

(UN)FORTUITOUS EVENT: THE COVID-19 PANDEMIC AS A FORTUITOUS EVENT*

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I. INTRODUCTION

Ever since the country recorded its first case of COVID-19,¹ the Philippines has imposed and implemented measures designed to prevent the fast transmission of the disease into—and eventually, within—our national borders. While these responses vary across regions, the various tiers of “community quarantine” include, in one way or another, restrictions on travel and movement, the temporary suspension of “non-essential” businesses, and the abrupt migration of school and work to online platforms.² Such measures are accompanied by strict social distancing and heightened standards for hygiene (such as frequent hand-washing and the use of face masks in public places).³

The strictest among these measures, the Enhanced Community Quarantine (“ECQ”), has been imposed in the country’s densest urban centers, including Metro Manila and Metro Cebu. In fact, as of the time of writing, the 74-day lockdown in Metro Manila has been hailed as the “world’s longest,” surpassing that imposed in Wuhan, China;⁴ and has undoubtedly frozen and delayed economic activity in these regions.

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¹ World Health Organization (“WHO”), *Coronavirus disease (COVID-19) in the Philippines*, WHO WEBSITE, at <https://www.who.int/philippines/emergencies/covid-19-in-the-philippines> (last accessed June 29, 2020).

² *See infra* Table 1.

³ *Id.* *See* Dep’t of Health (DOH) Adm. Order No. 15-20 (2020).

⁴ Argyll Crus Geducos, *Palace: No regrets on COVID-19 measures*, INQUIRER.NET, June 17, 2020, available at <https://news.mb.com.ph/2020/06/17/palace-no-regrets-on-covid-19-measures>; Jason Castaneda, *Why Duterte won’t lift world’s longest lockdown*, ASIA TIMES, May 15,

While these measures may be deemed necessary in curbing the transmission of the virus, such have undeniably disrupted the way we navigate our social, political, and economic life. The country's economic agencies have estimated over 1.9 trillion pesos in profit and wage losses,⁵ a figure that increases as the country remains in lockdown. As of the time of writing, such losses have forced over 3,000 companies across all sectors to declare permanent closure which, in turn, translated to a spike in laid-off workers.⁶ These losses are, in turn, a consequence of intrusive government measures that suspended the operation of “non-essential” businesses and restricted the transportation of goods and merchandise across regions.

However, in cases where losses are not as drastic, businesses are not left without remedies. Among these is the invocation of *force majeure* (or fortuitous event) clauses found in contracts underlying business transactions. Upon the happening of an unforeseeable or inevitable event, these clauses may relieve parties from liability brought about by their non-performance. Even in the absence of an explicit *force majeure* clause, a party may still avail of this defense through Article 1174 of the Civil Code, which states that “no person shall be responsible for those events which could not be foreseen, or which, though foreseen, were inevitable.”⁷

This Essay assesses and evaluates the coronavirus pandemic as a fortuitous event. In particular, we briefly revisit the statutory and jurisprudential conception of fortuitous events, apply this in the context of the pandemic, and identify issues that may arise in invoking this defense.

II. THE CONCEPT OF FORTUITOUS EVENT

In the Philippines, the concept of fortuitous event is enshrined in Article 1174 of the Civil Code:

Article 1174. Except in cases expressly specified by the law, or when it is otherwise declared by stipulation, or when the nature of the obligation requires the assumption of risk, no person shall be

2020, available at <https://asiatimes.com/2020/05/why-duterte-wont-lift-worlds-longest-lockdown>

⁵ Ben de Vera, *P2.2 trillion in losses: Cost of COVID-19 impact on PH economy*, INQUIRER.NET, May 28, 2020, available at <https://business.inquirer.net/298536/p2-2-trillion-in-losses-cost-of-covid-19-impact-on-ph-economy>

⁶ In turn, this has resulted in the unemployment of 90,000 workers. CNN Philippines Staff, *3,000 establishments nationwide permanently close, retrenched due to pandemic*, DOLE *sgys*, CNN PHIL., June 25, 2020, at <https://www.cnn.ph/business/2020/6/25/3000-establishments-retrench-close-due-to-pandemic.html>

⁷ CIVIL CODE, art. 1174.

responsible for those events which could not be foreseen, or which, though foreseen, were inevitable.

