



**British Institute of  
International and  
Comparative Law**

## **“Breathing space”**

Concept Note 2 on the effect of the 2020  
pandemic on commercial contracts  
September 2020 Update



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## Introduction

1. In his comments on the 2020 COVID-19 crisis, Mario Draghi has described the risk of a “plethora of defaults” leaving irreversible damage<sup>1</sup>. The challenge, he said, is to prevent the recession morphing into a deep depression. But the opportunity is there to meet that challenge, and see global activity gradually recovering towards the end of the year/beginning of 2021, as social distancing and other measures such as masks bring down the infection rate, aided by the massive liquidity provided by the macroeconomic policies that have been put in place in many countries. As the IMF’s policy tracker shows, a large number of such measures have been deployed at the fiscal and monetary level<sup>2</sup>.
2. There are a vast number of legal measures that have been taken to mitigate the societal effect of the pandemic. At the global level, steps are in place to relieve the debt burden on the poorest countries under the G-20’s April 2020 Debt Service Suspension Initiative<sup>3</sup>. There are multiple measures taken in domestic law giving relief particularly to SMEs and individuals. Some States have provided for moratoria and other protections in relation to (e.g.) rent<sup>4</sup>, and amendments to insolvency law are also in force in various jurisdictions<sup>5</sup>. A recent example is the UK Insolvency Act<sup>6</sup> providing for a new free-standing moratorium and new restructuring plan, preventing the enforcement of certain contractual insolvency related termination clauses and temporarily suspending the law on wrongful trading. In some jurisdictions, broader measures have been introduced to give a “breathing space”, offering temporary relief to specified businesses and individuals unable to fulfil their contractual obligations because of COVID-19<sup>7</sup>. In general, there is a question as to how the courts of one country will treat forbearance measures introduced by another<sup>8</sup>.

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<sup>1</sup> Financial Times, March 25, 2020: <https://www.ft.com/content/c6d2de3a-6ec5-11ea-89df-41bea055720b>.

<sup>2</sup> <https://www.imf.org/en/Topics/imf-and-COVID19/Policy-Responses-to-COVID-19>: Pandemic Crisis and Financial Stability, ed Gortsos and Ringe, European Banking Institute Working Paper, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3607930](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3607930).

<sup>3</sup> <https://www.worldbank.org/en/topic/debt/brief/covid-19-debt-service-suspension-initiative>. See also Born Out of Necessity: A Debt Standstill for COVID-19, CEPR, <https://cepr.org/content/new-cepr-policy-insight-born-out-necessity-debt-standstill-COVID-19>.

<sup>4</sup> E.g. On 7 April, New York State’s moratorium on COVID-related residential or commercial evictions was extended for an additional 60 days until August 20, 2020. On 30 June 2020, the New York Tenant Safe Harbor Act was enacted giving further protections. The judiciary itself has also taken measures, including a stay on possession proceedings in England & Wales until 23 August 2020 : <https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part51/practice-direction-51z-stay-of-possession-proceedings.-coronavirus>. See *Arkin v Marshall* [2020] EWCA Civ 620. Appeal proceedings are also stayed: *Hackney LBC v Okoro* [2020] EWCA Civ 681.

<sup>5</sup> See, e.g., the Swiss emergency legislation passed on 16 April 2020 (*Verordnung über insolvenzrechtliche Massnahmen zur Bewältigung der Coronakrise (COVID-19-Verordnung Insolvenzrecht)*, <https://www.admin.ch/opc/de/official-compilation/2020/1233.pdf>).

<sup>6</sup> Corporate Insolvency and Governance Act 2020.

<sup>7</sup> See, e.g., the German emergency legislation passed on 27 March 2020 (*Gesetz zur Abmilderung der Folgen der COVID-19-Pandemie im Zivil-, Insolvenz- und Strafverfahrensrecht*, BGBl. 2020 I, p. 569; [https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/Bgbl\\_Corona-Pandemie.pdf?\\_\\_blob=publicationFile&v=1](https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/Bgbl_Corona-Pandemie.pdf?__blob=publicationFile&v=1)); and the French emergency legislation (*LOI n° 2020-290 du 23 mars 2020 d'urgence pour faire face à l'épidémie de COVID-19* (1), JORF n°0072 du 24 mars 2020; [https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000041746313&dateTexte=&categorieLien=i\\_d](https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000041746313&dateTexte=&categorieLien=i_d)); COVID-19 related decrees can be consulted here: <https://www.vie-publique.fr/dossier/273985-les-ordonnances-COVID-19-mars-et-avril-2020-dossier>). In Asia, see the Singapore COVID-19 (Temporary Measures) Act 2020 <https://sso.agc.gov.sg/Acts-Supp/14-2020/Published/20200407?DocDate=20200407>.

<sup>8</sup> E.g. under Article 9(3) Rome Regulation, or the Act of State Doctrine. As to private sector financings, see Carlo de Vito Piscicelli, James Norris-Jones, Carlo Santoro, *COVID-19 relief measures and international financings: the law of unintended consequences?*, (2020) 4 JIBFL 267.

3. Concept Note 2 concerns the response at the private law level<sup>9</sup>, where the challenges are likely to be equally great. It focuses on commercial contracts, particularly international contracts, which are major facilitators of global commerce. The same considerations do not necessarily apply to all such contracts, such as market contracts, financial contracts<sup>10</sup> and those which reflect the markets (such as derivatives), and contracts where the pandemic risk is already allocated. Banks are under pressure to continue to provide credit to the real economy despite the prospect of falling profits, increased credit risk and higher levels of borrower defaults.<sup>11</sup> Financial supervisors nationally and internationally are best placed in this respect to assess the risk<sup>12</sup>.
4. Concept Note 2 was published in May 2020 and revised in September 2020. It expands on Concept Note 1<sup>13</sup> published on 27 April 2020<sup>14</sup>, and is intended to move forward a discussion of the need for the law to deal constructively with the effects of the pandemic, to facilitate global recovery in the interests of the whole community, and to avoid a deluge of disputes impeding that recovery. A further step in BIICL's breathing space project will be the publication of Concept Note 3 in September 2020 with practical guidelines for businesses which might encourage a more conciliatory approach to disputes that may arise, and which seek to avoid and/or minimise protracted legal disputes, without prejudicing or altering parties' legal rights.
5. Draghi's reference to a "plethora of defaults" was based on an economist's perspective, but from a legal perspective, it is easy to see how damage can happen on scale as parties trigger default clauses, and counterparties maintain that they are excused from performance. It can happen in many different ways under contracts with different governing laws. It can be mitigated by agreement, by mediation, and other forms of alternative dispute resolution – which as this paper emphasises must be encouraged and will have a crucial role<sup>15</sup> – minimising the risk of a deluge of litigation and arbitration placing a strain on the system of international dispute resolution (and domestic courts), reducing the prospect of more constructive solutions and increasing the prospect of uncertainty of outcome.
6. That uncertainty of outcome comes in part from the novel nature of the 2020 pandemic. It differs from major events to which the law has had to respond in the past, such as the two world wars, the 1918 flu pandemic, or most recently, the global financial crisis of 2007-8. The GFC was a crisis of the financial system, and this enabled its containment through support given to banks and other institutions. The 2020 pandemic has affected the whole gamut of global commerce, from large businesses to small – potentially, little is unaffected.

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<sup>9</sup> For an analogy, see Stephen Baister and John Tribe, *The suspension of debt obligations and bankruptcy laws during World War I and World War II: lessons from private law during the corona pandemic from previous national crises*, *Insol. Int.* 2020, 33(3), 67-77.

<sup>10</sup> Such as bonds and guarantees: though not a pandemic case, see *Leonardo SpA v Doha Bank Assurance Company LLC* [2020] QIC (A) 1 where the documentary nature of the transaction is emphasised..

<sup>11</sup> Benedict James and Elli Karaindrou, *COVID-19 measures from a lender's Perspective*, (2020) 7 JIBFL 460.

<sup>12</sup> E.g. PRA Statement re guidance on the application of regulatory capital and IFRS 9 requirements to payment holidays granted or extended to address the challenges of Covid-19, 22 May 2020: <https://www.bankofengland.co.uk/prudential-regulation/publication/2020/statement-on-application-regulatory-capital-ifrs9>

<sup>13</sup> Call to give companies 'breathing space' on coronavirus litigation, *Financial Times*, 26 April 2020, <https://on.ft.com/3cSR9Kt>.

<sup>14</sup> At [https://www.biicl.org/documents/10306\\_breathing\\_space\\_concept\\_note.pdf](https://www.biicl.org/documents/10306_breathing_space_concept_note.pdf). Press release at [https://www.biicl.org/documents/10302\\_concept\\_note\\_270420.pdf](https://www.biicl.org/documents/10302_concept_note_270420.pdf). We greatly appreciate the interest that Concept Note 1 gave rise to, and gratefully acknowledge the many comments received since.

<sup>15</sup> See Lord Phillips of Worth Matravers, former President of the UK Supreme Court, quoted in the press release linked in the preceding footnote.

7. The effects of the pandemic are magnified by supply chains which over the past three decades have become increasingly global<sup>16</sup>. This has implications for disputes as well, since the disruption of a single contract can disrupt the entire chain. One dispute can set off a chain reaction of disputes.
8. The focus of Concept Note 2 is, therefore, on contractual disputes between commercial parties arising out of the pandemic. Some similar issues are raised by claims made against employers, public authorities, etc, where, as has been said, vast potential liabilities greatly exceed the ability of many defendants to pay them: once the immediate health issues recede, fear of costly suits alone could hamper the recovery<sup>17</sup>.
9. It need not be like this. Adherence to the principle of legal certainty is fundamental<sup>18</sup>, but within the principle of legal certainty, new thinking is going to be required if the law is to play its full part in getting international commerce back on its feet. Speaking to the BBC, Lord Neuberger, former President of the UK Supreme Court, introducing this project, said that “the legal world has a duty to the rest of the world to prepare itself”.
10. In similar vein, the UK Cabinet Office has issued and updated guidance on “responsible contractual behaviour” in the context of the pandemic, urging parties to be “responsible and fair” when (among other things) requesting or giving relief for impaired performance, requesting or allowing extensions of time of performance, and making or responding to force majeure, frustration, change in law, and other claims.<sup>19</sup>
11. There have been other interventions to the same effect, including by authorities in some civil law jurisdictions. China plays a particular role in the global supply chain – CCPIT advises Chinese enterprises faced with force majeure claims by foreign enterprises first to assess the contractual position, and then to “conduct friendly negotiations and seek alternative solutions on the basis of mutual understanding”.<sup>20</sup>
12. Concept Note 2 considers the issues under two heads both of which are potentially important:
  - (1) Use of dispute resolution mechanisms to encourage negotiated solutions and ADR, while courts decide disputes that cannot be settled as expeditiously as possible, scaling up the use of technology, and avoiding backlogs.

