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"In case of emergency, break contract"? The case for a unified regime for changed circumstances in Singapore contract law

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Introduction

It has been accurately observed that the incremental nature of the common law's development makes it inherently unsuited to dealing with unprecedented crises.[208] This is particularly true of what I shall refer to (for convenience) as the law of changed circumstances, which in the common law regime comprises the doctrine of frustration and the operation of *force majeure* clauses, but could potentially encompass other doctrines and issues as well.[209]

I suggest that in this area, the flaws of the common law run deeper and broader than its inability to respond quickly to unprecedented crises. Rather, from a lay user's point of view, the common law on its own or layered with statute is necessarily unsatisfactory for dealing with changed circumstances – whether unprecedented or mundane – due to the uncertainty it creates in a context where certainty is vital. Further, the courts are poorly placed to implement the root and branch reform that is needed to provide certainty; what is needed is a unified statutory regime dealing with changed circumstances, not one cobbled together from disparate pieces of common law and legislation. The COVID-19 pandemic did not cause these problems. It merely brought issues of changed circumstances to the fore through their prevalence, and shone a light on the generally unsatisfactory state of the common law.

This chapter is primarily exploratory and diagnostic. I begin by explaining what I mean by uncertainty and why (and when) it is a problem for the law. I then assess the degree of uncertainty surrounding the law of changed circumstances in Singapore. Finally, I outline some of the attributes that an appropriate solution to this uncertainty should have.

Legal uncertainty and its problems

There are many ways of defining and categorising legal uncertainty, each valid and useful for different kinds of analysis. Scholars of dispute resolution, and of law and economics, have

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[207] Lecturer of Law, Singapore Management University.
[208] VK Rajah and Goh Yihan, 'The COVID-19 Pandemic and the Imminent Legal Epidemic' (*The Straits Times*, 7 May 2020) <https://www.straitstimes.com/opinion/the-COVID-19-pandemic-and-the-imminent-legal-epidemic>.
[209] Such as the doctrine of hardship or *imprévision* in French law, which allows for parties' obligations to be adjusted by the court.

developed particularly sophisticated frameworks, with which I claim no expertise.[210] For present purposes, I use the term in a broad and common sense way: it is a state of doubt about the legal consequences of a situation. Three types, or levels, of uncertainty are especially pertinent.

First, the legal standard, principle, or rule may itself be uncertain, as where there is a lacuna or an undeveloped area of the law, or contradictory lines of authority that have yet to be resolved by a jurisdiction's apex court. For brevity's sake, I will call this "rule uncertainty".

Second, the legal standard, principle, or rule, even if certain, may produce uncertainty in its application, as tends to be the case with highly fact-sensitive tests. The outcome may turn on shades of difference between broadly similar fact patterns, or shades of interpretation of the same fact pattern. I will call this "application uncertainty".

Third, even if the legal position is certain and its application to specific facts is (relatively) certain, there may still be subjective uncertainty in the minds of the parties. This is the case where the law, however certain and perfect it is substantively, is difficult for parties to discover or to understand. I will call this "epistemic uncertainty", because it relates to parties' knowledge of the state and consequences of the law.

Each of these types of uncertainty makes it harder for parties to predict the outcome of a dispute. This is generally thought to be undesirable, for obvious reasons: uncertainty makes it harder for parties to order their conduct,[211] makes wasteful litigation more likely,[212] and so on. Less obviously, it has been argued that increased uncertainty is bad for distributive justice, as it tends to transfer wealth from parties with lower risk appetite to parties with higher risk appetite, from parties with weaker bargaining power to parties with stronger bargaining power, and from one-off players to repeat players.[213] In a regulatory context, some research suggests that uncertainty as to the standard of compliance can, in certain circumstances, reduce efficiency without necessarily resulting in greater levels of compliance.[214]

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[210] See generally Kevin E Davis, 'The Concept of Legal Uncertainty' (2011) <https://ssrn.com/abstract=1990813>, which includes a survey of the major works on the topic as of 2011. Some more recent works will be cited in passing in the course of this chapter.

[211] As observed in *Vallejo v Wheeler* (1774) 1 Cowp 143, at p 153, cited in *Patel v Mirza* [2017] AC 467 at [113] (per Lord Toulson), among others.