The provision itself does not use the phrase “fortuitous event.” Instead, it contains the phrase “those events which could not be foreseen, or which, though foreseen, were inevitable.” While various terms have been used to describe these kinds of events,⁸ such as fortuitous event, *force majeure*, and *caso fortuito*, these terms have been held to refer to the same thing.⁹ A fortuitous event may be classified as an “act of God” or “act of man.”¹⁰ The former refers to natural occurrences such as typhoons and floods, while the latter refers to wars, strikes, or riots.¹¹ The Court also previously explained that:

Fortuitous events by definition are extraordinary events not foreseeable or avoidable. It is therefore, not enough that the event should not have been foreseen or anticipated, as is commonly believed but it must be one *impossible to foresee or to avoid*. The mere difficulty to foresee the happening is not impossibility to foresee the same.¹²

This, however, does not meet that the event itself must be impossible. It merely means that “the average person under the circumstances would not have foreseen or could have avoided the event.”¹³

The elements of a fortuitous event defense are laid down in *Nakpil & Sons v. Court of Appeals*.¹⁴ This case revolves around the liability of Juan F. Nakpil & Sons, the architects who prepared the plans and specifications for a building of the Philippine Bar Association (“PBA”). The said building collapsed in 1968 after an earthquake hit Manila, causing damages to the association. When PBA tried to recover from the construction company, United Construction, Inc., the construction company, filed a third-party complaint against the architects. The third-party complaint argued that the

⁸ See RUBEN BALANE, JOTTINGS AND JURISPRUDENCE ON CIVIL LAW (OBLIGATIONS AND CONTRACTS) 101 (2018 ed.).

⁹ *Id.*; Republic v. Luzon Stevedoring Corp., G.R. No. L-21749, 21 SCRA 279, Sept. 29, 1967.

¹⁰ Philippine Comm’n Satellite Corp. v. Globe Telecom, Inc. [hereinafter “Philcomsat”], G.R. No. 147324, 429 SCRA 153, May 25, 2004.

¹¹ *Id.*; Asset Privatization Trust v. T.J. Enter. [hereinafter “Asset Privatization Trust”], G.R. No. 167195, 587 SCRA 481, May 8, 2008.

¹² Sicam v. Jorge [hereinafter “Sicam”], G.R. No. 159617, 529 SCRA 443, 459, Aug. 8, 2007. (Emphasis supplied.)

¹³ ROMMEL CASIS, ANALYSIS OF PHILIPPINE LAW AND JURISPRUDENCE ON TORTS AND QUASI-DELICTS 262 (2012).

¹⁴ Nakpil & Sons v. Ct. of Appeals [hereinafter “Nakpil”], G.R. No. L-47851, 144 SCRA 596, Oct. 3, 1986.

collapse of the building was due to the “defects in the [...] plans and specifications” provided by Juan F. Nakpil & Sons.¹⁵ The primary issue revolved around the liability of the architects; they argue that the earthquake constituted a fortuitous event that exempted them from liability.

In disposing of the case, the Court had occasion to lay down the elements of a fortuitous event:

(a) the cause of the breach of the obligation must be independent of the will of the debtor; (b) the event must be either unforeseeable or unavoidable; (c) the event must be such as to render it impossible for the debtor to fulfill his obligation in a normal manner; and (d) the debtor must be free from any participation in, or aggravation of the injury to the creditor.¹⁶

Subsequent cases have adopted these elements,¹⁷ with the second element (event must be either unforeseeable or unavoidable) sometimes being phrased as “the event [...] must have been impossible to foresee or, if foreseeable, impossible to avoid,”¹⁸ so as to better conform to the wording of the Civil Code provision.

As provided in the Code, the general rule is that the presence of a fortuitous event renders a party free from liability.¹⁹ This is based on the maxim *lex non cogit impossibilia* (the law does not require the impossible).²⁰ However, the law also provides for exceptions: in cases expressly specified by law (e.g. when a debtor in delay promises a thing to two or more persons with different interests,²¹ when the debt is from a criminal offense²²), when the parties stipulate otherwise, or when the nature of the obligation requires the assumption of risk.²³ In these cases, the fortuitous event defense does not apply.

In determining whether a fortuitous event defense may be successfully invoked, Casis provides a three-step analysis:

¹⁵ *Id.* at 601.

¹⁶ *Id.* at 606-607. (Citations omitted.)

¹⁷ See *National Power Corp. v. Ct. of Appeals* [hereinafter “NPC”], G.R. No. 103442, 222 SCRA 415, May 21, 1993; *Philcomsat*, 429 SCRA 153, May 25, 2004; *Asset Privatization Trust*, 587 SCRA 481.

¹⁸ *Id.*

¹⁹ CIVIL CODE, art. 1174; *Sicam*, 529 SCRA 443, 459-460; *Philcomsat*, 429 SCRA 153.

²⁰ Balane, *supra* note 8, at 101.

²¹ CIVIL CODE, art. 1165 (3).