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<sup>16</sup> MIT Sloan Management Review, March 19, 2020, <https://sloanreview.mit.edu/article/is-it-time-to-rethink-globalized-supply-chains/>.

<sup>17</sup> *Who pays the bill? The coming deluge of pandemic litigation*, Financial Times, May 5, 2020, <https://www.ft.com/content/48d230ae-8df5-11ea-9e12-0d4655dbd44f>.

<sup>18</sup> In the commercial context, this is often referred to as commercial certainty. A classic statement by Lord Mansfield in *Vallejo v Wheeler* (1774) 1 Cowp 143 at 153 is that: “In all mercantile transactions the great object should be certainty: and therefore, it is of more consequence that a rule be certain, than whether the rule is established one way or the other”. His rationale was that this enabled commercial people to know where they stood in carrying on business.

<sup>19</sup> Cabinet Office, Guidance on responsible contractual behaviour in the performance and enforcement of contracts impacted by the COVID-19 emergency (it does not apply in the devolved administrations): [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/883737/ COVID-19\\_and\\_Responsible\\_Contractual\\_Behaviour\\_web\\_final\\_7\\_May.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/883737/COVID-19_and_Responsible_Contractual_Behaviour_web_final_7_May.pdf). Updated as of 30 June 2020 ([https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/899175/ Update\\_-\\_Covid-19\\_and\\_Responsible\\_Contractual\\_Behaviour\\_-\\_30\\_June\\_final\\_for\\_web.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/899175/Update_-_Covid-19_and_Responsible_Contractual_Behaviour_-_30_June_final_for_web.pdf))

<sup>20</sup> Advice issued in the context of the issuing of force majeure certificates by CCPIT (China Council for the Promotion of International Trade) [http://en.ccpit.org/info/info\\_40288117668b3d9b0171c8e0ef5408a2.html](http://en.ccpit.org/info/info_40288117668b3d9b0171c8e0ef5408a2.html).



- (2) Application of existing legal doctrine to the changed conditions created by the pandemic, while recognising that outcomes are likely to be specific to particular types of contract, and dependent on the precise facts.

## Dispute resolution mechanisms

13. Some types of contract, for example some financial contracts such as derivatives and construction contracts, contain detailed dispute resolution provisions sometimes including assessment of loss. Others simply refer disputes to arbitration or to a court. Some include express reference to good faith negotiation in the event of disputes. Subject to a consensual adjustment, the requirements of contractual dispute resolution provisions must be followed by the parties<sup>21</sup>.
14. Where a liability to pay has accrued, as in the case of a loan, or a sales contract where the goods have been delivered, ready access to the courts is important. It can be seen as assisting the negotiation (where sensible) of time to pay, because unless the creditor can if necessary achieve and enforce a speedy judgment, using (in the common law system) summary procedures, the risk is simply shifted from debtor to creditor. Subject to any contractual or legislative provisions to the contrary, at common law the fact that a debtor is unable to pay because of the effect of a pandemic on its business is, in itself, unlikely to provide a defence. A business in these circumstances might however be able to avail itself of the new restructuring plan (in the UK) which includes a cross-class cramdown, and other similar restructuring devices which are part of the law in many countries (e.g. Chapter 11 in the US, and under legislation in member states implementing the EU Restructuring Directive).
15. Also, there are some disputes which require authoritative determination by the courts, which determination should enable other similar disputes to be resolved without further recourse. The potential liabilities attendant on claims on business interruption insurance is an example.<sup>22</sup> The hearing in the Financial List of the High Court in London concluded on 30 July 2020 with judgment given on 15 September<sup>23</sup>. The effect of the court's consideration may go beyond the insurance field, with issues such as the nature and effect of governmental steps being equally relevant to force majeure. There are other disputes which may not be susceptible to settlement, fraud cases being an example.
16. Generally, however, the facilitation of the settlement of disputes (or particular types of dispute such as employment and consumer disputes) is established policy in many legal systems. It is sometimes obligatory, as in Germany<sup>24</sup>, or in Switzerland where, as a general rule (to which there are several exceptions) the Federal Civil Procedure Code requires the parties to participate in a conciliation procedure before a claim can be submitted to a court<sup>25</sup>. In late 2019, the French legislator made conciliation or mediation

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<sup>21</sup> A point made by The Construction Leadership Council, which is the UK Government's primary interface with the construction and infrastructure sector. However, its 7 May 2020 COVID-19 Contractual Best Practice Guidance also states that: "... notwithstanding the contractual provisions, Employers and Suppliers should seek to take a collaborative approach towards successful project delivery and discuss whether an extension of time can be granted and any additional costs shared in any event ...".

<sup>22</sup> See, for instance, the test case *The Financial Conduct Authority v Arch and Others* [2020] EWHC 2448 (Comm). For further information see <https://www.fca.org.uk/firms/business-interruption-insurance#latest-updates>.

<sup>23</sup> <https://blog.macfarlanes.com/post/102gcj8/high-court-hearing-of-business-interruption-test-case-concludes>

<sup>24</sup> § 278 German Civil Procedure Code, <https://dejure.org/gesetze/ZPO/278.html>.

<sup>25</sup> Art. 197 ff. Swiss Civil Procedure Code, <https://www.admin.ch/opc/de/classified-compilation/20061121/index.html>.

mandatory in certain cases, in particular for small claims of a value of less than 5000 €. <sup>26</sup> In Korea, the Judicial Conciliation of Civil Disputes Act contains detailed provisions in respect of conciliation <sup>27</sup>.

17. In commercial cases, English procedure encourages but does not require mediation <sup>28</sup>, unless it is provided for in the contract. The Commercial Court Guide at para G1.1 while “emphasising its primary role as a forum for deciding commercial cases, ... encourages parties to consider the use of ADR (such as ... mediation and conciliation) ...” <sup>29</sup>. This is particularly appropriate at the Case Management Conference, before costs have built up.

## Encouraging negotiated solutions and ADR in the COVID-19 situation

18. It is said that there has been a something of a shift towards mediation and conciliation in international commercial dispute resolution in recent years <sup>30</sup>. As well as a readiness to compromise, this may have to do with the perceived expense and time of arbitration (and court proceedings), the support of international bodies <sup>31</sup>, and the accumulation of expertise in law firms and elsewhere.
19. Because of the depth of the crisis, and the need to reduce obstacles to recovery to the minimum, it is important and probably likely now that this process is supported by the major stakeholders, and accelerated to minimise disruptions to trade and global supply chains.
20. There are numerous existing ADR tools and more may come particularly perhaps in seeking to link dispute resolution techniques (as is the aspiration of the China International Commercial Court <sup>32</sup>). If proceedings are started, the process should ideally take place at an early stage, before the parties’ positions become entrenched, and costs mount. Some of these tools only acquire binding force if an agreement is reached, others are speedy procedures resulting in binding outcomes:
  - (1) **Negotiation**: Most obviously, parties and their legal advisers can come together and seek to resolve their dispute at any stage in the process, whether through written

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<sup>26</sup> Article 750-1 of the French Code of Civil Procedure, [https://www.legifrance.gouv.fr/affichCodeArticle.do;jsessionid=1AAF370AAC46AF0EB930F7A6A580ECB4.tplgfr41s\\_3?idArticle=LEGIARTI000039501708&cidTexte=LEGITEXT000006070716&dateTexte=20200516&categorieLien=id&oldAction=&nbResultRech=](https://www.legifrance.gouv.fr/affichCodeArticle.do;jsessionid=1AAF370AAC46AF0EB930F7A6A580ECB4.tplgfr41s_3?idArticle=LEGIARTI000039501708&cidTexte=LEGITEXT000006070716&dateTexte=20200516&categorieLien=id&oldAction=&nbResultRech=).

<sup>27</sup> Nam-Geun Yoon, *Civil Procedure in South Korea*, to be published by Wolters Kluwer, 2020.

<sup>28</sup> This has seen as a general principle: *Halsey v. Milton Keynes General NHS Trust* [2004] EWCA Civ 576. It may now be subject to review: *McParland & Partners Ltd v Whitehead* [2020] EWHC 298 (Ch) at [42]. There may also be costs implications in a party’s refusal to engage in mediation or other ADR tools: see, for instance, *Wales v CBRE and Aviva* [2020] EWHC 1050 (Comm) at [24] *et seq.* Mediation can also be encouraged in other countries, e.g. in Germany (§ 278 a of the German Civil Procedure Code).

<sup>29</sup> The Commercial Court Guide, 10<sup>th</sup> edition, 2017, [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/672422/The\\_Commercial\\_Court\\_Guide\\_new\\_10th\\_Edition\\_07.09.17.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/672422/The_Commercial_Court_Guide_new_10th_Edition_07.09.17.pdf).

<sup>30</sup> *Mediation in International Commercial and Investment Disputes*, Ed Catharine Titi and Katia Fach Gómez, OUP, 2019.

<sup>31</sup> The UN Convention on International Settlement Agreements Resulting from Mediation (“Singapore Convention on Mediation”) was the work of the United Nations Commission on International Trade Law (UNCITRAL). It will enter into force on 12 September 2020, six months after the deposit of the third ratification instrument. The three ratifying countries were Singapore, Qatar, and Fiji.

<sup>32</sup> Which is set up to provide “a dispute resolution platform in which mediation, arbitration, and litigation are efficiently linked, thereby creating a “one-stop” international commercial dispute resolution mechanism”: Article 11 of the Provisions of the Supreme People’s Court <http://cicc.court.gov.cn/html/1/219/199/201/1574.html>.

correspondence or meeting (likely remotely for the time being). Unsurprisingly, as shown elsewhere in this Concept Note, in the 2020 pandemic authorities in various countries have introduced measures or guidance urging parties to act “in a spirit of cooperation” and to behave fairly and responsibly when requesting or responding to requests to amend contractual obligations.<sup>33</sup> In some jurisdictions the pandemic may trigger statutory duties to renegotiate contracts, based on *imprévision* or a fundamental change of circumstances.<sup>34</sup> For smaller contracts, the CIArb/CEDR Pandemic Business Dispute Resolution Service<sup>35</sup> provides a Facilitated Contract Negotiation service, which could be a good solution where parties cannot fund costly legal advice.

