

## Enforceability of Rental & Other Agreements During Covid 19

**Veekay Law Chambers, LLP** sincerely hope that you and your peers are safe and healthy given the situation with COVID-19. During these uncertain times, we are committed to proactively communicate with all our clients and stakeholders and extend our support, as we navigate through these complexities together.

While the Government of India is taking all the necessary steps to ensure that we are well prepared to face the challenge and threat posed by the growing pandemic, the outbreak and rapid spread of COVID-19 has not only hit China, but has sent shock waves across global economic markets of European Union and the US. The fallout of this, will surely have a major impact on the Indian economy.

Since most of the businesses have been forced to shut down, their cash flows are severely affected. Understandably the businesses are trying to reduce their expenditures during these times. One of the major expenditures for most of the businesses is the 'Rental Expenditure'. Most of the tenants are requesting / demanding their landlords to waive / reduce the rentals for the period of lockdown. In this scenario, it is important to analyse the 'Force Majuere' clause in the rental agreement.

**DEFINITION OF FORCE MAJURE:** Unforeseeable, Unavoidable circumstances which is not in the hands of or it can be called as Act of GOD.

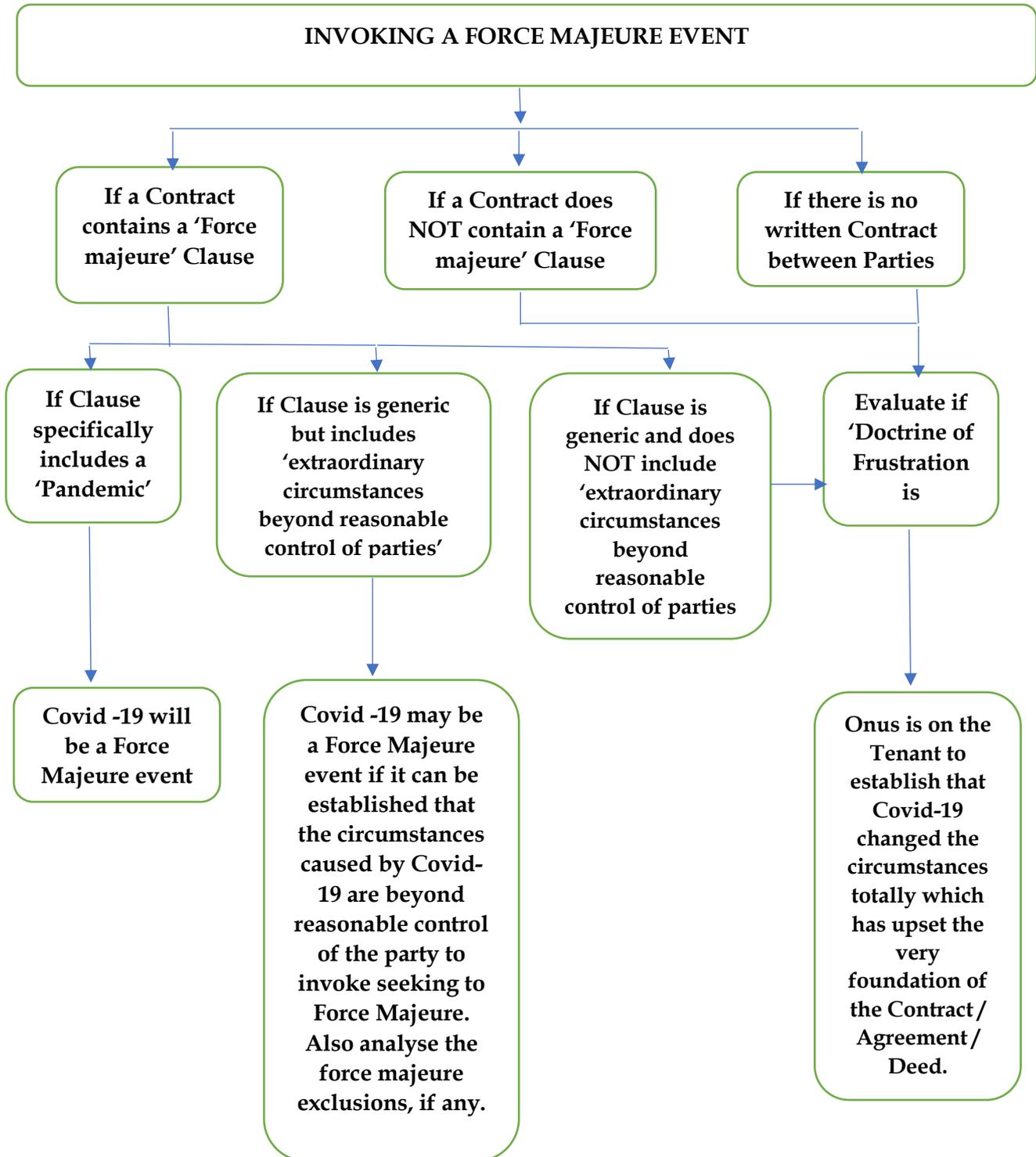
In Legal terminology it's a provision in a contract that excuses a party from not performing its contractual obligations that becomes impossible or impracticable, due to an event or effect that the parties could not have anticipated or controlled.