²² Art. 1268.

²³ Art. 1174.

First, a fortuitous event must be identified. The question that must be asked is: Was there an extraordinary event, which could not be foreseen by the parties or though foreseen, was inevitable?

Second, it must be determined if the circumstance falls within any of the three exceptions under Article 1174. The questions that must be asked are: Is this a case expressly specified by the law where the defense of fortuitous event is not available? Is there a stipulation by the parties that the defense of fortuitous event is not available? Does the nature of the obligation require the assumption of risk?

Third, it must be established that all the essential requisites of a fortuitous event are present. The questions that must be asked are: Is the cause of the unforeseen and unexpected occurrence independent of human will? Is the event impossible to foresee or if it can be foreseen, was it impossible to avoid? Was the occurrence such as to render it impossible for the debtor to fulfill his obligation in a normal manner? Was the obligor free from any participation in the aggravation of the injury resulting to the creditor?²⁴

It must be emphasized, however, that it is the concurrence of the elements that allows a party to raise the defense of a fortuitous event. It would be erroneous for one to say that the happening of a strong earthquake, while a fortuitous event in itself, allows a party to use the fortuitous event defense. While an earthquake may be an act of God that is unavoidable or unforeseeable, the defense of fortuitous event requires, among others, that the debtor is free from contributory negligence. Thus, even if a strong earthquake happens, a debtor may still be held liable if he or she is found to be negligent. In *Nakpil*, the Court explained that:

If upon the happening of a fortuitous event or an act of God, there concurs a corresponding fraud, negligence, delay or violation or contravention in any manner of the tenor of the obligation as provided for in Article 1170 of the Civil Code, which results in loss or damage, the obligor cannot escape liability.

The principle embodied in the act of God doctrine strictly requires that the act must be one occasioned exclusively by the violence of nature and all human agencies are to be excluded from creating or entering into the cause of the mischief. When the effect, the cause of which is to be considered, is found to be in part the result of the participation of man, whether it be from active intervention or neglect, or failure to act, the whole occurrence is thereby

²⁴ *Casis*, *supra* note 13, at 268.

humanized, as it were, and removed from the rules applicable to the acts of God.²⁵

The doctrine of fortuitous event applies to obligations arising from the different sources provided under the Civil Code.²⁶ However, jurisprudence has applied the doctrine mainly to obligations arising from contracts and quasi-delicts. In contractual obligations, the happening of a fortuitous event frees a contracting party from liability in case he or she commits a breach of contract. Thus, the contracting party cannot be held liable for its failure to abide by the contract's terms.²⁷ On the other hand, in obligations arising from quasi-delicts, a party may be held free from liability if he or she is able to show that the proximate cause of the injury is a fortuitous event. This is primarily where the concept of contributory negligence applies: the defendant must show that the injury was caused solely by the fortuitous event, and that he or she was not negligent in any way.²⁸

III. COVID-19 AS A FORTUITOUS EVENT

Shortly after the World Health Organization (“WHO”) declared COVID-19 as a pandemic,²⁹ legal commentators across jurisdictions have discussed how this event may trigger existing *force majeure* clauses and, in the absence thereof, statutory remedies related to fortuitous events.³⁰ This comes as no surprise, since the pandemic has undoubtedly halted economic activity all over the world, preventing businesses and private individuals from the ordinary fulfillment of their contractual obligations. Despite witnessing similar outbreaks in the last two decades, some commentators have argued

²⁵ *Nakpil*, 144 SCRA 596, 606-607.

²⁶ CIVIL CODE, art. 1170. Obligations arise from: 1) Law; 2) Contracts; 3) Quasi-contracts; 4) Acts or omissions punished by law; and 5) Quasi-delicts.

²⁷ See, e.g., *Philippine Realty & Holdings Corp v. Ley Construction & Development Corp.*, G.R. No. 165528, June 13, 2011; *Philcomsat*, 429 SCRA 153.

²⁸ See, e.g., *Nakpil*, 144 SCRA 596; *Sicam*, 529 SCRA 443; *NPC*, 222 SCRA 415.