[212] As observed in *Patel v Mirza* (ibid) at [263] (per Lord Sumption), again to list one of many examples. Cf. Yuval Feldman and Shahar Lifshitz, "Behind the Veil of Legal Uncertainty" (2011) 74 Law and Contemporary Problems 133, at p 157 (arguing that *ex ante* uncertainty – as distinguished from *ex post* uncertainty, i.e. uncertainty as to the outcome after a dispute has arisen – may encourage compromise and strengthen relationships).

[213] See generally Uri Weiss, "The Regressive Effect of Legal Uncertainty" (2019) Journal of Dispute Resolution 149.

[214] Scott Baker and Alex Raskolnikov, "Harmful, Harmless, and Beneficial Uncertainty in Law" (2017) 46(2) The Journal of Legal Studies 281.

Uncertainty is not, however, without its virtues. It may sometimes lead to more economically efficient outcomes, because parties who are uncertain what the law is, before a dispute arises, may be more likely to act in accordance with their genuine (non-legal) interests rather than legal incentives.[215] In other words, knowledge of the law's *ex post* response can distort parties' *ex ante* decisions in unproductive ways.

In the context of the law of changed circumstances, uncertainty brings little if any benefit, because it is inherently unlikely that the law's *ex post* response to changed circumstances could distort parties' actions *ex ante* to any significant degree. Parties generally do not plan to find themselves in changed circumstances, and parties who do turn their minds to the question are free to bargain for and contractually provide for them in any event.

On the flipside, uncertainty is especially prone to do harm in this context, because it is when circumstances have suddenly changed for the worse that parties are most likely to be under considerable pressure to act quickly, and least likely to be in the mood to spend freely on legal advice, or to absorb that advice with a clear head if they do obtain it. More than one practitioner has witnessed the mess that can result from a client going off half-cocked on the basis of "DIY" research and, sometimes, the challenge of getting them to appreciate the precariousness of their position after the fact. It would thus be to the public advantage for the shapers of the law to make this area as user-friendly as possible.

How uncertain is the current regime governing changed circumstances?

In Singapore, there is a low to moderate amount of rule uncertainty in the law of changed circumstances, mostly pertaining to the doctrine of frustration (*force majeure* in common law being a matter of contractual interpretation, subject to the usual principles and rules). The general definition of frustration is well-established: a contract is frustrated, and thus discharged with prospective effect, "when something renders it physically or commercially impossible to be fulfilled, or transforms the obligation to perform into a radically different obligation".[216] Nonetheless, some doubt remains as to its subsidiary principles or rules. For instance, it is not entirely clear what role, if any, commercial impracticability (such as an astronomical increase in the cost of performance) can play in frustration.[217]

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[215] Feldman and Lifshitz (n 212), especially 137–139.
[216] *Adani Wilmar Ltd v Cooperatieve Centrale Raiffeisen-Boerenleenbank BA* [2002] 2 SLR(R) 216, [44]; Tham Chee Ho, "Frustration" in Andrew Phang Boon Leong (ed), *The Law of Contract in Singapore* (Academy Publishing 2012) ch 19, para 19.003.
[217] *Holcim (Singapore) Pte Ltd v Precise Development Pte Ltd* [2011] 2 SLR 106, [54]; Tham (n 216), paras 19.054–19.072.

There is a high amount of application uncertainty. It may seem at first that this is not so, given that academic commentators, practitioners, and courts can at least agree that frustration is an exceptional doctrine that is not easily satisfied. Thus, one could very safely say that (for instance) an increase in cost of performing a contract of 20% is not going to sustain a frustration argument. But in cases where performance is sufficiently disadvantageous or difficult that a party will seriously consider whether to try to perform or to invoke frustration (in other words, the very cases that are likely to generate actual disputes), it is exceedingly difficult to predict when the line will be crossed, especially when it is not the impossibility limb but rather the radical transformation limb that is engaged. The leading local textbook observes that "there is no clear-cut rule of law that determines the question"[218] and that "the difficulties … in determining whether a contract has been frustrated continue to perplex even to the present day".[219] Lord Neuberger put it more bluntly during a recent webinar on the subject, commenting that "it is very difficult – indeed, it could be positively dangerous – to give any specific advice, and it's quite hard even to give general advice".[220] This is good and sobering (meta-)advice, but points toward a rather unsatisfactory state of law.

