When Culture Takes Over the Law

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Speakers:

Eliana Baraldi
Baraldi Mariani Advogados
Rua Funchal, 263 6ºandar Vila Olímpia
04551-060 São Paulo, Brazil

Nicole Boehler
Squire Patton Boggs
Herrenberger Straße 12
71032 Böblingen, Germany

Sitpah Selvaratnam
Tommy Thomas
Suite 3.2, Level 3, Block B
The Five @ KPD, Jalan Dungun
Damansara Heights
50490 Kuala Lumpur, Malaysia

Ricardo Woods
Burr & Forman LLP
11 North Water Street, Suite 22200, Mobile, Alabama 36602, USA

Laws are meant to be objective, blind to ethnicity and culture. The topic under discussion ("When culture takes over the law") suggests the subordination of the law to culture, in the wake of the COVID-19 pandemic. Is that really so?

COVID-19 undoubtedly disrupted supply chains and invaded social norms. Ships were under quarantine. Containers with supplies, detained. Crew sign-off hampered. Movement of commodities, as we knew it, seriously interrupted. Health was severely compromised, with a devastatingly high number of fatalities. Social distancing, face masks, temperature scanning, contact tracing, became the norm. The daily experience of simply going to work, meeting friends or family; significantly curtailed. Orders for movement control, suspension of school, stay home/lock down/circuit breaker, were issued. COVID-19 forced adaptation of professionals or commerce to technology, and a new style of office space and work arrangements.

The world experience of COVID-19 is wide ranging, dependent largely on the manner of political governance and structure of the legal system. A generalization of the experience is not possible. Certainly, there were varied responses to, and styles of managements of, the pandemic across the world.

Legislation introduced in most countries on movement control, border closure, limits to social gatherings and re-organization of statutory obligations (such as mandatory corporate meetings) became common place, to curtail the spread of COVID-19 and to reduce the economic and legal impact upon its society. These were accompanied by a prescription of an offence for infringement.

Nonetheless, the laws introduced have had the short-term and perceived benefit of containing potential chaos. Performance of contracts were impacted, both by the pandemic and the regulations imposed to prevent its spread; pushing companies and individuals into insolvency; with lay-off and furlough becoming inevitable, particularly in the hospitality, travel, airline and event management industries. Courts were shut to physical hearing. Time bar issues became very real.

Funding and subsidies in key industries and to members of lower strata of society were implemented. Tax exemptions offered to employers, and a variety of financial support granted to keep retrenchments low, including forbearance on calls of default on loans, and the deferred repayment on financing facilities.

Having said that, five legal issues will be addressed with an international perspective, which have arisen because of the COVID-19 pandemic: (a) Performance of contracts, (b) Insolvency, (c) Insurance, (d) Court shut-down and (e) Workplace issues.

a) Performance of contracts

In most civil law countries, force majeure is a broad-spectrum clause. Specifically, in Brazil, article 393 of the Brazilian Civil Code provides that the debtor shall not be liable for damages resulting from fortuitous event or force majeure, if it has not expressly taken responsibility for them. In other words, the fortuitous event or

force majeure occurs when the event or the effects of which it was not possible to predict, to avoid or prevent.

As every broad clause, it demands an appropriate language to be provided for in a contract to parties make sure how to regulate the contractual matters in case of fortuitous event or force majeure. In this sense, the events of force majeure must be indicated in the contract as force majeure events, for example earthquake, tsunami, war, pandemics.

Ideally, and obviously, parties shall establish a process for force majeure to prevent responsibilities: a notice must be served do the other party as soon as the event happens or as soon as the consequences of the event starts to adversely affect the ability of the party to perform its duties. Should the conditions precedent provided for in the contract be met by the party who intends to claim for exemption to comply with its contractual obligations, there are more than 10 legal causes that parties could resort to in accordance with the Brazilian Civil Code. It depends on which business interruption or temporary impossibility of compliance with the obligations provided for in the contract we are dealing with.

Regarding the common law system, its ordinary principles would leave parties to a contract relying on *force majeure* clauses, or frustration, to be relieved of contractual obligations at the peak of uncertainty surrounding the pandemic, from February to August 2020.