- (2) **Mediation:** There are many mediation bodies and structures, but mediation is inherently a flexible ADR process, in which a third party neutral assists the parties in negotiating a settlement of their dispute without resolving the case on its merits. Whilst a typical mediation may rely on face-to-face meetings (whether between the mediator and individual parties, or jointly between all parties), in the current pandemic there is technology available to facilitate online and remote mediation, whether by video or over telephone.<sup>36</sup> The differing approaches internationally as to whether parties can be compelled to mediate are noted above. The Singapore Convention (see above) will provide for the enforcement of international commercial settlement agreements resulting from mediation when it enters into force.<sup>37</sup> At the smaller contract level, the London Chamber of Arbitration and Mediation launched in June 2020 expedited arbitration services using fast-track, fixed-fees and documents-only processes as well as expeditious mediation with blockchain technology-based document management<sup>38</sup>.
- (3) **Med-arb:** Med-Arb (or Arb-Med, depending on the order in which the processes are pursued by commercial parties) is a hybrid mediation-arbitration process, in which the same neutral third person acts as both mediator to help facilitate a settlement negotiation between the parties, and as arbitrator to determine the dispute on the merits and issue a final and binding arbitral award. The practice may be more widespread in some jurisdictions than others, and the structure and level of formality will inevitably vary as between the individual mediator-arbitrator and as a matter of local custom.<sup>39</sup> The process of med-arb has been specifically recognised in the arbitration law of some jurisdictions, which recognise arbitral tribunals’ authority to conduct a conciliation during arbitration and issue a binding arbitral award that gives effect to any settlement agreement reached.<sup>40</sup>
- (4) **ENE:** In early neutral evaluation, a neutral third party is typically appointed to provide the parties with an objective, non-binding view of the strengths and weaknesses of their

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<sup>33</sup> UK Cabinet Office Guidance cited above. Cooperation duties have also been introduced by national emergency legislation. See, as an example, the German Art. 240 § 3(2) and (4) EGBGB, <https://dejure.org/gesetze/EGBGB/240.html>, which encourage the renegotiation of contractual terms in consumer credit contracts.

<sup>34</sup> See, e.g., Article 1195 of the French Civil Code, § 313 of the German Civil Code.

<sup>35</sup> <https://www.cedr.com/commercial/mediationschemes/pbdrs/>.

<sup>36</sup> Civil Mediation Council, Guidance – Online & Remote Mediation: <https://civilmediation.org/wp-content/uploads/2020/03/CMC-Guidance-on-Online-and-Remote-Mediation-31.3.20.pdf>.

<sup>37</sup> Procedures in the Saudi Centre for Commercial Arbitration COVID-19 Emergency Mediation Program enables the SCCA to convert settlements into enforceable titles (bonds): <https://sadr.org/news-details/70?lang=en>.

<sup>38</sup> See <https://lcam.org.uk/accelerated-arbitration/#rules> and [https://www.londonchamber.co.uk/news/press-releases/london-chamber-of-arbitration-and-mediation-\(lcam\)/](https://www.londonchamber.co.uk/news/press-releases/london-chamber-of-arbitration-and-mediation-(lcam)/)

<sup>39</sup> See, e.g., the Hong Kong Court of Appeal’s decision concerning a med-arb conducted over dinner in Mainland China in *Gao Haiyan v Keeneye Holdings Ltd* CACV 79/2011.

<sup>40</sup> Article 51 of the Arbitration Law of China. See further Shahla F Ali, *The Legal Framework for Med-Arb Developments in China: Recent Cases, Institutional Rules and Opportunities*, *Dispute Resolution International*, DRI 119. PP. 119-132, 2016.



respective case. In England, such a process is analogous to Financial Dispute Resolution hearings commonly used to negotiate financial settlements in the Family Courts (whereby a without prejudice hearing is conducted by a Family Judge who provides an indicative view of what they would have ordered at a subsequent hearing). In appropriate cases the Guides for the Commercial Court and Technology and Construction Court recognise that it may be advantageous to undertake ENE before a High Court Judge at an early stage of proceedings.<sup>41</sup> In practice, this is presently infrequent, though this may now change.

- (5) **Other examples:** There are many examples of dispute resolution procedures which are intended to be speedy and authoritative.<sup>42</sup> In the financial field, an example is ISDA's External Review Panel of various Determinations Committees.<sup>43</sup> And there is much room for innovation. Instead of court proceedings, the Singapore COVID-19 (Temporary Measures) Act 2020 provides for resolution of disputes as to "breathing space" by independent assessors issuing binding determinations on the basis of the financial condition of the party seeking relief and achieving an outcome that is "just and equitable".<sup>44</sup> Parties may not have legal representation before the assessor, and no costs orders will be awarded.<sup>45</sup>

## Maintaining court and arbitral processes during the pandemic and thereafter

21. The overall picture seems to be that courts in many countries physically closed during the early stages of the pandemic to prevent the risk of infection, and are subject to a gradual reopening process. In some countries, hearings on-line have been taking place with increasing frequency in court proceedings<sup>46</sup>. The process works most easily for applications, but full trials/hearings are also happening<sup>47</sup>.
22. As regards service, it has been held that the COVID-19 pandemic makes service by email more reliable and safer than attempting to use postal or personal service in a case where the defendant's lawyer's responses made clear that they had received and were fully aware of the contents and nature of the application and accompanying documents<sup>48</sup>.

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<sup>41</sup> The Commercial Court Guide, 10<sup>th</sup> edition, 2017, G2 and The Technology and Construction Court Guide, 2<sup>nd</sup> edition, 2005, 7.5.

<sup>42</sup> An example from history comes from the Great Fire of London of 1666 after which a special Fire Court was set up to deal with property disputes, a verdict usually being given within a day – it is said that otherwise lengthy legal wrangles would have seriously delayed the rebuilding which was so necessary if London was to recover ([https://en.wikipedia.org/wiki/Great\\_Fire\\_of\\_London](https://en.wikipedia.org/wiki/Great_Fire_of_London)).

<sup>43</sup> International Swaps and Derivatives Association. For a full list of requests made to Credit Derivatives Determinations Committee, see: <https://www.cdsdeterminationscommittees.org/>.

<sup>44</sup> COVID-19 (Temporary Measures) Act 2020, s. 13(2). See also the COVID-19 (Temporary Measures) Amendment Act 2020 which introduces a s.13A into the 2020 Act permitting variation or replacement of the first determination if there is a material change in the circumstances and it is just and equitable for the change to be made, and enabling time to pay to be extended.

<sup>45</sup> COVID-19 (Temporary Measures) Act 2020, ss. 14 and 15.

<sup>46</sup> The platforms used include Skype for Business, Cisco's Webex, Zoom, Microsoft Teams and Polycom Real presence. See IBA survey: <https://www.ibanet.org/Document/Default.aspx?DocumentUid=E9A83AEF-6B17-4A54-815F-1C6E0D600163>.

<sup>47</sup> E.g. *NBK v BNYM* [2020] EWHC 916 (Comm).

<sup>48</sup> *HC Trading Malta Ltd v Savannah Cement Ltd* [2020] EWHC 2144 (Comm).

23. In England & Wales, the Lord Chief Justice advised in March 2020 that remote attendance should be the default position for Court hearings<sup>49</sup>, though a number of priority courts remained open for essential face-to-face hearings, and reopening is continuing. This appears to have worked well, and in business and property cases, on-line hearings have enabled the system to continue to function. The Commercial Court continues to support international arbitration – hearings during lockdown include applications to constitute arbitration tribunals where the contractual mechanism has broken down, applications for anti-suit injunctions in support of arbitration agreements, and injunctions to assist in the enforcement of arbitration awards<sup>50</sup>.
24. The position in the New York State Courts as of mid-April 2020 was explained in by Chief Judge Janet DiFiore<sup>51</sup>. The commencement of new nonessential cases was not permitted, and the courts were seeking to take the opportunity to address existing backlog in advance of what is expected to be a “surge of new litigation” once the court system returns to more normal operation.<sup>52</sup> As of August 2020, the courts were gradually reopening. The Federal District courts in New York however accepted new case filings throughout<sup>53</sup>. A particular challenge for the US courts is the jury trial, which extends to civil cases as well as criminal cases. On May 7, 2020, the Governor issued executive order (No. 202.28) extending the tolling of some New York statutes of limitation until June 6, 2020<sup>54</sup>, subsequently extended to 5 August 2020, to 4 September 2020 and then to 4 October 2020<sup>55</sup>.
25. Online hearings<sup>56</sup> present a number of challenges, including technical issues such as electronic documentation which is easy to navigate, sufficient screens and stable connections for all participants. For lawyers and clients and others who expect to work as teams in complex commercial cases, there are separate challenges in dealing with work-at-home rules, social distancing etc. These will ease as the lockdown is lifted and offices and courts reopen. Initial problems with online hearings have generally been resolved, but there are other important issues such as public access to hearings, and proper provision for self-represented litigants which remain problematic<sup>57</sup>. Commercial disputes may be particularly suitable for online hearings, and there are benefits by way of reduced travelling costs. Managing a complex trial with a large amount of evidence requires careful preparation on the technical side for lawyers, witnesses and the tribunal. It should also be recognised that current technology does not perfectly reproduce face-to-face interaction. Protocols for the conduct of online hearings are essential, and becoming increasingly

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<sup>49</sup> Lord Burnett of Maldon, <https://www.judiciary.uk/announcements/coronavirus-update-from-the-lord-chief-justice/>. Announcing the resumption of some criminal jury trials from 18 May 2020, the LCJ said “It is important that the administration of justice continues to function whenever it is possible in an environment which is consistent with the safety of all those involved.”

<sup>50</sup> As of 4 May 2020: <https://www.judiciary.uk/announcements/commercial-court-judges-say-thank-you-for-work-carried-out-during-COVID-19-pandemic/>.

<sup>51</sup> At <http://wowza.nycourts.gov/vod/WowzaPlayer-CJ.php?source=ucs&video=20200413-DiFiore-COVIDUpdate.mp4>. It is regularly updated.

<sup>52</sup> Memorandum from Judge Lawrence K. Marks to all Trial Court Justices and Judges dated 30 April 2020, <https://images.law.com/contrib/content/uploads/documents/389/7593/Memo-04-30-20.pdf>.

<sup>53</sup> Milonas, Flanders, Shlenger, New York State Courts Remain Closed to New Nonessential Actions, updated 8 May 2020, <https://www.pillsburylaw.com/en/news-and-insights/new-york-state-courts-closed-nonessential-actions.html>.

<sup>54</sup> <https://www.governor.ny.gov/news/no-2028-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency>.

<sup>55</sup> See Order 202.60, available at <https://www.governor.ny.gov/news/no-20260-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency>.