Finally, there is a high amount of epistemic uncertainty. Simply put, Singapore's law of changed circumstances is challenging for a layperson to grasp as it has so many moving parts and does not form a coherent whole. This can be readily seen by browsing the various notes on COVID-19 and contractual obligations put out by law firms, primarily for the benefit of laypersons.[221] These notes generally convey (at least) the following general advice:

a) Check your contract to see if it contains any clause providing for discharge or suspension of obligations under specified changed circumstances (i.e. a *force majeure* clause), and if so, whether it should be interpreted as applying to the COVID-19 pandemic.
b) If there is no applicable *force majeure* clause, you can try to invoke the doctrine of frustration, which applies when the unforeseen change of circumstances is so great that performance is physically or commercially impossible or would be radically different from what was agreed.

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[218] Tham (n 216), 19.026.
[219] ibid, 19.092
[220] "Force Majeure: Practical Implications in Times of Crisis", webinar organised by the ICC International Court of Arbitration, 14 July 2020 ("ICC Webinar").
[221] See e.g. Rajah & Tann Asia, 'FAQ on COVID-19 and its Potential Impact on Contracts' (February 2020) <https://eoasis.rajahtann.com/eoasis/lu/pdf/2020-02_FAQ_on_COVID-19_Potential_Impact.pdf> accessed 24 July 2020; Martin See and Jonathan Lim, 'COVID-19 Impact on contractual performance' (*Dentons Rodyk*, 29 April 2020) <https://dentons.rodyk.com/en/insights/alerts/2020/april/29/covid19-impact-on-contractual-performance> accessed 24 July 2020; Mahesh Rai, 'COVID-19 – Frustration, Force Majeure, or Simply Frustrating?' (*Drew & Napier*, 3 March 2020) <https://www.drewnapier.com/DrewNapier/media/DrewNapier/3Mar2020_Covid19-frustration,-Force-Majeure-or-simply-frustrating.pdf> accessed 24 July 2020. I have chosen to refer to these notes, rather than to textbooks and monographs, because the former better reflect the lay experience of the law.

c) If your frustration argument works, the consequences depend on whether the contract is of a type to which the Frustrated Contracts Act[222] applies (in which case payments made prior to frustration may be claimed and losses prior to the frustrating event may be apportioned by the court) or not (in which case the court will not interfere with payments made and losses incurred prior to the frustrating event). Either way, the contract is discharged and has no prospective effect.
d) You may also be able to temporarily suspend your obligations under a contract falling within specified categories by following the procedure under the COVID-19 (Temporary Measures) Act 2020, if you can show that the COVID-19 pandemic has contributed significantly to (but need not be the sole or dominant cause of) your inability to perform your obligations under the contract.
e) There is no compulsory mechanism for any other adjustment of obligations, but it would be prudent to negotiate with your counter-party if such adjustment would help.

Even at this much-simplified level of detail,[223] the full picture is not easy to immediately take in, especially for a layperson.

In contrast, based on my understanding of similar notes on the French position,[224] a rough-and-ready summary of the French law of changed circumstances could read as follows:

a) Check your contract to see if it contains any clause specifically providing for discharge or suspension of obligations under specified changed circumstances, and if so, whether it should be interpreted as applying to the COVID-19 pandemic.
b) If not, Art 1218 of the Civil Code, which codifies the *force majeure* doctrine, provides for suspension or discharge (depending on whether the state of affairs is temporary or permanent) of the contract/contractual obligations if an external and unforeseeable event makes performance impossible. Unless your contract provides otherwise, "impossibility" is likely to be interpreted to mean physical impossibility or legal prohibition only.
c) If the contract is discharged under Art 1218, both parties' obligations are deemed to have been discharged under Articles 1351 and 1351-1.

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[222] Frustrated Contracts Act (Cap 115, 2014 Rev Ed), s 2.
[223] For the many wrinkles left out of the common law position, see generally Tham (n 216).
[224] See e.g. Ashurst, 'COVID-19 - impact on the performance of French contracts and overview of the legal consequences' (20 March 2020) <https://www.ashurst.com/en/news-and-insights/legal-updates/COVID-19---impact-on-the-performance-of-french-contracts-and-overview-of-the-legal-consequences/> accessed 24 July 2020; Emmanuel Gaillard et. al., 'Force Majeure and *Imprévision* under French Law' (*Shearman and Sterling*, 26 March 2020) <https://www.shearman.com/perspectives/2020/03/force-majeure-and-imprevision-under-french-law-COVID-19> accessed 24 July 2020; Alexandre Bailly and Xavier Haranger, 'COVID-19 and Force Majeure under French Law' (*Morgan Lewis*, 6 April 2020) <https://www.morganlewis.com/pubs/COVID-19-and-force-majeure-under-french-law-cv19-lf> accessed 24 July 2020.

d) If performance is not impossible but has become much more burdensome for you, Art 1195, which codifies the doctrine of hardship/*imprévision*, allows you to request renegotiation and, if renegotiation fails or is refused, to apply to court to modify or terminate the contract, unless your contract excludes this option.