Typically, rental of non-residential or business premises were impacted. It would appear, from a couple of landlord and tenant cases decided in Hong Kong[1], consistent with the expectation of its application in other Commonwealth countries, that the COVID-19 circumstances of declined business do not result in a frustration of a tenancy agreement. Failure to *"make money"* by occupying the premises, was not an excuse to avoid tenancy obligations; and did not render business occupation of the premises impossible for the remaining tenure of the agreement. There was no fundamental or radical change in circumstances to deem the tenancy agreement frustrated; despite the pandemic and the consequential social disruption, being unforeseen. That the performance of the obligation became more onerous and not profitable, did not cause it to be impossible under the objective test of frustration. It was but a part of the commercial risk undertaken. The pandemic may not fall within the exemption of Act of God or the like, since there was no damage or destruction to the business premises. The causative link between the pandemic and the inability to perform, is obviously fact and evidence sensitive. This is merely an illustration of the possible rigid outcome in the application of common law principle of frustration. Obviously, precise terms of contracts could apply to excuse performance, if framed wide.

In a similar vein, in the context of an international trade agreement for the supply and delivery of goods carried by sea, it seems that a Court in India, has held that the financial inability to perform a contractual obligation, caused by the decline of business during the COVID-19 pandemic does not amount to frustration.

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[1] *Top Bright Properties Consultants Ltd v Naeem Akhter and Another* [2020] HKCU 3959
The Center (76) Ltd v Victory Serviced Office (HK) Ltd [2020] HKCU 4037

Neither did it fall within the force majeure clause in that particular case. This rationale would apply equally to other types of contracts.

Hence, a party is not readily absolved of performance under the contract, despite the exigence of COVID-19. It is in this context that the Acts of Parliament of Singapore and Malaysia prove interesting.

In Singapore, the COVID-19 (Temporary Measures) Act 2020 was passed in early April 2020 ("the Singapore Act"). Where a party to class of contracts (identified by schedule to the Act) entered into before 25 March 2020, issues a notice to its counterparty that it is unable to perform an obligation under the contract (being an obligation that arose on or after 1 February 2020), caused to a material extent by the COVID-19 pandemic or the operation of or compliance with any law made by reason of the pandemic; no action through Court or arbitration may be commenced, or security enforced or contract terminated, or equipment repossessed, or winding-up sought, for a prescribed period. This effectively, is a moratorium on proceedings, and a preservation of the status quo.

The dispute, as to whether the cause of the non-performance was COVID-19 or the operation or compliance with laws introduced due to the pandemic, is to be referred to as assessor for a just and equitable outcome. No legal representation is allowed before the assessor, except with the permission of the assessor. The scheduled contracts include construction contracts, loan facilities by banks, hire-purchase agreements, event and tourism related contracts, and lease of non-residential immovable property.

The Singapore Act effectively gives businesses a reprieve from their creditors, where the contract is governed by Singapore law. What amounts to a just and equitable outcome is not entirely clear. But the Singapore Act continues to be amended as lessons are being learned.

In Malaysia, the Temporary Measures for Reducing Impact of Coronavirus Disease 2019 (COVID-19) Act 2020 ("the Malaysian Act") modifies rights for a period. That part of the Malaysian Act governing the inability to perform contractual obligation is deemed to be in operation from 18 March 2020 to 31 March 2021. Section 7 provides that the inability to perform contractual obligations arising in any category of contract identified in the schedule to the Act, due to measures prescribed, made or taken under the Prevention and Control of Infectious Disease Act 1988 to control or prevent the spread of COVID-19, shall not give rise to the counterparty's exercise of rights under the contract, unless rights have been exercised or proceedings commenced before the coming into force of the Malaysian Act on 26 October 2020. Any dispute on the inability to perform due to measures prescribed may be settled by mediation. This mechanism is arguably less satisfactory than the assessor's system introduced in Singapore. While "just and equitable" may be arbitrary, it offers an independent conclusion to the dispute. Mediation only enables a consensual settlement and can be frustrated by either party. The absence of an independent determination process hampers its viability. This may be asking too much of the "accepting" Malaysian culture. Time will tell.

The Malaysian Act also extends the time for commencing proceedings. This extension may be relevant to any continuing breach of obligation, despite the cessation of COVID-19 restriction. Also, the extension in time allows for when parties were not fully prepared to access Court electronically.

b) Insolvency

In order to deal with the COVID-19 pandemic scenario and to keep the economy stable during the crisis, some countries have adopted measures to protect businesses against insolvency and bankruptcy.

In Brazil, despite the absent of changes to federal insolvency law facing the COVID-19 pandemic, on 25 November 2020, the Brazilian Federal Senate approved the Bill of Law 4,458/2020 which reforms the Brazilian Bankruptcy Federal Law (11,105/2005). The main objectives are (a.) to support the economic recovery of businesses, (b.) to reduce litigation and court proceedings, as well as its duration and (c.) to encourage the use of extrajudicial reorganization and alternative dispute resolution.

