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Force Majeure Issues—Introduction

Since the first cases of Covid-19 have been discovered, the outbreak of the coronavirus disease has rapidly caused a global emergency that has involved our lives in numerous ways. Among these is the deep impact on our economies, causing failure to fulfill contractual obligations due to various factors such as the shutdown of business activities and limits to circulation and movement of goods and people.

It is therefore important to assess whether the concept of “force majeure” may apply. This assessment should cover what remedies may be provided on the basis of the applicable laws chosen by the parties or found under the rules governing private international law, in particular when agreements do not provide for special clauses with regard to such events.

What follows are assessments of the general conditions related to force majeure clauses in various countries. We recommend that LES members perform a similar assessment of the impact of Covid-19 on contracts and remedies in any specific geography to which you may be subject. ■

Force Majeure Issues—United States of America

How Force Majeure Is Intended By National Laws?

There is no overriding federal law, so this is handled on a state-by-state basis. Most states have some common law that governs impossibility of performance, commercial impracticability, and/or frustration of purpose. The doctrines are generally stated as:

“Where, after a contract is made, a party’s performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.” Restatement (Second) of Contracts, Section 261.

For contracts of goods, the Uniform Commercial Code applies:

“Delay in delivery or non-delivery in whole or part by a seller...is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made[.]” Section 2.615.

The interpretation of impossibility varies greatly between states and impracticability does not apply in all states, so analysis is required for the specific state of interest. As an extreme, Alabama does not recognize the doctrines.

In most instances force majeure contract clauses are used instead of relying on the doctrines. Including a force majeure clause overrides the doctrines.

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The Renaissance Of LESI Through Innovation

By Audrey Yap,
President,
LES International



Dear LESI Family,

It is my great pleasure and honor to address you as your LESI President. These are unique times.

Given the cancellation of the Berlin Annual Meeting this year, our gathering in Padua Italy, kindly hosted by LES Italy early this year, was all the more precious and meaningful. I was very glad so many LESI leaders were able to attend, so I could share in person my plans. For those who missed out, I have a video for you: <https://www.youtube.com/watch?v=0w3LjGlrmSM&feature=youtu.be>

The Covid pandemic has upended life as we know it. All of a sudden, the way people move, communicate, work, eat and meet has changed radically. Some feel life is on the “pause button” waiting for actual life to return. We recognize and acknowledge that there is pain out there, not only for the ongoing battle to manage the health of individuals, but also the ripple effect on economies globally. Yet humanity has been guarding against plagues and surviving them for thousands of years.

History shows us that crisis often inspires innovation. The word “crisis” in Chinese combines the characters danger and opportunity. The opportunity here is to create. Tectonic shifts in demand and innovation catalyze and spur

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the emergence of new inventions and changes in behavior. These innovations are likely to endure beyond this pandemic.

We only need to look at the past to assure us of this.

In the 1930s, the radio was invented and became the primary source of news and entertainment. In the 1940s, in the midst of world wars, the GAS MASK became a household essential! The government was taking no chances and everyone had to have one. Fines were issued for non-compliance—sound familiar? Out of the great depression came innovations like instant coffee, produced by Nestle amid a glut of coffee beans. During this period, DuPont invented nylon, a low cost material that revolutionized clothing, parachuting and rope making.

Fast forward, we see that out of the rubble of the dot-com bust of 2001 came Google and eBay. Google transformed search & advertising; eBay's auction gave rise to p-to-p e-commerce, while SARS first catalyzed China's online business and mall and Alibaba's fortune. It also saw the launch of Facebook.

When the iPhone first came out in 2007, most people were just using the phone to TALK to people. 13 years later we can't live without our smartphones! Social media, Pinterest, Instagram and Twitter came alive. After the financial crisis of 2008, AirBnB and Uber were created, responding to financially stretched consumers eager to save on accommodation and commuting, which shows how innovation is not limited to technology changes but also ways of doing business.

How do we re-write 2020? In the last four months, Covid-19 has triggered a tidal wave of innovation around the world.

Robots to disinfect from the U.S., drones to detect body temperature for Covid hotspots from Australia, remote monitoring from Israel, labs on a chip for accelerated Covid-19 testing in ten minutes by Singapore.

China and Korea use sophisticated positioning technology to map and identify risk areas to carry out relief and rehabilitation efforts—they harness AI and satellite technology. WuChang Hospital, China Mobile and Cloud Minds came together to make hospital facilities completely smart and digital. Robots are used for everything from preparing meals in the hospital to diagnosis. Tencent and Alibaba developed color-coded health rating systems to track millions via smartphone apps.

Singapore, Poland, South Korea and the U.S. also use smart phone tracking. Korea used AI to develop a test kit within a week which was certified by the EU. Japan, which owns half the global market share in the sensor market, has rolled out touchless/contactless technology.

Innovation includes pivoting and repurposing.

Vehicle manufacturers Tesla/GM repurposing idle factories to make ventilators; Ford/Volkswagen manufacturing PPE and face masks from air bags; distillers, brewers and fragrance companies making hand sanitizers; medical professionals harnessing telemedicine; schools providing home-based learning with a vengeance!