This could be condensed even further: *If your contract tells you what happens in the circumstances at hand, follow that. If it doesn't, the Civil Code allows you to (i) discharge the contract if performance is permanently impossible, (ii) suspend your obligations if performance is temporarily impossible, or (iii) ask the court to modify the contract if performance has become excessively burdensome for you (after first trying to reach agreement with the other party).*

One struggles in vain to formulate a similarly succinct and intuitive summary of the Singapore position. Simply put, the common law with its statutory overlay demands the reader take a longer walk for a shorter drink of (muddier) water. A more systematic re-ordering of the law is needed, and would be beneficial in normal times as well as in times of crisis.

How should these deficiencies in the law be addressed?

Space does not permit me to present a detailed proposal here, but I will set out a few key propositions as to the attributes an adequate solution should have.

The solution should provide a wider spectrum of remedies, rather than a binary

It may seem paradoxical, but I suggest that the legal toolbox be expanded to include (i) suspension of obligations[225] and (ii) a doctrine of hardship (akin to *imprévision* in French law) allowing modification of obligations by the court, if negotiations fail. These features multiply the possible outcomes of a dispute, and in that sense seem to increase application uncertainty. However, the more meaningful measure of application uncertainty is not the *number* of possible outcomes, but the *variance* between outcomes,[226] and by this measure, expanding the legal toolbox would increase certainty.

For instance, it would admittedly be difficult to guess the exact outcome of a scenario with a 25% chance of the contract standing unaltered, a 25% chance of discharge by frustration, a 25% chance of obligations being suspended, and a 25% chance of some degree of judicial modification of the

[225] This may already be possible depending on the construction of a contract; for instance, changed circumstances may mean that a condition precedent to an obligation has not been satisfied. But there is no distinct doctrine allowing suspension of obligations otherwise.
[226] Weiss (n 213) at p 154–155.

obligations.[227] Nonetheless, this scenario is one with relatively low variance; some sort of alteration to the contract would be a good bet, the greater uncertainty being as to degree. The parties in this scenario would better able to plan for the consequences of litigation, and, one would think, more likely to reach a compromise (since a middle-of-the-road result would be the most likely anyway).

Sensible judicial modification would tend to also reduce the variance between what the parties expected going in and what they ended up getting.[228] A modified bargain will often be closer to what both parties expected when they assumed all would be well, as compared to no bargain at all. (In cases where this is untrue, and parties would have considered themselves well shot of each other in that scenario, judicial modification should of course not be granted.) Further, I suspect – though I am unaware of any empirical research on this point – that if laypersons were forced to guess at how the common law deals with drastically changed circumstances in the absence of specific contractual provisions, very few would guess that a party is bound completely or not bound at all. It *feels right* that if *impossibility* releases a party from her obligations, extreme and unforeseen *difficulty* should allow her to seek a relaxation of those obligations. The lawyer's retort, that this seemingly sensible compromise would undermine freedom of contract, is one that only lawyers are likely to find satisfying. If my intuition is correct, it is ironic to deprive parties of a closer substitute to their bargain on the basis of a narrow conception of freedom of contract, not shared by the persons for whose intended benefit it exists.

The solution should come from the legislature, not the judiciary

Given the scope of the expansion I have proposed above, legislation would be the sensible path to reform. It is hard to disagree with Lord Neuberger's argument, delivered during a recent webinar on *force majeure* and COVID-19, that judicially relaxing the requirements of frustration or creating a general doctrine of *force majeure* would subvert the reasonable expectations of parties who have ordered their affairs on the basis that no such doctrine exists, and erode the common law's reputation for predictability and incremental change.[229] Such sweeping changes are more appropriately implemented by Parliament in prospective and highly public fashion.