²⁹ WHO, *WHO Director-General's opening remarks at the media briefing on COVID-10*, WHO WEBSITE, Mar. 11, 2020, at <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19--11-march-2020/>

³⁰ See Christian Twigg-Flesner, *A comparative perspective on commercial contracts and the impact of COVID-19 - change of circumstances, force majeure, or what?* in *LAW IN THE TIME OF COVID-19* 155-165 (Katharina Pistor, ed., 2020); Matthew Jennehjohn, Julian Nyarko & Eric Talley, *COVID-19 as Force Majeure in Corporate Transactions*, in *LAW IN THE TIME OF COVID-19* 141-154 (Katharina Pistor, ed., 2020). In the context of the Philippines, see also Donemark Calimon, Michael Macapagal & Dranyl Jared Amoroso, *COVID-19 and Force Majeure: Managing Contract Crisis in the Philippines*, BAKER MCKENZIE WEBSITE, Mar. 20, 2020, at <https://www.bakermckenzie.com/en/insight/publications/2020/03/covid19-force-majeure-ph>

that a pandemic of this scale is undeniably unforeseeable;³¹ and superlative descriptions, such as “unparalleled economic shocks”³² and “worst economic downturn since the Great Depression,”³³ merely reaffirm this.

In fact, several government agencies have issued guidelines expressly designating the pandemic as a “fortuitous event.”³⁴ For instance, in governing the refund of payments made for events affected by the pandemic, the Department of Trade and Industry (DTI) considers the following as “fortuitous events” which would void the obligation:

- The restriction or directive on social distancing is the sole and proximate cause of the cancelled or scaled-down event or function;
- a. The restriction or directive on social distancing is the independent of the will of the obligor;
 - b. The restriction or directive on social distancing is either unforeseeable or unavoidable that renders it impossible for the obligor to fulfill his obligation in a normal manner;
 - c. The obligor did not have a hand in the issuance of the directive on social distancing for the purpose of avoiding the obligation.³⁵

However, while parties may acknowledge these guidelines, such interpretation is not controlling. After all, it is the courts, not executive agencies, that shall interpret the law. It is in this context that we discuss the several issues that may arise in invoking the defense of fortuitous event—whether it is in relation to a *force majeure* clause or in the absence thereof.

A. What exactly is the fortuitous event?

Two of the four elements of the fortuitous event defense pertain to the nature of the event itself: *first*, it must be unforeseeable (or if foreseeable, inevitable); and *second*, it must prevent the fulfillment of the obligation in a normal manner. Thus, it is important to identify what exactly constitutes the

³¹ Twigg-Flesner, *supra* note 30, at 161.

³² COVID-19: ‘Unparalleled economic shock’ threatens development hopes and gains, UN NEWS WEBSITE, June 10, 2020, at <https://news.un.org/en/story/2020/06/1066032/>

³³ Gita Gopinath, *The Great Lockdown: Worst Economic Downturn Since the Great Depression*, INTERNATIONAL MONETARY FUND BLOG WEBSITE, Apr. 14, 2020, available at <https://blogs.imf.org/2020/04/14/the-great-lockdown-worst-economic-downturn-since-the-great-depression>; *Coronavirus: Worst economic crisis since 1930s depression, IMF says*, BBC NEWS, Apr. 9, 2020, at <https://www.bbc.com/news/business-52236936>

³⁴ Dep’t of Trade and Industry (DTI) Mem. Circ. No. 30-20 (2020). *See also* PhilHealth Circ. No. 7-20 (2020).

³⁵ DTI Mem. Circ. No. 30-20 (2020).

fortuitous event. Did the liability arise because of the pandemic itself? Or is it brought about by the severe restrictions on travel and transportation?

These questions are critical in invoking the remedies found in the Civil Code and in the *force majeure* clauses themselves. In the case of the latter, most *force majeure* clauses do not expressly include the terms “pandemics” and “epidemics,” only adopting generally-worded terms such as “calamities” and “acts of God.”³⁶ As such, it is crucial to identify whether the COVID-19 pandemic may fall under these generally-worded terms.

Twigg-Flesner explained that, in itself, the occurrence of a pandemic is “not unforeseeable,” especially in light of recent international public health crises, such as SARS, MERS, and the H1N1 Swine Flu outbreaks.³⁷ What is perhaps unforeseeable is the sheer scale of the ongoing pandemic. Put differently, he asked, “would it suffice that there was a possibility that there must be *a* pandemic which could be seriously disruptive or would it be necessary that a pandemic caused by a novel type of coronavirus spreading rapidly around the globe was reasonably foreseeable?”³⁸

It could also be argued that the pandemic *per se* does not constitute a fortuitous event. Instead, it is the severe restrictions on movement and transportation that prevented the businesses and individuals to fulfill their contractual obligations. After all, the mere existence of a global pandemic does not necessarily entail non-fulfillment, as seen in countries that are already opening up. It is the severity of government response, which considerably varies across and within jurisdictions, that is the proximate cause of liability.