These players, having acquired such expertise and adjusted and expanded their customer base, may continue with these innovations long after Covid-19. This is only the beginning...

LESI needs to remain nimble and respond to these changes. Innovation will gird global economies for the future.

My theme is **Renaissance of LESI Through Innovation**. Innovation and IP must remain critical pillars of LESI, and we must press on with these efforts through my three task forces, which were established to move this agenda forward:

High Growth Enterprises (**HGE**—focusing on SMEs which represent a huge potential for the future growth of LES)

LESI Innovation Trends (**LIT**—important new areas of technology that will light our path ahead)

LESI Industry IP Festival (**LIIF**—integrating IP with the life of business)

In brief, the HGE task force will focus on high growth enterprises as we recognise that innovation and the need for IP is not restricted in size or type of company, but by their potential to grow. This task force will be engaging High Growth Enterprises, particularly their decision makers, on the topic of the use of IP for business growth. Please look out for the special edition of *les Nouvelles* to be published in June 2020, which is a collaborative effort between the EPO and LESI on this subject. The LIT task force will be our think tank for identifying new content and emerging areas of IP law and technology innovation sectors to assist LESI in channelling our energies into these areas of interest, whether for publication, seminars/webinars or discussion forums. The LIIF task force focuses not only on education, but also on bringing interested parties together to further IP licensing and collaboration.

And so the theme for my term will be a call to action: LET'S INNOVATE!

I have chosen the following logo to represent it:



As you can see, the letters L, E, S, I are embedded in the tag-line, just as the capacity to innovate is within us in LESI. The logo calls for a change in our paradigm, recalling how Galileo's

astronomical observations helped to change the scientific understanding of our solar system, that rather than the Earth being at the centre, the Earth and the planets revolve around the Sun. In the same way, the theme of innovation for LESI is also aimed at shifting our focus to innovative startups and SMEs using IP for business growth. The vertical lines of increasing height on the top right of the logo evoke a sense of growth. I believe that with our shift in focus and strategy, LESI will experience not only renewed growth, but a true Renaissance that will have lasting impact. And lastly, the fiery colors I have chosen for the logo represent our energy and passion for our LES, our mission, and the good we can do in the world.

We need a comprehensive strategy to deal with this changing global landscape. To do this we need to ask the right questions:

What strategic changes are needed to not only remain relevant, but strengthen our dominant position in advancing

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Tribute to Larry Plonsker

By Fiona Nicolson

In February, at the LESI Winter Planning Meeting in Padua, I was privileged to be able to make a presentation to Larry Plonsker to acknowledge his 15 years as the editor of *les Nouvelles* and *LES Global News*. For those who were not present in Padua, I would like to record the sincere and heartfelt appreciation of the LES family to Larry for his efforts over those years.

As you would be aware, *les Nouvelles* is one of the jewels in the LES crown and is regarded both within and outside the LES community as a valuable resource for high quality information and articles relating generally to intellectual property and technology transfer. One clear reason for that status is the quality of service provided by Larry as editor. As with all good editors, he made the publications better than they would have been without his contribution.

As I remarked in Padua, the first issue which he edited was published in March, 2005, since then he has managed the publication of 57 issues totalling more than 5,700 pages of reading material. Importantly, Larry encouraged and oversaw the introduction of a “double blind” peer review system which is extremely important for acceptance in the academic and scientific communities.

Larry also encouraged the removal of the “blue pages” from *les Nouvelles*, the creation of *LES Global News* and the electronic distribution of that publication.

All of this was achieved with a lot of hard work, but a minimum of fuss. As Rodney DeBoos, on behalf of the Editorial Review Board has said, Larry was a dream to work with; there was rarely a question he could not answer and almost nothing that he would not do to make the life of the ERB members easier.

Larry Plonsker, continued from Page 4

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the business of IP? What should take priority? Where shall we invest our efforts most? How do we build solid collaborations that support our goals and endure?

We cannot fight tomorrow’s wars with yesterday’s strategies.

It is important for each of us to have a sense of ownership of this great association LESI, as this creates and allows for a tremendous sense of empowerment among the members. This very sense has enabled LESI in the past to produce some of the most thought-provoking forward-looking strategies and management tools for IP.

I believe that LESI’s greatest strategic advantage is that it has access to IP’s best and brightest. We deal not only with IP, which is one of the most forward-looking categories of law, but the business of IP, which provides the economic motivation to generate and protect our IP assets. Corporate wealth is built on these critical IP assets. Our organization LESI is therefore one of the future.

The diversity of our membership allows for building ever stronger IP ecosystems to feedback, in a loop, for our members. We can be a movement, an unstoppable force for IP in each of the communities and industries we represent and work in.

Let us therefore prepare ourselves for this great renaissance of LESI.

LET’S INNOVATE!



Dana Colarulli, Larry Plonsker and David Massey at the LESI meeting in Padua, Italy.

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LESI Board members with Mayor Giordani of Padua. The meeting was hosted in a beautiful hall of the Municipality of Padua.