<sup>56</sup> See the valuable discussion in Richard Susskind, *Online Courts and the Future of Justice*, OUP, 2019.

<sup>57</sup> This underlines the importance of pro bono assistance during the pandemic. For a May 2020 initiative by the Qatar International Court and Dispute Resolution Centre, see <https://www.qicdrc.gov.qa/legal-bureau/pro-bono>.

common<sup>58</sup>. These issues have been the subject of consideration by the Standing International Forum of Commercial Courts.<sup>59</sup> Overall, online hearings have proved a success.

26. The issue of new proceedings at this point in the pandemic is probably reduced, but there is inevitably the risk of a backlog building up, which could be exacerbated if there is a rush of new cases as the pandemic lifts.
27. Much of the above applies equally to arbitration, albeit some of the challenges may be less pronounced than in court litigation. Given the cross-border nature of many commercial arbitration disputes, most arbitration practitioners are already accustomed to electronic document management systems and communicating electronically or by telephone with tribunals and arbitral institutions.
28. Likewise, case management conferences and other interim hearings are already routinely conducted remotely. Such practice is specifically reflected in the ICC Rules of Arbitration 2017, Article 24(4) of which recognizes that “case management conferences may be conducted through a meeting in person, by video conference, telephone or similar means of communication”, specifying no order of preference as between the formats.<sup>60</sup> Similarly, Article 19.2 of the LCIA Rules 2014 provided that “the Arbitral Tribunal shall have the fullest authority under the Arbitration Agreement to establish the conduct of a hearing, including its date, form, content, procedure, time-limits and geographical place. As to form, a hearing may take place by video or telephone conference or in person (or a combination of all three).”<sup>61</sup> As the LCIA recently explained upon the publication of its 2020 Rules (which will take effect from 1 October 2020), to reflect the impact of the pandemic on the conduct of arbitration the updated rules (1) make explicit that (under the new Article 19.2) “a hearing may take place in person, or virtually by conference call, videoconference or using other communications technology with participants in one or more geographical places (or in a combined form)”<sup>62</sup>, and (2) confirm “the primacy of electronic communication”.<sup>63</sup>
29. Complications may arise where parties are at odds as to whether an in-person hearing is required, particularly for evidentiary hearings or where delay or uncertainty caused by the impracticality of holding a hearing might be in the interest of one party but not the other. Although there is general flexibility in moving geographical venues for arbitration,<sup>64</sup> such that it remains theoretically possible to order for in-person hearings to take place in less COVID-19-affected jurisdictions, the expense involved and global travel restrictions mean that this is unlikely to be a practical solution for most disputes at the present time.

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<sup>58</sup> E.g., Hong Kong SAR, China: Guidance Note for Remote Hearings for Civil Business in the High Court (Phase 1 – Video-Conferencing Facilities). [2020] HKCFI 614. For a more recent protocol, see the COMBAR Guidance on remote hearings, <https://www.combar.com/wp-content/uploads/2020/06/COMBAR-Guidance-Note-on-Remote-Hearings-2nd-edition-23-June-2020-002.pdf>

<sup>59</sup> <https://sifocc.org/>.

<sup>60</sup> ICC Rules of Arbitration 2017, <https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/>. Appendix IV (f) also refers to “Using telephone or video conferencing for procedural and other hearings where attendance in person is not essential and use of IT that enables online communication among the parties, the arbitral tribunal and the Secretariat of the Court” as a helpful case management technique.

<sup>61</sup> LCIA Arbitration Rules 2014, [https://www.lcia.org/Dispute\\_Resolution\\_Services/lcia-arbitration-rules-2014.aspx](https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2014.aspx).

<sup>62</sup> Updates to the LCIA Arbitration Rules and the LCIA Mediation Rules (2020), <https://www.lcia.org/lcia-rules-update-2020.aspx>

<sup>63</sup> E.g., Requests for Arbitration (and Responses thereto) are now required to be submitted only in electronic form unless with the LCIA Registrar’s prior approval (Article 4.1), whereas parties under the previous Rules could elect between paper or electronic form. The Rules also now confirm that awards may be signed electronically and/or in counterparts (Article 26.2).

<sup>64</sup> E.g., LCIA Arbitration Rules, Article 16.3.

30. Experience suggests that most arbitration practitioners are now adjusting to conducting fully virtual or online evidentiary hearings, which can present a range of practical and legal considerations. Examples include seeking to maintain the integrity of witness testimony by arranging for rotating cameras operated by the Tribunal, which can capture a witness' surroundings in order to ensure that a witness is alone and/or assisted only by those approved; or splitting hearings in multiple tranches to accommodate for tribunals, counsel, and witnesses participating from different time zones. Where such practical challenges are not resolved (e.g., if one party were to suffer from poor internet connections, such as their video or audio quality were substantially affected), due process considerations could arise, which may give rise potential challenges to the eventual arbitral award.<sup>65</sup>
31. To this end, in many jurisdictions and arbitral institutions, tribunals will be subject to a duty to provide parties with a reasonable opportunity to put their case and deal with that of their opponent, which duty must be counterbalanced against their duty to conduct the arbitration in a way which avoids unnecessary delay or expense.<sup>66</sup> Ultimately, such issues will be a matter for case management, on which tribunals are generally conferred wide discretion.<sup>67</sup>
32. As in court litigation, arbitral institutions have issued specific COVID-19 guidance, which (among other matters) encourage hearings to be conducted virtually and offer guidance for protocols to be adopted for the same.<sup>68</sup> The Chartered Institute of Arbitrators (CIARB) has also issued a guidance note on remote proceedings.<sup>69</sup>
33. While conducting fully virtual evidentiary hearings will invariably require adjustment by practitioners, arbitrators, and expert witnesses, experience suggests that many remote arbitration hearings can be conducted effectively.<sup>70</sup> Notably, the ICC Court has issued guidance commenting that the COVID-19 pandemic ought not necessarily delay tribunals' deliberations and their drafting of awards, and reiterating that the relevant time limits for the submission of draft awards to the ICC Court (as well as its policy of reducing arbitrator fees for unjustified delays) remain in place.<sup>71</sup>
34. The overall picture, from an arbitration perspective, therefore, seems to be that the disruption caused by COVID-19 can be minimised through use of technology and careful case management tools. However, other factors specific to the pandemic may very likely cause delay in many cases. These include limited ability of management to devote time to the dispute, financial pressure on parties, disruption to the work of legal teams and

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<sup>65</sup> See, e.g., A. Lo, Virtual Hearings and Alternative Arbitral Procedures in the COVID-19 Era: Efficiency, Due Process, and Other Considerations, *Contemporary Asia Arbitration Journal*, Vol. 13, No. 1, pp. 85-98, May 2020.

<sup>66</sup> See, e.g., Arbitration Act 1996, s. 33(1)(a) and (b), Article 14.4(i) and (ii) of the LCIA Rules 2014, and Article 22(2) and (4) of the ICC Rules of Arbitration 2017.

<sup>67</sup> E.g., Article 14.5 of the LCIA Rules 2014 and Article 22(2) of the ICC Rules of Arbitration 2017. See further below under summary procedures.

<sup>68</sup> E.g., ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic, <https://iccwbo.org/content/uploads/sites/3/2020/04/guidance-note-possible-measures-mitigating-effects-COVID-19-english.pdf>, and COVID-19: Information and Guidance in SCC Arbitrations, <https://sccinstitute.com/about-the-scc/news/2020/COVID-19-information-and-guidance-in-scc-arbitrations/>.

<sup>69</sup> Guidance Note on Remote Dispute Resolution Proceedings, <https://www.ciarb.org/media/8967/remote-hearings-guidance-note.pdf>

<sup>70</sup> See, e.g., comments by the President of the LCIA Court, Paula Hodges QC, regarding the 2020 Vis East Moot conducted virtually, <https://www.lcia.org/News/virtual-mooting-and-recalibrating-for-the-future.aspx>. See also comments by Gary Born, president of the SIAC Court, regarding the pandemic ([https://www.siac.org.sg/images/stories/press\\_release/2020/%5bOpen%20Letter%20from%20SIAC%20Court%20President%5d%20Arbitration%20at%20SIAC%20during%20%20COVID-19.pdf](https://www.siac.org.sg/images/stories/press_release/2020/%5bOpen%20Letter%20from%20SIAC%20Court%20President%5d%20Arbitration%20at%20SIAC%20during%20%20COVID-19.pdf)).

<sup>71</sup> ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic, <https://iccwbo.org/content/uploads/sites/3/2020/04/guidance-note-possible-measures-mitigating-effects-COVID-19-english.pdf>, paragraph 5.

others and (so long as it applies) the need to maintain social distancing when working from offices, and difficulties in accessing documentary and other evidence.

## Application of existing legal doctrine to the changed conditions created by the pandemic

35. The principles of law that apply to the effect of unanticipated events on contractual performance are well established in both common law and civil law. However, they can be difficult to apply in certain cases, and the 2020 pandemic creates particular difficulties because of its novelty and global effect.
36. The common law (English law being widely used in international commerce) has traditionally taken a strict approach to the principle of *pacta sunt servanda* – commercial agreements should be interpreted and enforced in accordance with the terms of the bargain agreed by the parties. This has generally worked well so far, and consistency in approach is fundamental to ensuring legal certainty. Still a discussion of the present crisis has to recognise that it does not have an easy analogy in past case law.
37. For many commercial parties, the COVID-19 pandemic has rendered performance of their obligations impossible or prohibitively costly. The circumstances brought about by the crisis may have also rendered performance of some parties' obligations radically different to that which the parties had in mind and agreed at the outset. The introduction of measures to give "breathing space" – offering temporary relief to SMEs for example to fulfil their contractual obligations because of COVID-19<sup>72</sup> – reflects the widely shared belief that the unthinking enforcement of contracts, particularly those entered into before the scale of the pandemic became apparent, risks causing widespread defaults and, ultimately, business failure. That belief is also reflected in temporary measures put in place by the UK Corporate Insolvency and Governance Act, which prohibits statutory demands served between 1 March 2020 and 30 September 2020 being used for presenting winding-up petitions, unless the Court is satisfied that a creditor has reasonable grounds for believing that COVID-19 has not had a financial effect on the debtor, or that the debtor would have been unable to pay the debt regardless of the financial effect of COVID-19.<sup>73</sup>

## The different concepts most widely invoked during the crisis

38. The common law and the civil law have different approaches<sup>74</sup> to force majeure, material adverse change, supervening illegality, and frustration/impossibility or its equivalent, and clauses bringing the contract to an end, with or without contractual termination payments.<sup>75</sup>
39. The following is a summary of some of the main principles in common/civil law, and the questions that the particular nature of the COVID 19 pandemic present.<sup>76</sup>

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<sup>72</sup> E.g. Germany, Austria, Switzerland, France, Italy, Spain and Singapore: see also fn 5-7 above.