As summarized in Table 1, the government response for COVID-19 is streamlined into four tiers of “community quarantine”—namely the Enhanced Community Quarantine (“ECQ”), Modified Enhanced Community Quarantine (“MECQ”), General Community Quarantine (“GCQ”), and Modified General Community Quarantine (“MGCQ”)—representing a sliding-scale of restrictions on several matters, such as the movement of individuals (including workers), the operation of non-essential

³⁶ Matthew Jennehjohn, Julian Nyarko & Eric Talley, *COVID-19 as Force Majeure in Corporate Transactions*, in *LAW IN THE TIME OF COVID-19* 141-154 (Katharina Pistor, ed., 2020). In fact, despite the inclusion of these specific events in more recent contracts, the study estimates that only 12% of *force majeure* clauses in their data set contain the term “pandemics” or equivalent terms. Instead, majority of these *force majeure* clauses only include generally-worded terms, such as “force majeure,” “acts of God,” and “calamities.”

³⁷ Twigg-Flesner, *supra* note 30, at 162.

³⁸ *Id.* (Emphasis supplied.)

businesses, and the transportation of goods and merchandise.³⁹ As previously mentioned, the strictest among these measures, the ECQ, has been imposed in two of the country's most important financial centers, Metro Manila and Metro Cebu.

In this context, it is thus undeniable that the scale of these restrictions—and not the pandemic itself—is the fortuitous event. Had these restrictions been more relaxed, invoking the defense of fortuitous event may be more difficult. In more concrete terms, a party whose residence remains under ECQ may have a better chance in invoking the defense compared to someone who lives in a locality with lighter restrictions (such as those under MGCQ).

B. In what circumstances does time matter?

One other important element to a successful fortuitous event defense is that “the event [...] must have been impossible to foresee or, if foreseeable, impossible to avoid.”⁴⁰ A litigant must successfully prove that it was impossible for them to foresee, or avoid, the effects of COVID-19. Of course, it goes without saying that a fortuitous event defense contemplates that there was a breach of the obligation, which necessarily implies that there was a binding obligation to begin with. In terms of foreseeability, however, an important question arises: at what point in time did the COVID-19 pandemic become foreseeable?

The Philippines reported the first case of COVID-19 in the country on January 30, 2020.⁴¹ The first local transmission was reported three months after on March 7.⁴² While the first instance of the disease was identified in China in December 2019,⁴³ it was only on January 30, 2020 when the outbreak of the virus was declared as a Public Health Emergency by the WHO.⁴⁴

³⁹ See *infra* Table 1.

⁴⁰ See *NPC*, 222 SCRA 415; *Philcomsat*, 429 SCRA 153; *Asset Privatization Trust*, 587 SCRA 481.

⁴¹ WHO, *Coronavirus disease (COVID-19) in the Philippines*, WHO WEBSITE, at <https://www.who.int/philippines/emergencies/covid-19-in-the-philippines> (last accessed June 29, 2020).

⁴² *Id.*

⁴³ WHO, *Novel Coronavirus – China*, WHO WEBSITE, Jan. 12, 2020, at <https://www.who.int/csr/don/12-january-2020-novel-coronavirus-china/en>

⁴⁴ WHO, *Statement on the second meeting of the International Health Regulations (2005) Emergency Committee regarding the outbreak of novel coronavirus (2019-nCoV)*, WHO WEBSITE, Jan. 30, 2020, at <https://www.who.int/news-room/detail/30-01-2020-statement-on-the-second->

Months later, on March 11, 2020, WHO officially classified COVID-19 as a pandemic.⁴⁵

While these dates are somewhat considered as “milestones” for the COVID-19 pandemic, it would be remiss to conclude that, insofar as foreseeability is concerned, these dates are controlling. With respect to contracts entered into before December 2019, it is submitted that the pandemic was certainly not foreseen. Given the novel nature of the virus, it would be impossible for one to expect that the virus outbreak would have happened. However, the complications lie in the contracts entered into after December 2019. Was the COVID-19 pandemic foreseeable as early as January, when the first case reached the Philippines? Or was it foreseeable only in March, when the first instance of local transmission was announced?

The case of *Philippine National Construction Corporation (“PNCC”) v. Court of Appeals*⁴⁶ may be instructive. In this case, PNCC raised the principle of *rebus sic stantibus* in arguing that it should be free from liability in breaching a contract of lease entered into in November 1985. Among others, it argued that the abrupt change in political climate was an unforeseen event. In ruling against the petitioner, the Court held that the abrupt change in political climate was not unforeseen.

It is a matter of record that petitioner PNCC entered into a contract with private respondents on November 18, 1985. Prior thereto, it is of judicial notice that after the assassination of Senator Aquino on August 21, 1983, the country has experienced political upheavals, turmoils [sic], almost daily mass demonstrations, unprecedented, inflation, peace and order deterioration, the Aquino trial and many other things that brought about the hatred of people even against crony corporations. On November 3, 1985, Pres. Marcos, being interviewed live on U.S. television announced that there would be a snap election scheduled for February 7, 1986.