The solution should displace the common law, not supplement it

As earlier argued, though there may be substantive merits in an interlocking system of common law and statute, this invariably comes at a cost of increased epistemic uncertainty. The substance

[227] This example is an adaptation, to the frustration context, of Weiss's comparison between a tort regime in which an award is proportional to the parties comparative negligence, and a tort regime in which the plaintiff recovers either her full loss or none: ibid.
[228] As argued by JA McInnis, "Frustration and *Force Majeure* in Building Contracts" in Ewan McKendrick (ed), *Force Majeure and Frustration of Contract* (2nd ed, Lloyd's of London 1995) ch 10, at p 213.
[229] ICC Webinar, n 220.

of the law of changed circumstances is complicated enough without forcing users to contend with its patchwork form as well.

The solution should be permanent and general, not temporary and event-specific

Though there is much to commend for the Singapore government's recent COVID-19 measures, and especially those concerning changed circumstances and contractual obligations, these should not be reserved for crises only but should *mutatis mutandis* be extended generally, for two main reasons.

First, this would provide fairer outcomes. The Minister for Law's comments during the Parliamentary debates concerning the COVID-19 measures show that they were motivated not only by economic exigency (though that was certainly a dominant concern), but also by a sense of fairness to the disadvantaged parties.[230] In a more mundane case of changed circumstances, the economic imperative of having a robust and responsive system in place is less pressing, as the economy can better tolerate smaller-scale failures; the concern of fairness, however, is equally applicable. If it is unfair for a party to lose, say, the entire benefit of a bargained-for rent-free period (intended to cover renovation and moving in) due to the circuit breaker,[231] it seems intuitive that it would be equally unfair for that to happen due to other circumstances that are less wide-spread but similarly unforeseen, out of the party's control, and serious in their consequences for the transaction in question.

Second, it would make our legal system more crisis-resilient. It is a testament to the efficiency of Singapore's legislative and executive branches that a regime as effective and wide-reaching as the COVID-19 measures could be implemented from scratch (and tweaked through further amendments) in mere weeks. Still, it would be ideal if future responses did not require such feats from politicians and public servants.[232] If this was what the legislature and executive could produce from scratch in a short time, an even better solution would presumably have been possible with the benefit of a permanent regime dealing with changed circumstances that had been implemented and refined at (relative) leisure, into which further measures/modules could be slotted in times of emergency.

Moreover, taking a long view, it cannot necessarily be assumed that parliamentary conditions will always allow for such broad emergency legislation to be pushed through so efficiently. There may

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[230] See *Singapore Parliamentary Debates, Official Report* (5 June 2020) vol 94 (K Shanmugam, Minister for Law, speech on Second Reading of the COVID-19 (Temporary Measures) (Amendment) Bill) <https://sprs.parl.gov.sg/search/sprs3topic?reportid=bill-464> accessed 24 July 2020.
[231] An example given by the Minister: ibid.
[232] The extraordinary nature of the efforts involved were highlighted by the Minister in his speech: ibid.

come a day when legislation in Singapore – as in much of the rest of the world – requires bi- or multi-partite compromise and extensive negotiation, potentially even in times of emergency. Regardless of how one views such a potential political future,[233] it makes sense to plan for that contingency now by making the permanent legal infrastructure of commerce as complete and robust as possible, thereby minimising the extent of emergency interventions that need to be agreed upon in times of crisis.

Conclusion

Oliver Wendell Holmes was no doubt right to observe that in matters of law, "certainty generally is an illusion, and repose is not the destiny of man".[234] But there is yet merit, and some measure of repose to be found, in giving that illusion as much substance as reality allows. At the least, parties should have the comfort of a regime that makes it readily apparent what is certain and what is uncertain, so that they can negotiate in the shadow of known unknowns rather than unknown unknowns. Singapore's law of changed circumstances has some way to go, and only legislation can get us there.

[233] For the government's position on the practicability of such a model in the Singaporean context, see K Shanmugam, 'Speech by Minister for Law K Shanmugam at the New York State Bar Association Rule of Law Plenary Session' (*Ministry of Law Singapore*, 28 October 2009) <https://www.mlaw.gov.sg/news/speeches/speech-by-minister-for-law-k-shanmugam-at-the-new-york-state-bar-association-rule-of-law-plenary> accessed 24 July 2020), at paras 55–57.

[234] Oliver Wendell Holmes, "The Path of the Law" (1897) 10 Harvard Law Review 457, 466.