the dustbins of the locality. During the execution of the contract, larger dustbins were installed, which eventually were vandalised. Both these occurrences led to higher costs for the company, therefore the plaintiffs sued for compensation. The defendant pleaded that the vandalism was beyond their contract stipulations and thus a *force majeure*. The court went on to say that jurisprudence is consistent in its dictum, ergo that a *force majeure* is a force which is irresistible, whereas a fortuitous event is that event which could not have been predicted by a person performing ordinary diligence. In this case, there was no *force majeure* since the defendant had exercised the proper diligence of a *bonus paterfamilias*.

In another case in the names of ***Direttur tal-Kuntratti v Office Electronics Ltd,*** decided on 22nd October 2004, by the First Hall Civil Court presided by Justice Noel Cuschieri, the defendant signed a contract to supply government departments with a particular quality of paper imported from the United Kingdom. Due a devaluation of the British currency, the defendant importation price increased. As a result, the defendant claimed that he could not perform the obligation because he would be making a loss and thus pleaded both *force majeure* and *rebus sic stantibus* (when there is a fundamental change in the circumstance). The court said that in order for the plea of *force majeure* to be accepted, the defendant must prove that the lack of performance was due to an external force which was beyond his control, and that he used the ordinary diligence. In this case, defendant failed to prove that the three elements mentioned above subsisted and found against defendant.

Thus, when analysing the above it is clear that the plea of *force majeure* has not been applied and accepted lightly by Maltese Courts that is unless all the mentioned three elements co-existed. One is yet to see how our Courts will interpret this plea in the light of the Covid-19 virus outbreak. Also worth noting is the doctrine of 'frustration' or *rebus sic stantibus* as there were instances, especially after World War II, where Courts in Malta accepted it. Such doctrine allows a party not to perform its future obligations because of a dramatic change in circumstances that would be extremely prejudicial if performed.

***This article does not purport to give legal, financial or tax advice, or any other advice of whatever nature. Hence it is always one's responsibility to seek legal advice before taking, or not taking, any action.***

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