On November 18, 1985, notwithstanding the above, petitioner PNCC entered into the contract of lease with private respondents with open eyes of the deteriorating conditions of the country.⁴⁷

meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-(2019-ncov)

⁴⁵ WHO, *supra* note 29.

⁴⁶ G.R. No. 116896, 272 SCRA 183, May 5, 1997.

⁴⁷ *Id.* at 193.

Proceeding from this, the Court concluded that the happening of the EDSA Revolution in February 1986 did not constitute an unforeseen event.⁴⁸ While there are differences as to nature and application of the principle of *rebus sic stantibus* and that of the fortuitous event defense,⁴⁹ the Court's rationale in *PNCC* may also be applied in determining whether an event, for the purposes of a fortuitous event defense, is unforeseen or not. In the eyes of the Court, the fact that the contract was entered into even during times of political uprisings and turmoil constituted some form of knowledge or awareness that a revolution could happen.

Similarly, it can also be argued that parties who entered into contracts after December 2019, i.e. the date of the emergence of the coronavirus outbreak, could have had knowledge that a pandemic was on the rise.⁵⁰ As early as January, the WHO already issued advice for internal travel and trade due to the initial outbreak of the virus in Wuhan, China.⁵¹ The Philippine government started to prepare its response to the virus in the same month, establishing an nCoV Task Force, releasing health advisories, and issuing guidelines.⁵² At this time, the public began to have awareness and knowledge about the disease outbreak and its debilitating effects in Wuhan. Following the Court's rationale in *PNCC*, it may be said that parties who enter into a contract at this time have done so "with open eyes of the deteriorating conditions of the country[.]"⁵³ particularly with respect to the COVID-19 pandemic.

However, it is not enough to deal with the dates constituting the various "milestones" of the COVID-19 pandemic. As previously discussed, it may also be submitted that it is not the pandemic itself that is the fortuitous event, but rather, the government restrictions on the movement of individuals and businesses.

This assumption would entail looking at different dates and timelines, particularly those that deal with the different guidelines issued by the

⁴⁸ *Id.* at 192 & 196.

⁴⁹ See, generally, Balane, *supra* note 8.

⁵⁰ Twigg-Flesner, *supra* note 30.

⁵¹ WHO, *WHO advice for international travel and trade in relation to the outbreak of pneumonia caused by a new coronavirus in China*, WHO WEBSITE, Jan. 10, 2020, at <https://www.who.int/news-room/articles-detail/who-advice-for-international-travel-and-trade-in-relation-to-the-outbreak-of-pneumonia-caused-by-a-new-coronavirus-in-china/>

⁵² President Communications Operations Office, *Jan COVID-19 Timeline*, LAGING HANDA PH, at <http://www.covid19.gov.ph/jan-covid-19-timeline/> (last accessed June 29, 2020).

⁵³ *Philippine Nat'l Constr. Corp. v. Ct. of Appeals*, G.R. No. 116896, 272 SCRA 183, 193, May 5, 1997.

government regarding the community quarantine measures.⁵⁴ Specifically, the first time the quarantine classifications were released was on March 12, 2020, when President Duterte imposed community quarantine measures from March 15, 2020 because of the growing number of COVID-19 cases.⁵⁵ The imposition of the ECQ was further extended until May 15 in Metro Manila.⁵⁶ This was shifted to MECQ starting May 16⁵⁷ and to GCQ starting June 1.⁵⁸

D. What is contributory fault in times of COVID-19?

As explained in the previous Part, a party's contributory fault prevents him from invoking the fortuitous event defense under Article 1174. *Philippine National Railways v. Brunty*⁵⁹ defines contributory fault as “conduct on the part of the injured party, contributing as a legal cause to the harm he has suffered, which falls below the standard to which he is required to conform for his own protection.” In this case, the defendant (or the party invoking contributory fault as a defense) must show a causal link (although not necessarily proximate) between the plaintiff's negligence and the subject injury.⁶⁰

The rationale behind this rule is explained in *Sicam v. Jorge*.

It has been held that an act of God cannot be invoked to protect a person who has failed to take steps to forestall the possible adverse consequences of such a loss. One's negligence may have concurred with an act of God in producing damage and injury to another; nonetheless, showing that the immediate or proximate cause of the damage or injury was a fortuitous event would not exempt one from liability. When the effect is found to be partly the result of a person's participation — whether by active

⁵⁴ See *infra* Table 1.