<sup>73</sup> Schedule 10, Corporate Insolvency and Governance Act.

<sup>74</sup> Christian Twigg-Flesner, *A comparative Perspective on Commercial Contracts and the impact of COVID-19 - Change of Circumstances, Force Majeure, or what?*, published in Pistor, Katharina, "Law in the Time of COVID-19" (2020). Books. 240, <https://scholarship.law.columbia.edu/books/240>.

<sup>75</sup> See as to financial contracts FMLC note at <http://fmlc.org/wp-content/uploads/2020/03/cov19memo-1.pdf>.

<sup>76</sup> For a more detailed discussion of the main principles under English law, see de Verneuil Smith, Kramer and Day, COVID-19: Force Majeure, Frustration and Illegality in English Law: A Detailed Guide:



## Force majeure

40. A “force majeure” clause normally describes a contractual term by which, upon a specified event or events beyond the parties’ control, parties to a commercial contract are entitled to suspend, postpone, or cancel performance of their obligations (in whole or in part).<sup>77</sup>
41. The concept of force majeure is not a term of art in English law. It has been said that the only general statement which can safely be made is that the effect of a force majeure clause will depend on the words used by the parties and is a matter of construction of the contract.<sup>78</sup> Commercial parties will therefore need carefully to refer to the language of the relevant clause, which often takes the form of a list of phrases (such as an “Act of God”<sup>79</sup>) or specified factual events. In the Covid-19 pandemic, question arise as to the categorisation of different government measures (and what specific language in the relevant clause might be triggered under what measures), and establishing causation as a result of the measures.<sup>80</sup>
42. But as a general principle under English law, force majeure clauses are construed restrictively (such that any ambiguity will be resolved against the party seeking to rely on the clause).<sup>81</sup> Such clauses are also approached with the presumption that they will be restricted to supervening events which arise without fault of the contracting parties<sup>82</sup> and for which the parties have not undertaken responsibility.<sup>83</sup> As well as a force majeure clause, parties can include a hardship clause in commercial contracts governed by English law. Such a clause provides that in certain circumstances parties will renegotiate e.g. the price, and will frequently also include provision for intervention of a third party expert should the parties fail to reach agreement<sup>84</sup>.
43. Other common law jurisdictions such as New York adopt a similar emphasis on the terms of the relevant clause. Experience seems to show that the same supervening global event will trigger some force majeure provisions and not others,<sup>85</sup> which indicates that the application of such clauses in the COVID-19 pandemic will be specific to individual contracts and depend on the underlying facts. Different sectors and industries may also have differing attitudes towards invoking force majeure or similar provisions.<sup>86</sup>

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[https://www.3vb.com/images/uploads/vcards/3VB\\_Final\\_Version\\_-\\_Force\\_Majeure\\_Frustration\\_and\\_Supervening\\_Illegality.pdf](https://www.3vb.com/images/uploads/vcards/3VB_Final_Version_-_Force_Majeure_Frustration_and_Supervening_Illegality.pdf).

<sup>77</sup> *Chitty on Contracts*, 3rd Ed., Sweet & Maxwell, 2019, 15-152. Chitty 15-161 lists common phrases used in FM clauses and references cases in which the meaning of each phrase is considered.

<sup>78</sup> Treitel, *Frustration and Force Majeure* 3rd Ed., Sweet & Maxwell, 2014, 12-026.

<sup>79</sup> The meaning of which, see *Chitty on Contracts*, 3rd Ed., Sweet & Maxwell, 2019, 15-161.

<sup>80</sup> The question also arises (in the context of causation) in the UK Financial Conduct Authority’s test case in relation to business insurance policies. See paragraphs 214 ff in the FCA’s skeleton argument, available at: <https://www.fca.org.uk/publication/corporate/bi-insurance-test-case-fca-skeleton-argument.pdf>

<sup>81</sup> *Great Elephant Corporation v Trafigura Beheer BV* [2013] EWCA Civ 907 at 25.

<sup>82</sup> *Classic Maritime v Limbungan Makmur Sdn Bhd* [2019] EWCA Civ 1102. See Bridge, (2020) LQR 1.

<sup>83</sup> *Fyffes Group Ltd v Reefer Express Lines Pty Ltd (The Kriti Rex)*, [1996] 2 Lloyd’s Rep. 171 at 196.

<sup>84</sup> McKendrick, Cases and Materials (see below) 403-4, *Superior Overseas Development Corp v British Gas Corp* [1982] 1 Lloyd’s Rep. 262; *Wates Ltd v GLC* (1983) 25 Build. L.R. 1.

<sup>85</sup> Contrast two decisions under New York law, *Alavon, Inc. v Wachovia Bank*, 841 F. Supp. 2d 1298, 1308–09 (N.D. Ga. 2011) and *In re Old Carco LLC*, 452 B.R. 100, 119 (S.D.N.Y. 2011). The 2007-8 financial crisis was not considered a force majeure event in the former case, but where in the latter case the clause specifically included the phrase “change to economic conditions” as a force majeure event, it was found to trigger the clause.

<sup>86</sup> See, e.g., a survey published by Norton Rose Fulbright, which found that in the COVID-19 pandemic financial institutions were less likely to consider using force majeure provisions than companies in the infrastructure and MIC (mining and construction) sectors. Norton Rose Fulbright, *The spread of force majeure in the COVID-19 crisis*,

44. By contrast, in many civilian systems the concept of force majeure is enshrined in statute. The approach varies across jurisdictions. Force majeure generally (as in France and China) refers to an event that is beyond a party's control and could not have been reasonably foreseen at the time of the parties' contract, which is unavoidable and has the effect of preventing a party's performance of its obligations.<sup>87</sup> In other jurisdictions (such as Italy), the concept of force majeure is not recognised as such, but subsumed within a broader doctrine of impossibility whereby obligations can be excused or suspended where performance has become impossible due to reasons not attributable to the performing party.<sup>88</sup> By contrast in yet other jurisdictions (such as Spain), a pandemic declared by the World Health Organisation has been found to constitute force majeure, even where the declaration did not in itself render performance of the relevant contract impossible.<sup>89</sup>
45. Other jurisdictions such as France<sup>90</sup> and the Netherlands have, in the meantime, seen their first cases on the interpretation of force majeure clauses in context with the pandemic<sup>91</sup> and on the distribution of the pandemic risk, e.g. in insurance contracts.<sup>92</sup> In Egypt, the Conseil d'Etat has confirmed that the pandemic qualifies as a force majeure event.<sup>93</sup> In Canada, the Superior Court of Quebec recently ruled that a commercial landlord would not be entitled to collect rent from a tenant (a fitness centre) for the duration of a Quebecois governmental decree during COVID-19 preventing fitness centres from reopening, on the basis that the governmental decree prevented the landlord from fulfilling its obligations to provide peaceful enjoyment of the property (thus constituting, in this case, force majeure).<sup>94</sup> Tenancy contracts have also been the subject of court cases in other jurisdictions, such as the Netherlands<sup>95</sup>, Germany<sup>96</sup> and Italy.<sup>97</sup>
46. Authorities in some civilian jurisdictions – notably China and Italy – have adopted the practice of issuing COVID-19 “force majeure certificates” to local companies that are unable to perform their contractual obligations. In China, as of 30 April 2020 CCPIT had issued 7,004 certificates involving contracts amounting to a value of RMB 690 billion (approximately GBP 78 billion).<sup>98</sup> One function of the certificates is said to be to provide

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June 2020: <https://www.nortonrosefulbright.com/en/knowledge/publications/25915fef/the-spread-of-force-majeure-in-the-covid-19-crisis>

<sup>87</sup> See, e.g., Article 12.18 of the French Civil Code and Article 117 of the Contract Law of the PRC.

<sup>88</sup> E.g., under Articles 1218, 1256, and 1456 of the Italian Civil Code.

<sup>89</sup> See, e.g., the Toronto SARS decision (2006), Audiencia Provincial de Madrid (SAP M 15159/2006 - ECLI:ES:APM:2006:15159, <http://www.poderjudicial.es/search/AN/openDocument/5b15bbacd4a1d283/20070308>).

<sup>90</sup> On 20 May 2020, the Tribunal de commerce de Paris found force majeure established in the case of the effect of the virus in producing a “*baisse brutale*” – steep decline – in consumption and market prices of electricity. This was confirmed by the Cour d'appel on 28 July 2020 (*Total Direct Energie v EDF* – references in next footnote).

<sup>91</sup> See Tribunal de commerce de Paris - 20 mai 2020 - n° 2020016407; Cour d'appel de Paris - 28 juillet 2020 - n° 20/06689; Cour d'appel de Colmar, 12 March 2020 - n° 20/01098 Rechtbank Amsterdam, 20-05-2020, No. C/13/681613 / KG ZA 20-281, ECLI:NL:RBAMS:2020:2647.

<sup>92</sup> Tribunal de commerce de Paris - 22 mai 2020 - n° 2020017022; Rechtbank Amsterdam, 19-06-2020, No. C/13/682942 / KG ZA 20-368, ECLI:NL:RBAMS:2020:3091. See also the pending business insurance cases in Germany – LG München I, Az. 12 O 7241/20, 12 O 7208/20, 12 O 5868/20 und 12 O 5895/20.

<sup>93</sup> 28 June 2020, No. 37214 / 74 JY.

<sup>94</sup> *Hengyun International Investment Commerce Inc. v. 9368-7614 Québec inc.*, 2020 QCCS 2251

<sup>95</sup> See Rechtbank Amsterdam, 11-06-2020, No. 8453358 KK EXPL 20-245, ECLI:NL:RBAMS:2020:2914; Rechtbank Noord-Nederland, 27-05-2020, No.130929, ECLI:NL:RBNNE:2020:1979; Rechtbank Gelderland, 29-05-2020, No. 8509809, ECLI:NL:RBGEL:2020:2768 and Rechtbank Overijssel, 03-06-2020, No. 8452376 CV EXPL 20-1565, ECLI:NL:RBOVE:2020:1906 on the interpretation of Art. 7:204 NBW.

<sup>96</sup> See eg. LG Heidelberg, 30.07.2020 - 5 O 66/20, on the obligation to pay rent for business premises during lockdown.

<sup>97</sup> See eg. Tribunale sez. V - Roma, 25/07/2020; Tribunale sez. III - Genova, 01/06/2020.