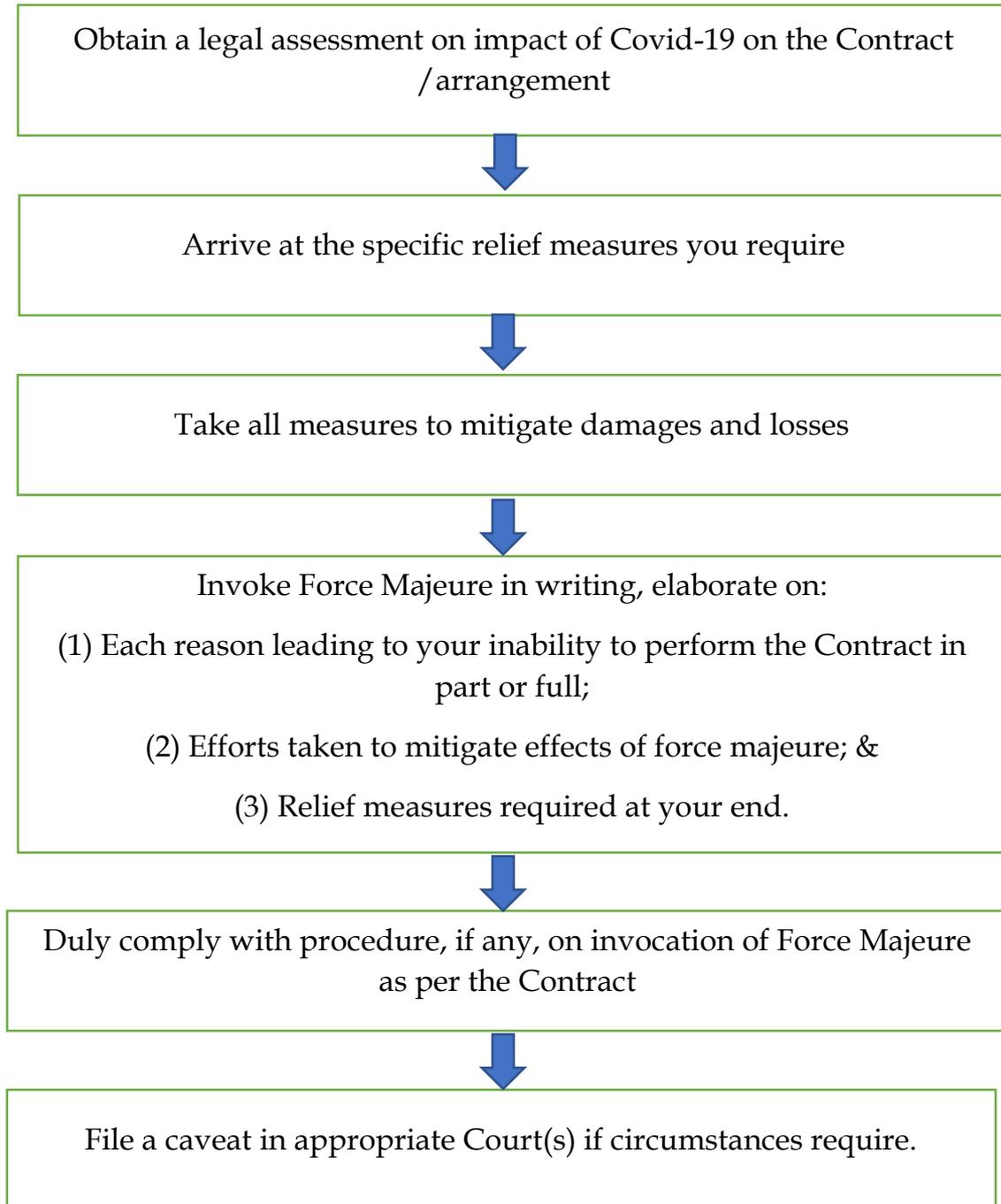
Example of Force Majure Clause in agreement or lease deed:

"Force Majured shall mean any cause, existing or future, which is beyond the reasonable control of any of the parties including acts of God, storm, floods, exposition, epidemics, quarantine, earthquake, etc., interference by civil or military authorities, acts, regulations or orders of any orders of governmental authority in their sovereign capacity, acts of war (declared or undeclared).

**CONTRACTUAL OBLIGATION OF THE TENANTS:** The obligation is on the Tenant to notify the Landlord within 1 week or 10 days about the impact which has caused to them by fax / email of such force majeure or as per the agreed terms and conditions as per the agreement they have entered.

**COVID-19: STEPS TO DETERMINE FORCE MAJEURE EVENT**



**STEPS TO BE TAKEN**

**IMPLICATIONS ON THE AGREEMENT:**

Government on humanitarian grounds has deferred payments on few things as in providing moratorium on the bank loans, tax payment extension likewise the tenant can delay his rent amount to be paid to his landlord.

**Force Majeure FAQ:: When a Pandemic Ruins Your Contract****What is a “force majeure” clause, and how do I use mine?**

*Force majeure*, which is French for “superior force” is a legal concept that allows a party to be excused from performing a contract due to some sort of unforeseeable event. These types of events (also called “acts of God”) may include hurricanes, earthquakes, tornados, war, blackouts, government action, and, very currently important, pandemics. Whether or not your contract covers a particular event depends upon the language of the contract. To determine whether your force majeure clause has been triggered, take the following steps:

- First, **read** your *force majeure* provision. This includes reading the list of *force majeure* events as well as any language before and after the list.
- Second, consider the list of events. If you don’t see your event listed (pandemic or government shut-down perhaps) OR a catch-all phrase that could include your event, you need to be particularly cautious.
- Third, carefully consider the language before and after the list of events. What is it really saying? If it says “the occurrence of any of these events excuses performance entirely” then you (or perhaps the other party) do not have to perform (but you do often have to make each party the way they were prior to the contract – i.e. return any pre-paid monies). However, if it says “if performance is rendered impossible by any of the following events”, pause for a moment. Ask yourself – is performance truly impossible? Or maybe is it just inconvenient?
- Fourth, if you’re still unsure about whether your clause excuses your performance or the performance of the other party, ask your attorney! They will be familiar with this type of situation and can help guide you.

**Help - I don't have a force majeure clause in my contract!**

Even if a contract does not have a force majeure clause, a party can still be excused from performance. There are two avenues courts allow to excuse non-performance of a contract:

- **Impracticability.** If some unforeseen event occurs, neither party assumed the risk of the event occurring, and a party now has an *extremely* high level of difficulty or expense in performing the contract, then a court may consider the contract “impracticable” and excuse the performance of the party. Consider the following example:

You are hosting a art expo in Bangalore, India. You order hundreds of chairs and tables from a local supplier, who in turn orders them from an overseas manufacturer. However, a pandemic has occurred and the prime minister bans all imports. As a result, the supplier can only purchase the tables and chairs from Mumbai for quadruple the price. The supplier wants out of the contract. In this example, a court would likely find the supplier's performance impracticable and excuse performance because it has become *extremely* expensive for the supplier to perform the contract.