⁵⁵ President Communications Operations Office, *March COVID-19 Timeline*, LAGING HANDA PH, at <http://www.covid19.gov.ph/mar-covid-19-timeline/> (last accessed July 18, 2020).

⁵⁶ Ruth Abbey Gita-Carlos, *Duterte issues EO on ECQ, GCQ implementation*, PHILIPPINE NEWS AGENCY WEBSITE, May 1, 2020, at <https://www.pna.gov.ph/articles/110/1639>

⁵⁷ Virgil Lopez, *Metro Manila, Laguna, 5 other provinces shift to modified ECQ*, GMA NEWS ONLINE, May 16, 2020, at <https://www.gmanetwork.com/news/news/nation/738392/metro-manila-laguna-cebu-city-shift-to-modified-ecq/story>

⁵⁸ GMA News, *Duterte places Metro Manila under GCQ beginning June 1*, GMA NEWS ONLINE, May 28, 2020, available at <https://www.gmanetwork.com/news/news/nation/740232/duterte-places-metro-manila-under-gcq-despite-warnings-from-experts/story>

⁵⁹ *Philippine Nat'l Railways v. Brunty* [hereinafter “Brunty”], G.R. No. 169891, 506 SCRA 685, Nov. 2, 2006.

⁶⁰ *Id.*

*intervention, neglect or failure to act — the whole occurrence is humanized and removed from the rules applicable to acts of God[.]*⁶¹

While existing government guidelines generally regard the pandemic as a “fortuitous event,”⁶² such guidelines are not absolute. The defenses found in the Civil Code and existing jurisprudence remain available for defendants in these cases. As such, the relevant question here is, in the context of the pandemic, what amounts to “contributory negligence”? In other words, what factors determine the standard of care required from the parties in times of COVID-19?

Article 1173 of the Civil Code provides a framework for answering this question. It states that the diligence required of a party is determined by the nature of the obligation and the circumstances of the persons, time, and place.⁶³ In the context of the coronavirus pandemic, several government agencies (including the Inter-Agency Task Force for the Management of Emerging Infectious Diseases or “IATF-EID”) have issued and implemented several health- and safety-related guidelines. While some of these rules apply throughout the pandemic, others depend on the tier of “community quarantine.” The most relevant of these guidelines is the IATF Omnibus Guidelines on the Implementation of Community Quarantine,⁶⁴ which is summarized below.

⁶¹ *Sicam*, 529 SCRA 443. (Emphasis supplied.)

⁶² *See* DTI Mem. Circ. No. 30-20 (2020). *See also* PhilHealth Circ. No. 7-20 (2020).

⁶³ CIVIL CODE, art. 1173.

⁶⁴ Inter-Agency Task Force for the Management of Emerging Infectious Diseases (IATF-EID) Omnibus Guidelines on the Implementation of Community Quarantine [hereinafter “IATF Guidelines”] (2020).

When required	Guidelines
Enhanced Community Quarantine (“ECQ”) and Modified Enhanced Community Quarantine (“MECQ”)	<ul style="list-style-type: none"> • Minimum public health standards⁶⁵ • Strict home quarantine,⁶⁶ restrictions on travel for specified groups of people (e.g. persons with health risks and pregnant women)⁶⁷ • Restrictions in the operations of non-essential businesses⁶⁸ • Suspension of face-to-face classes⁶⁹ • Suspension of public transportation⁷⁰ • Prohibition on mass gatherings⁷¹

⁶⁵ § 1.11. This refers to “guidelines set by the DOH under Administrative Order No. 2020-0015, as well as sector-relevant guidelines issued by national government agencies as authorized by the IATF, to aid all sectors in all settings to implement non-pharmaceutical interventions (NPI), which refer to public health measures that do not involve vaccines, medications or other pharmaceutical interventions, which individuals and communities can carry out in order to reduce transmission rates, contact rates, and the duration of infectiousness of individuals in the population to mitigate COVID-19. For this purpose, the Department of Tourism and Department of Public Works and Highways are recognized as the sector-relevant agencies with respect to tourism and construction, respectively.”

⁶⁶ §§ 2.2 & 3.2.

⁶⁷ §§ 2.3 & 3.3.

⁶⁸ §§ 2.4, 2.9, 3.4, 3.5, 3.8, 3.13 & 3.15. This operates in a sliding scale, with localities under ECQ having the most restrictions, and those under MGCQ having the least.

⁶⁹ §§ 2.11 & 3.10.

⁷⁰ §§ 2.12 & 3.11.

⁷¹ §§ 2.10 & 3.9.