<sup>98</sup> CCPIT Carries out International Communications on Force Majeure Certificates, 30 April 2020, [http://en.ccpit.org/info/info\\_40288117668b3d9b0171c8e0ef5408a2.html](http://en.ccpit.org/info/info_40288117668b3d9b0171c8e0ef5408a2.html).

evidentiary proof of a force majeure event in future disputes between parties.<sup>99</sup> However, it will still be necessary for parties to consider (among other matters) the causal link between the specific COVID-19 restriction relied upon and their performance obligations, and (where the relevant contract contains one) whether the restriction falls within the terms of the force majeure clause agreed as a matter of construction.<sup>100</sup>

## Frustration

47. Unlike force majeure, the concept of frustration is a recognised common law principle which operates to discharge parties from their obligations to perform a contract. A frustrating event occurs where surrounding circumstances have changed so dramatically as to render the performance of the contract radically different to that which the parties had in mind and agreed.<sup>101</sup> At common law, the test for a frustrating event is not simply that an event was unforeseen or unforeseeable by the parties; the courts will adopt a multi-factorial test, of which one principal consideration is the extent to which the risk for a certain event has been impliedly allocated between the parties.<sup>102</sup>
48. The effect of frustration is to automatically bring a contract to an end, releasing both parties from their obligations without incurring any liability for breach in respect of failure to perform and with the financial consequences regulated not by contract but by the law of restitution.<sup>103</sup> This is a drastic result. The English Courts are clear that the principle is therefore not to be “lightly invoked to relieve contracting parties of the normal consequences of imprudent bargains”,<sup>104</sup> and courts in other jurisdictions (such as New York applying the common law doctrines of impossibility<sup>105</sup> and frustration of purpose<sup>106</sup>) have similarly held that frustration will be limited to instances of “a virtually cataclysmic” event.<sup>107</sup>
49. In previous cases, a frustrating event is most likely to occur where the specified subject matter of the contract has been destroyed or is otherwise unavailable<sup>108</sup> or has deprived

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<sup>99</sup> *Ibid*

<sup>100</sup> *Ibid*. The CCPIT has stated that the acquisition of a certificate would not, in itself, mean that a commercial party is excused from performing its obligations.

<sup>101</sup> The classic English law formulation is by Lord Radcliffe in *Davis Contractors Ltd v Fareham UDC* [1956] AC 696 at 729: “frustration occurs whenever the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. Non haec in foedera veni. It was not this that I promised to do.” The formulation has also been cited in Canada (see, e.g., *Naylor Group Inc. v Ellis-Don Construction Ltd.*, 2001 SCC 58) and Australia (see, e.g., *Brisbane CC v Group Projects Pty Ltd* (1979) 145 CLR 143 and *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337). Recently applied in *Canary Wharf (BP4) T1 Ltd v European Medicines Agency* [2019] EWHC 335 (Ch) (effect of Brexit on commercial lease).

<sup>102</sup> *Edwinton Commercial Corp v Tsavlis Russ (Worldwide Salvage & Towage) Ltd (The Sea Angel)* [2007] EWCA Civ 547 at [111].

<sup>103</sup> In England, largely in the Law Reform (Frustrated Contracts) Act 1943. See further E. McKendrick, *Contract Law: Text, Cases and Materials*, 8<sup>th</sup> Ed, OUP 2018, 21-6 and *Force Majeure and Frustration of Contract*, 2<sup>nd</sup> Ed, Informa Law from Routledge 2013.

<sup>104</sup> *Pioneer Shipping Ltd v BTP Tioxide Ltd (The Nema) (No.2)* [1982] A.C. 724, at 752.

<sup>105</sup> Banks, New York Contract Law § 20:8 citing *RW Holdings, LLC v. Mayer* (2016).

<sup>106</sup> § 77:95. Frustration of purpose, 30 Williston on Contracts § 77:95 (4th ed.).

<sup>107</sup> *U.S. v. Gen. Douglas MacArthur Senior Village, Inc.*, 508 F.2d 377, 381 (2d Cir. 1974).

<sup>108</sup> E.g., *Taylor v Caldwell* (1863) 3 B & S 826, *Howell v Coupland* (1876) 1 QBD 258.

the parties' of their common commercial purpose.<sup>109</sup> By contrast, in cases of shortage (which may be of particular relevance for supply chain contracts in the COVID-19 context), where a party has an element of choice in how to allocate its existing resources to the performance of certain (but not all) of its concluded contracts, the existence of choice may mean that frustration will not be available.<sup>110</sup>

50. Section § 2-615(a) of the Uniform Commercial Code (“UCC”) recognises a more general doctrine of impracticality in the sale of goods. A seller may be excused from delay or non-delivery of goods where performance has become impracticable either due to (i) unforeseen circumstances not within the contemplation of the parties at the time of contracting; or (ii) compliance in good faith with an applicable foreign or domestic governmental regulation or order. According to the official comment, a severe shortage of raw materials or of supplies due to a contingency such as war, embargo, local crop failure, unforeseen shutdown of major sources of supply or the like, which causes a marked increase in cost or prevents the seller from necessary securing supplies, is within the contemplation of this section.<sup>111</sup>

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<sup>109</sup> *Krell v Henry* [1903] 2 KB 740, to be contrasted with *Herne Bay Steamboat Co v Hutton* [1903] 2 KB 683, which also concerned the cancelled coronation procession of King Edward VII. See further Treitel, *Frustration and Force Majeure*, 3rd Ed., Sweet & Maxwell, 2014, 7-014.

<sup>110</sup> See, e.g., *J Lauritzen AS v Wijsmuller BV (The Super Servant Two)* [1990] 1 Lloyd's Rep 1.

<sup>111</sup> Mann, Warren, Westbrook, *Comprehensive Commercial Law: 2019 Statutory Supplement*, p. 80. See also Restatement (Second) of Contracts - § 261 Impracticability: “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 to the contrary.” See also *Ford Sons Ltd v Henry Leatham Sons Ltd*, 21 Com Cas 55 (1915, KBD).

## Supervening illegality

51. Frustration may also arise when it is no longer possible to perform a contract because of supervening illegality of performance.<sup>112</sup> However, this is subject to the requirement that the illegality has had a fundamental effect on the agreed method of performance of the contract, particularly where a temporary illegality is being relied upon.<sup>113</sup> By way of illustration (and analogous to COVID-19), the Hong Kong courts have held that a temporary government isolation order issued during the SARS outbreak preventing a tenant from entering his flat for 10 days was not sufficiently fundamental to frustrate a 2-year lease.<sup>114</sup> There may also be questions as to what amounts to illegality in COVID-19 circumstances – is an absolute prohibition of the activity in question required?<sup>115</sup>
52. Under English law there is currently some debate as to whether the supervening illegality must be that of the governing law of the contract or of the place of performance.<sup>116</sup> This may be relevant in the pandemic as different jurisdictions enact and lift restrictions on civilians and businesses at different points throughout the global crisis. Generally, illegality must preclude performance of the contract in the place in which the contract must be performed. The court will not require a party to commit an act which is unlawful in the place where it must be performed.
53. A variation of this issue may arise in the COVID-19 context where authorities issue government guidance and pronouncements of varying legal status, or where business takes action in line with them. In Spain, government recommendations have been relied upon to invoke the force majeure provision in a contract during the SARS outbreak.<sup>117</sup> In the COVID-19 outbreak, the situation is similar, but many national legislators respond to it by more or less detailed emergency legislation, which aims at rebalancing the parties' obligations for specific types of contracts, notably those involving consumers.<sup>118</sup>

## Change of circumstances, imprévision or hardship

54. The common law principle of frustration, which does not recognize a change of circumstances in itself as a basis for setting aside a contract,<sup>119</sup> can be distinguished from

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<sup>112</sup> Per Lord Macmillan in *Denny, Mott & Dickinson v James Fraser* [1944] AC 265: “It is plain that a contract to do what it has become illegal to do cannot be legally enforceable. There cannot be default in not doing what the law forbids to be done.”

<sup>113</sup> E.g., *Cricklewood Property Investment Trust Ltd v Leighton's Investment Trust Ltd* [1945] A.C. 221.

<sup>114</sup> *Li Ching Wing v Xuan Yi Xiong* [2004] 1 HKLRD 754.

<sup>115</sup> In the UK context, for example, a government message to “stay at home” may be of different legal effect than a government message to “stay alert”. See e.g., M Reynolds, *A world turned upside down*, Comp. Law. 2020, 41(9), 272-273 (discussing the issue in the context of force majeure clauses).

<sup>116</sup> See, e.g., W. Day, “*Contracts, Illegality and Comity: Ralli Bros Revisited*”, Cambridge Law Journal, Volume 79, Issue 1 (March 2020), pp 64-90.

<sup>117</sup> The Toronto SARS decision of the Spanish court (see above) concerned governmental guidance discouraging travel to Toronto during the SARS outbreak. A claim for a refund for a flight to Toronto was upheld notwithstanding that the flight was not cancelled, the rationale being that someone with average diligence would heed the recommendations of the authorities and not endanger health by recklessly travelling to a place subject to such a health alert. A similar decision on cancellation costs has recently been rendered by the AG Frankfurt/Main (11.08.2020 - 32 C 2136/20 (18)). The court confirmed that the interpretation of exceptional circumstances at a holiday destination should not be subject to overly strict requirements. Consequently, travel warnings for a holiday destination were not considered mandatory, a certain probability of a health-threatening spread of the Coronavirus was deemed sufficient.

<sup>118</sup> For Spain, see the Spanish Real Decreto-ley 11/2020, <https://www.boe.es/buscar/act.php?id=BOE-A-2020-4208>. For travel contracts, see its Article 36.4.

<sup>119</sup> *Davis Contractors Ltd v Fareham UDC* [1956] AC 696.



the approach taken in civilian systems, such as Germany, France or The Netherlands<sup>120</sup> where judicial intervention on the grounds of a change of circumstance involves discharge of the contract as a whole only when its adaptation fails. The main approach in civil law systems is to adapt if possible. This might suggest that such civilian principles could have wider application than the common law equivalents, and could be more readily invoked in the COVID-19 context.