NOTE: Pay attention to “assumption of risk” for impracticability. If you order 100 paintbrushes from an art supply store and the store later says it can't perform the contract because the cost of paintbrushes went up by a hundred of rupees, they are out of luck. Basic market fluctuations and other “predictable” occurrences are not a foundation for an impracticability defense.

- **Frustration of purpose.** If an unforeseen event occurs that destroys the purpose of the contract, courts have held that such an event excuses the performance of the contract.

Consider the following example: Again, you are hosting a large art expo in Bangalore, India. Attendance was supposed to be in the thousands. However, a recent pandemic has scared away all of the attendees, and only 50 people are willing to attend. You want out of the contract – the purpose of the event was to host a large expo to allow for ample networking and interaction, and now nobody is coming. In these circumstances, the court would likely find the purpose “frustrated” and excuse your performance.

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**I'm not sure if I'm excused from performance - what do I do?**

Talk to your lawyer! They went to law school to help guide you through this jungle of words. Not only have they read contracts like yours before, but they are familiar with (or have access to) the cases that interpret your contract's language.

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**I'm definitely excused from performance - what now?**

If you are certain you are excused from performance, the next step is to review the rest of your contract. There are likely termination procedures you need to comply with (giving notice through email, for example), or perhaps financial situations that need to be addressed. Make special note of provisions regarding deposits, retainers, instalments, etc. Sometimes, contracts are very unclear, and your attorney may provide you with some default procedures that are used in circumstances where contracts are lacking. They may also be able to contact the other party or their attorney to determine what steps to take next.

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**The other party is trying to get out of our contract, but I want them to perform.**

First of all, read this article in it's entirety. It will help give you the background you need to be able to understand whether or not the other party may stop performance. If you find that the other party does have a valid excuse (*force majeure*, impracticability, frustration of purpose), follow the appropriate termination procedures detailed in your contract. If you do **not** believe they have a valid excuse, consider the following steps:

- Communicate with the party in writing telling them that you do not believe they have a valid excuse from performance, and explain why.
  - Do **not** terminate the contract abruptly- give the other party a reasonable chance to perform their end of the deal.
  - If you are unsure of whether the party must perform, or the party insists on non-performance, consult with your attorney. They can assist you with the nuances contained in your contract as well as procedures for communicating with the other party.
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**Both parties still want to uphold the contract - can we agree to delay performance?**

YES! - but get that agreement in writing AND have both parties sign! For example, you could draft an addendum like the following\*:

*“Due to the unforeseen event of the COVID-19 pandemic and the resulting cessation of tennis ball production, ABC, LLC and XYZ, Ltd., agree to delay the performance of the January 23, 2020 Purchase Agreement (attached as Exhibit A) for 1,000 tennis balls. This agreement was to be performed on March 28, 2020. Both parties now agree that the Purchase Agreement will instead be performed on July 28, 2020.”*

Both parties would then sign the addendum. This means that the original contract would stand, but now with a new date of performance.

\*Again, it is always best practice to ask your advocate to draft you a provision that suits your specific needs. Every set of circumstances is different – protecting your business in times of uncertainty requires the care and skill of an attorney who is familiar with your situation.

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### **Anything else I need to know?**

If you are reading this article, some event has probably occurred that is making your life difficult. First of all, I applaud you for taking the steps that will be proactive and protective of your business. Carefully evaluating your options now will help create a more stable, secure future. If you are still uncertain, please reach out to **VEEKAY LAW CHAMBERS LLP**. This is what we do. We are here to help. Please reach out to Mr.Rajesh – 99725 67576 / Ms. Bhargavi – 98453 57787 for further assistance.

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