<p>General Community Quarantine (“GCQ”) and Modified General Community Quarantine (“MGCQ”)</p>	<ul style="list-style-type: none"> • Minimum public health standards⁷² • Restrictions on travel for leisure purposes,⁷³ restrictions on travel for specified groups of people (e.g. persons with health risks and pregnant women)⁷⁴ • Restrictions in the operations of non-essential businesses⁷⁵ • Suspension of face-to-face classes during GCQ,⁷⁶ and limited face-to-face classes during MGCQ⁷⁷ • Operation of public transportation at a “reduced operational and vehicle capacity” during GCQ,⁷⁸ at the “capacity in accordance with guidelines issued by the [Department of Transportation]” during MGCQ⁷⁹ • Prohibition on mass gatherings⁸⁰
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TABLE 1. Summary of the IATF Omnibus Guidelines on the Implementation of Community Quarantine.

While violating these guidelines does not give rise to an independent cause of action, these may nevertheless be used in determining whether a party is guilty of contributory negligence. If the defendant proves by a preponderance of evidence that the plaintiff violated any of these guidelines,

⁷² §§ 4.1 & 5.1.

⁷³ §§ 4.2 & 5.2.

⁷⁴ §§ 4.3 & 5.3.

⁷⁵ §§ 4.6, 4.7, 4.9, 4.10 & 5.11.

⁷⁶ § 4.11.

⁷⁷ § 5.6.

⁷⁸ § 4.14.

⁷⁹ § 5.8.

⁸⁰ §§ 4.12 & 5.5.

he may mitigate his liability.⁸¹ In fact, if the defendant shows that the proximate cause of the plaintiff's injury is his own negligence (in this case, his own violation of these guidelines), then he or she shall be absolved from his liability altogether.⁸²

Additionally, these very guidelines may be used as grounds to file an independent suit for torts and/or quasi-delict under Articles 20 and 2176 of the Civil Code.

IV. CONCLUSION

It bears repeating that the existence of a fortuitous event does not necessarily mean the successful invocation of the fortuitous event defense.

Article 1174 of the Civil Code and jurisprudence laid down the four elements needed to apply the defense of fortuitous event. Nevertheless, the determination of the availability of the fortuitous event defense is not as easy as checking four boxes. This Essay raised different issues in treating the COVID-19 pandemic as a fortuitous event. We highlight the importance of determining the acts that constitute the fortuitous event, the foreseeability of the pandemic, and contributory negligence in light of the pandemic.

Several commentaries have attempted to answer whether the COVID-19 pandemic can be classified as a fortuitous event.⁸³ However, as raised in this Essay, treating COVID-19 as a singular event for the purposes of the fortuitous event defense may be misleading and erroneous. To consider COVID-19 as a singular event—regardless of other factual circumstances—amounts to ignoring the nuances and issues involved. Other factors, such as the government policies on community quarantine, social distancing measures, and operation of businesses, are crucial in determining the success in invoking this defense.

⁸¹ See CIVIL CODE, art. 2179. See also *Brunty*, 506 SCRA 685.

⁸² Art. 2179.

⁸³ See, e.g., Baker McKenzie, *COVID-19 and Force Majeure: Managing Contract Crisis in the Philippines*, BAKER MCKENZIE WEBSITE, Mar. 20, 2020, at <https://www.bakermckenzie.com/en/insight/publications/2020/03/covid19-force-majeure-ph>; Zyra Montefolca, *COVID-19 as a Fortuitous Event and Its Implications on Contractual Obligations*, ACCRALAW WEBSITE, Apr. 14, 2020, at <https://accralaw.com/covid-19-as-a-fortuitous-event-and-its-implications-on-contractual-obligations>; Jeffrey Neuburger & Jordan Horowitz, *The Coronavirus and Force Majeure Clauses*, THE NATIONAL LAW REVIEW WEBSITE, Mar. 2, 2020, at <https://www.natlawreview.com/article/coronavirus-and-force-majeure-clauses>

As argued, the fortuitous event should not be limited to the pandemic itself, but rather the response of the government to this pandemic. It is important to frame the fortuitous event properly because the determination of the other elements, e.g. foreseeability and contributory negligence, would depend on what the fortuitous event is. Among others, the location of the parties would also play a vital role in determining whether the fortuitous event defense is applicable. Different locations are under different community quarantine guidelines; the experience of contracting parties in Metro Manila is different from the experience of parties in Batanes.

In conclusion, invoking the defense of fortuitous event requires a case-to-case assessment of the factual circumstances raised in this Essay. Notwithstanding the sheer scale and impact of the COVID-19 pandemic, one size does not fit all.

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