In Malaysia, the Malaysian Act further increased the baseline monetary limit to commence bankruptcy proceedings against an individual; in an attempt to minimise the personal consequences and stigma that come with a bankruptcy. The change of the parameters to corporate winding-up however, was not introduced through this Malaysian Act, but by a Ministerial Order - to increase the minimum limit of debt before winding-up proceedings may be filed; and to enlarge time to pay on a demand, from 21 days to 6 months. This Ministerial Order, however, has seen several challenges; for being ultra vires the parent Act of Parliament, Companies Act 2016 (There is some resistance after all albeit small!)

c) Insurance

Regarding the implications of COVID-19 for the insurance industry, the virus puts a spotlight on insurers since it increased the inquiries and claims across different views, since the insurance coverage could support customers and societies through the crisis and the recovery.

However, the COVID-19 does not automatically imply coverage for non-life or general insurance, or workers' compensation insurance, or indemnification/liability insurance. Some measures became highly advisable: (a) review of current insurance policies, being especially sensitive to the wide array of possible provisions and exclusions that affect coverage; (b) carefully consider the notice requirements for filing claims with an insurance carrier; (c) determine how best to value or calculate the losses suffered; and (d) alternatives for better establish covered losses.

d) Court shutdown

Most countries have been facing a severe confinement strategy as an attempt to slow down the spread of COVID-19. Although non-essential services were closed, the justice system is s an essential to any modern society, that could the reason

why Judicial Courts had to deal with the pandemic with a reduce of staff, or remote work.

The Brazilian National Council of Justice (CNJ) issued the Resolution 313/2020 which (a.) determined the shutdown of Brazilian Courts, with exception of urgency cases that could be handled by a reduced staff but is also (b.) authorized local courts to work remotely. Therefore, although physically closed, Brazilian Courts managed to efficiently work under a remote legal system during such phase, handling virtual hearings and adjusting routine accordingly.

In Malaysia, the Court's jurisdiction to make rules and provide directions on the filing and service of court papers by electronic means has been enabled through this Malaysian Act, and amendments effected to several other Acts such as the Court of Judicature Act 1964. Thus, the Courts have moved largely to conduct hearings by remote communication technology, using live video links or other electronic means of communication, and are able to receive oral evidence by such electronic methods. Similarly to Brazil, the physical shutdown of Courts have not impeded access to justice. Broadcast of proceedings is permissible in appropriate circumstances to meet the interest of justice.

e) Workplace issues

Not in a surprising way, different approaches urged around the world.

In Brazil, although it was issued a Law No. 13,979 to deal with the COVID-19, it did not provide for protective measures at work environment to prevent the spread of the coronavirus. It considers the disease as a justified reason for absence of the employee (i.e., paid leave). On 22 March 2020, the government issued Provisional Measure nº 927/2020 determine the need to quarantine the workforce, the use of a telework regime, however the presidential decree was not voted by the Congress and expired on 19 July 2020.

In addition, considering that it is the employer's duty to preserve the employees' right to carry out their occupational responsibilities in a healthy and safe work environment, Brazilian companies are following instructions from health authorities and the government and are adopting measures such as: (i) informative programs; (ii) basic hygiene measures for workplaces and company facilities; and (iii) remote work for employees.

Governmental guidelines on wage cuts, and retrenchment have been elaborate in Singapore, with reporting requirement by employers to the Ministry of Manpower of any measures taken, which could impact on future governmental grants to such employers.

Malaysia however, has fallen back on ordinary contractual rights to regulate employer-employee relationship. Employers are to honor their obligations, or face claims for wrongful or constructive dismissal. This situation is not easily managed. There is much tension at work. Unilateral deduction in salaries, and lay-off occasioned by the collapse and closure of business. The advice has been to seek consensual variation to the terms of the employment contract, in the face of

a valid justification upon the decline in business. Adoption of appropriate redundancy measures with fair and reasonable selection criteria is critical, where retrenchment is necessary for the business to survive. The “accepting” culture may leave the weak without adequate protection.

Has culture taken over the law? Culture to a large extent dictates if voluntary compliance of laws will ensue. Culture can equally harbor abuse. Law and culture are but joint partners in organizing society. The power of enforcement of laws can override culture. Laws can mold and shape the evolving nature of culture.