55. By way of illustration, for contracts entered into on or after 1 October 2016<sup>121</sup>, the new Article 1195 of the French Civil Code provides for a rule of hardship (*imprévision*) which allows a party to request renegotiation of a contract where its performance has become excessively onerous in light of circumstances that were unforeseeable at the time of the contract<sup>122</sup>. This is so even where the contract is silent on the issue of hardship. Where renegotiation is refused or otherwise fails, the parties can either agree to terminate the contract or to make a joint request to the court to order for the contract to be amended. If no consensus is found, the request to the court to amend or terminate it can be made by one party.
56. Comparable statutory provisions and authorities can be found in other civilian jurisdictions (albeit with differences).<sup>123</sup> Art. 6:258 of the Dutch Civil Code allows either party to ask a judge to modify the effects of the contract or to terminate it, unless the risk of a change of circumstances case can be imposed on the non-performing party. This provision, amongst others, has been tested in a recent Covid 19 case, in which the Netherlands Commercial Court exercised a cautious approach regarding the modification or mitigation of a break-up fee based on principles of unforeseen circumstances, reasonableness and fairness, as such clauses have a clear objective of risk allocation.<sup>124</sup> In Germany, § 313 of the German Civil Code<sup>125</sup> allows for adaptation of a contract where the equivalence of the parties' performances is seriously disturbed,<sup>126</sup> e.g. due to a disruption of the "social existence" by war, revolution or hyperinflation, unless the non-performing party has assumed the risk of a change of circumstances.<sup>127</sup> If the conditions of § 313 are met, the creditor is obliged to cooperate and participate in the adaptation of the contract.<sup>128</sup> In Spain, the Court of first instance of Madrid<sup>129</sup> applied the doctrine of *clausula rebus sic stantibus* to a Covid 19 case. The case concerned a large Spanish steel group which asked the court to prevent a group of syndicated banks from activating a clause of immediate repayment of a massive loan. The judges accepted that the borrowers' repayment capacity had been calculated according to a viability plan which was based on a group activity that could vary "within a

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<sup>120</sup> § 313 German Civil Code (*Störung der Geschäftsgrundlage*); Art. 1195 French Civil Code (*imprévision*); sec. 6:258 of the Dutch Civil Code.

<sup>121</sup> Ordonnance n° 2016-131 du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations.

<sup>122</sup> The Article may be excluded by agreement. An exclusion applies for financial instruments, see Article L 211-40-1 and L 211-1 I-III of the French Monetary and Financial Code, <https://www.legifrance.gouv.fr/affichCodeArticle.do?cidTexte=LEGITEXT000006072026&idArticle=LEGIARTI000036828490>.

<sup>123</sup> See also the Spanish Tribunal Supremo's decision in Urt. v. 15.10.2014, Resolución Nr. 591/2014, which concerned the effect of the 2008 financial crisis on hotel properties in Valencia. See further Article 1457 of the Italian Civil Code, which provides parties with the right to seek judicial termination of a contract when, due to a change in circumstances, performance of a contract becomes excessively onerous ("eccessiva onerosità").

<sup>124</sup> Rechtbank Amsterdam, 29-04-2020 ECLI\_NL\_RBAMS\_2020\_2406.

<sup>125</sup> The provision codified case law based on the principles of good faith (§ 242 German Civil Code) and *clausula rebus sic stantibus*. See RGZ 100, 129, 132.

<sup>126</sup> So-called "*Äquivalenzstörung*", BGH, 2 February 1995, I ZR 211/92, NJW-RR 1995, p. 1117, 1119.

<sup>127</sup> BGH, 1 June 1979, V ZR 80/77, BGHZ 74, p. 370, 373; 25 February 1993, VII ZR 24/92, BGHZ 121, p. 379, 392; 17 June 1992, XII ZR 253/90, NJW 1992, p. 2690, 2691.

<sup>128</sup> BGH, 30 September 2011 - V ZR 17/11.

<sup>129</sup> Roj: AJPI 13/2020 - ECLI: ES: JPI: 2020: 13A (30 April 2020).

certain normality" or within the framework of "a scenario evolving in usual standards". The court stressed that it is "well known that the Covid-19 pandemic caused a drastic drop in production and demand" and that "this is an exceptional and unprecedented situation as Covid-19 had paralysed the world economy." As a result, the judges decided that it is "necessary to adapt contract law institutions to the social reality of the moment" and to apply the theory of *clausula rebus sic stantibus* to the "current economic crisis which will have deep and prolonged effects of economic recession and can be openly considered as an economic phenomenon generating a serious disturbance or change of circumstances".

57. Similarly under Chinese law, the Interpretation on Certain Issues Concerning the Application of the PRC 1999 Contract Law (II), issued by the Supreme People's Court in 2009, says that parties may petition the court to modify or terminate a contract on the basis that performance would be obviously unfair due to the occurrence of a material change of circumstances. During the SARS outbreak in 2003, the SPC issued a notice specifying that any contracts affected by should be resolved in accordance with the principle of fairness, by reference to force majeure.<sup>130</sup> Subsequent authorities recognised the epidemic as an unpredictable disaster, and the economic losses caused by the suspension of business as objectively beyond the scope of market risk.<sup>131</sup> In other instances, Chinese courts have held that in a change of circumstances, both parties should bear losses on the basis of fairness.<sup>132</sup> For contracts affected by COVID-19, the SPC Guiding Opinion encourages renegotiations in case of performance difficulties caused by the outbreak or by measures implemented to contain it. If a party requests a change in the contractual arrangements, the courts shall decide whether to support the request in light of the actual circumstances of the case, and the principle of fairness.<sup>133</sup> Further Guiding Opinions have been issued on May 15 and June 16, 2020.

58. Arts. 6.2.2. and 6.2.3 of the Unidroit Principles of International Commercial Contracts (UPICC) also entitle the disadvantaged party to request renegotiations in a case of hardship, and, if these fail, to resort to the court which may terminate or adapt the contract.<sup>134</sup> Art. 13(2) of the European Law Institute's COVID-19-Principles says that: States should ensure that, in accordance with the principle of good faith, parties enter into renegotiations where performance has become excessively difficult as a consequence of the COVID-19 crisis and the measures taken during the pandemic, even if renegotiations have not been provided for by contract or law. This includes situations where the cost of performance has risen significantly.<sup>135</sup> See also Principles of European Contract Law 6.111, Change of circumstance.

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<sup>130</sup> Notice of the Supreme People's Court on Effectively Conducting Trial and Execution Work according to Law During the Period of Prevention and Control of Contagious Severe Acute Respiratory Syndrome (effective from June 11, 2003 to April 18, 2013), Fa [2003] No. 72.

<sup>131</sup> (2018) Lu 06 Min Zhong No. 268, Civil Judgment by Yantai Intermediate People's Court: (rent reduction based on the principle of hardship). See also (2018) Jin 04 Min Zhong No. 2272, Civil Judgment by Changzhi Intermediate People's Court.

<sup>132</sup> Art. 5 Chinese Contract Law; see (2007) Gui Min Si Zhong Zi No. 1, Civil Judgment by Intermediate People's Court of Guangxi Zhuang Autonomous Region; (2004) Hu Er Zhong Min Er (Min) Zhong Zi No. 354, Civil Judgment by Shanghai No. 2 Intermediate People's Court; (2008) Luo Min Zhong Zi No. 2021, Civil Judgment by Luoyang Intermediate People's Court.

<sup>133</sup> Supreme People's Court Guiding Opinion on the Handling of Civil Cases Affected by the COVID-19 Outbreak (16 April 2020) <https://www.chinacourt.org/law/detail/2020/04/id/150152.shtml>.

<sup>134</sup> <https://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2016>. The UNIDROIT Secretariat has produced a note on the application of the Principles of Commercial Contracts in the COVIUD crisis, see <https://www.unidroit.org/english/news/2020/200721-principles-covid19-note/note-e.pdf>

<sup>135</sup> European Law Institute, ELI Principles for the COVID-19 Crisis, [https://www.europeanlawinstitute.eu/fileadmin/user\\_upload/p\\_eli/Publications/ELI\\_Principles\\_for\\_the\\_COVID-19\\_Crisis.pdf](https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Principles_for_the_COVID-19_Crisis.pdf).

## Good faith in contractual performance

59. § 242 of the German Civil Code (BGB) is a fundamental principle of the law in Germany and requires contracts to be executed in good faith. Similar principles are found in Articles 1134 and 1135 of the French Civil Code, Article 2 of the Swiss Civil Code (ZGB), Art. 6.2 of the Dutch Civil Code and in numerous other jurisdictions. Dutch law further contains provisions which bar the application of rules applicable under a contract if their application would violate the principle of reasonableness and fairness.<sup>136</sup> These principles have been addressed in court and it has been confirmed in context with the COVID-19 pandemic that the parties have to act according to a standard of reasonableness and fairness to find a joint solution in case of unforeseen circumstances.<sup>137</sup> Also under Italian Law, courts have the power to intervene and adjust a contract to a standard of “fairness in the individual case” (“giustizia nel caso concreto”) or to terminate it when its terms are in contrast with the constitutional principle of solidarity<sup>138</sup> and with good faith.<sup>139</sup>
60. Good faith has also been referred to in national COVID-19 emergency legislation. An example is Spain’s Real Decreto-ley 11-2020.<sup>140</sup> According to its Art. 36.1., the right to terminate a consumer contract is dependent on a prior party attempt at contract revision, on the basis of good faith, which restores the reciprocity of both parties’ interests in the contract.
61. By contrast, a principle of good faith performance is not generally recognised in common law jurisdictions, subject to some exceptions.<sup>141</sup> Some practitioners have suggested that the UK Cabinet Office’s guidance on “responsible contractual behaviour” (discussed above) may have the potential to influence the future development of the principle of good faith, though the guidance is not of binding effect and is not likely to alter parties’ existing contractual rights and obligations.<sup>142</sup>

## Implied terms

62. As stated above, English law and other similar common law systems do not generally recognise a general organising principle of good faith in contractual performance<sup>143</sup>. It has been pointed out that the same does not necessarily apply in (e.g.) US law.<sup>144</sup> The debate as to the development of good faith in English law in the case of long-term relational contracts where cooperation is needed to make the contracts work over time may however

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<sup>136</sup> Art. 6:248 of the Dutch Civil Code.

<sup>137</sup> See *Rechtbank Overijssel*, 3 June 2020, ECLI:NL:RBOVE:2020:1906 (X/Urbana), at para. 6.3.

<sup>138</sup> Art. 2 of the Italian Constitution, [https://www.senato.it/documenti/repository/istituzione/costituzione\\_inglese.pdf](https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf)

<sup>139</sup> Cass., 23 November 2015, n. 23868; Corte cost., 2 April 2014, n. 77.

<sup>140</sup> [https://www.boe.es/diario\\_boe/txt.php?id=BOE-A-2020-4208](https://www.boe.es/diario_boe/txt.php?id=BOE-A-2020-4208).

<sup>141</sup> See the discussion in *Yam Seng Pte Ltd v International Trade Corporation Ltd* [2013] EWHC 111 (QB) at [126-131], summarising the position in the United States, Canada, Australia and New Zealand. See also *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 SCR 494 in Canada, though it has been questioned how far that decision has changed the way the law is applied.

<sup>142</sup> See, e.g., Dechert LLP, COVID-19 and Duties of Good Faith Under English law, 25 June 2020, <https://www.dechert.com/knowledge/onpoint/2020/6/covid-19-and-duties-of-good-faith-under-english-law.html>

<sup>143</sup> *MSC Mediterranean Shipping Company SA v Cottonex Anstalt* [2016] EWCA Civ 789 at [45].

<sup>144</sup> “The New York Court of Appeals said in 1918: “Every contract implies good faith and fair dealing between the parties to it”: *Wigand v Bachmann-Bechtel Brewing Co*, 222 NY 272 at 277. The Uniform Commercial Code, first promulgated in 1951 and which has been adopted by many States, provides in section 1-203 that “every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement.” Similarly, the Restatement (Second) of Contracts states in section 205 that “every contract imposes upon each party a duty of good faith and fair dealing in its performance and enforcement.” See *Yam Seng*, *ibid*, at [124].

be relevant more broadly to the pandemic.<sup>145</sup> The High Court recently noted that the English law on the implied duties in such relational contracts “*has not yet reached a stage of settled clarity*”.<sup>146</sup>

63. In some cases, the court will imply a term (at least in the context of the sale of goods) that the buyer has the option of requiring the seller to deliver the part it can while relieving the seller of liability for failing to deliver the part it cannot,<sup>147</sup> although this will depend on the facts. In some cases, applying settled principle,<sup>148</sup> common law courts may be open to finding that a term implied by necessary implication into a commercial contract obliges a party to allow a short “breathing space” until it becomes possible to resume performance – whether this is so will depend on the facts. In any such case, and whether at common law or in civil law, causation will be an important issue.

## Unjust enrichment

64. The doctrine of unjustified enrichment also poses important issues, the question being whether, without declaring their contract at an end, the relations of the parties can be equitably readjusted by the court so that the one will not be unintentionally enriched at the expense of the other.<sup>149</sup> Civil law doctrines such as *Enrichissement sans cause/ungerechtfertigte Bereicherung* may be relevant. More generally, the law of Scotland<sup>150</sup> indicates that the general principle, which is given the *nomen juris* ‘unjustified enrichment’, is a principle of broad application where circumstances require<sup>151</sup>.

## Material Adverse Change

65. “Material adverse change” (MAC) or “material adverse effect” (MAE) clauses normally describe clauses that permit parties to (for instance) declare an event of default, refuse draw-down of financing, or exit from a transaction entirely upon the occurrence of a fundamental change in one party’s ability to perform its obligations, or representations

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<sup>145</sup> Lecture to the Commercial Bar Association, <https://www.judiciary.uk/wp-content/uploads/2016/10/mr-justice-leggatt-lecture-contractual-duties-of-faith.pdf>.

<sup>146</sup> *Cathay Pacific Airways Ltd v Lufthansa Technik AG* [2020] EWHC 1789 (Ch) (10 July 2020) at [189].

<sup>147</sup> *Sainsbury v Street* [1972] 1 WLR 834

<sup>148</sup> The leading English law case is *Marks and Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Limited* [2015] UKSC 72, and see *BP Refinery (Westernport) Pty Ltd v President, Councillors and Ratepayers of the Shire of Hastings* (1977) 52 ALJR 20, 26. See in Singapore *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] SGCA 43. The tests for implication are discussed in *Express and Implied Terms in Contracts*, a speech given by Lord Neuberger in 2016 (<https://www.supremecourt.uk/docs/speech-160819-02.pdf>).

<sup>149</sup> This outcome was contended for by Lord Cooper as to Scottish law in the aftermath of world war, see *Journal of Comparative Legislation and International Law*, Vol. 28 (1946), “Frustration of Contract”: and see *Shilliday v Smith* 1998 Session Cases 725 where the potential width of the principle of unjust enrichment is emphasised. The position may remain open, despite the decision in *Lloyds TSB Foundation for Scotland v Lloyds Banking Group Plc* [2013] UKSC 3. See generally Hector MacQueen, *Contract Law in Scotland*, 4<sup>th</sup> ed, 2016.

<sup>150</sup> See in this context *Cantiare San Rocco v Clyde Shipbuilding and Engineering Company* [1924] AC 226, and *Fibrosa Spolka Akcyjna v Fairbairn Lawson*, [1942] AC 32 (the decision in the latter case gave rise to the Law Reform (Frustrated Contracts) Act 1943 which applies to contracts governed by English law which have become impossible of performance or been otherwise frustrated).

<sup>151</sup> in *Banque Financière de la Cité v Parc (Battersea)*, [1999] AC 221 at p. 237: Lord Clyde said that the principle is “more fully expressed in the Latin formulation *nemo debet locupletari alieni jactura*. The principle is equitable in the sense that it seeks to secure a fair and just determination of the rights of the parties concerned in the case. ... The remedy may vary with the circumstances of the case, the object being to effect a fair and just balance between the rights and interests of the parties concerned. The obligation to provide the remedy does not rest on any contractual basis but on the general principle of the common law and it may find its expression in a variety of circumstances.”

made in connection with a party's financial position. Such clauses routinely appear in finance or corporate acquisition documents and can be heavily negotiated, but are relatively rarely interpreted by courts. This may reflect the fact that the consequences of wrongly invoking a MAC and MAE clause can be both reputationally and legally (in terms of liability to a counterparty) severe.<sup>152</sup> But given the widespread economic impact of COVID-19, such clauses may become increasingly litigated.

66. The construction of such clauses will invariably depend upon its terms. In particular, the effects of pandemic may have been expressly included or excluded from the scope of the clause.<sup>153</sup> But as a general principle, in *Grupo Hotelero Urvasco S.A. v Carey Value Added S.L.*<sup>154</sup> the English court held (in the context of a loan agreement) that a change in financial condition would only be considered material if it significantly affects a borrower's ability to perform its obligations for a durationally significant period, and the change is not a circumstance of which the lender was aware at the time of the agreement.<sup>155</sup> This follows the approach in US case law, which has described MAE clauses (in the M&A context) as "*best read as a backstop protecting the acquiror from the occurrence of unknown events that substantially threaten the overall earnings potential of the target in a durationally significant manner.*"<sup>156</sup> A recent Dutch decision addressed the question of risk assessment in a scenario in which the parties to an M&A-transaction had discussed the COVID-19 pandemic during the contractual negotiations, but had refused to add a Material Adverse Change clause or a specific corona clause to their SPA.<sup>157</sup>
67. In the COVID-19 crisis, questions may arise as to when a MAC or MAE clause can be invoked, where the financial effect of pandemic-related restrictions on a business may be self-evident to parties but would not be manifested until a later stage (for instance in company accounts or at the end of the term of a loan). Such questions are likely to turn upon the specific language of the triggering event in the relevant MAC and MAE clauses.<sup>158</sup> A number of high profile suits have been brought in the Delaware and London courts arising out of M & A transactions in which the purchaser seeks to walk away from the deal on the grounds of the pandemic.

## *Hell-or-high-water*

68. The flip side of force majeure, MAC and MAE clauses, and frustration are so-called "hell or high water" or similar clauses which some commercial contracts (particularly finance leases) may contain. These typically describe an obligation as "absolute and unconditional" and thereby seek to compel a party to perform its contractual obligations irrespective of any reasons for non-performance.
69. US cases indicates that such clauses will generally be enforced according to their terms and can provide a contractual defence to prevent a non-performing party from relying on impossibility or frustration, particularly when negotiated between sophisticated commercial

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<sup>152</sup> *Grupo Hotelero Urvasco S.A. v Carey Value Added S.L.* [2013] EWHC 1039 (Comm) at [334].

<sup>153</sup> E.g., in *Ipsos SA v Dentsu Aegis Network Ltd (formerly Aegis Group Plc)* [2015] EWHC 1726 (Comm).

<sup>154</sup> [2013] EWHC 1039 (Comm) at [364].

<sup>155</sup> *Grupo Hotelero Urvasco S.A. v Carey Value Added S.L.* [2013] EWHC 1039 (Comm) at [364].

<sup>156</sup> *IBP Inc v Tyson Foods Inc* 789 A2d 14 (Del Ch 2001) 65. As to the meaning of "durationally significant", see *Akorn, Inc. v. Fresenius Kabi AG*, No. 535, 2018.

<sup>157</sup> District Court Amsterdam, 14 May 2020, ECLI:NL:RBAMS:2020:2644 (Everts c.s./Nordian Fund).

<sup>158</sup> See, e.g., *Minumbra Lancewood Pty Ltd v AM Lancewood Investment Nominees Pty Limited* [2013] NSWSC 1929 and further discussion by R. Zaman, 3VB's finance column: Is Coronavirus a Material Adverse Change? <https://uk.practicallaw.thomsonreuters.com/w-024-5454>.



parties.<sup>159</sup> However, exceptions are where the party seeking to rely on the clause has engaged in intentional or wilful wrongful acts or violations of public policy,<sup>160</sup> or where the wider agreement is set aside for total failure of consideration.<sup>161</sup> As with force majeure clauses, the application of such clauses in the COVID-19 pandemic will be specific to individual contracts, the language used by the parties, and the specific factual background.

70. Whether other contractual defences may be available will depend on the terms of the contract. In particular, many negotiated force majeure clauses contain built-in exclusions that commercial parties may seek to rely upon in response to any claim for force majeure. One common feature is to exclude liability for foreseeable or foreseen events, and the application of such clauses in the COVID-19 pandemic may depend on the underlying facts (though, save for contracts entered into after the publication of reports of coronavirus emerged, arguments based on foreseeability might be unlikely to succeed). Parties may also insist on any formalities or notice requirements specified in the force majeure clause, to which strict adherence can be construed as conditions precedent for invoking force majeure.<sup>162</sup> Nevertheless, it is possible to envisage an implied term allowing (for example) service of a notice in a way which satisfies the substance on the notice requirements, even if strict compliance as to method is impossible because of lockdown restrictions.

### *Commercially reasonable efforts*

71. Rather than describe parties' contractual obligations by reference to specified performance standards, some commercial contracts impose obligations on parties to use their best, reasonable, or commercially reasonable efforts to perform. Where a contract does not define what level of "efforts" are required by such clauses, there is limited authority as to what such obligations require in practice.<sup>163</sup> Such terms will be still more ambiguous against the backdrop of the COVID-19 pandemic and the associated volatility in the price of oil (and the associated global slowdown), and are likely to be increasingly litigated.<sup>164</sup>

### *Waiver*

72. In an environment where commercial parties are encouraged by authorities to negotiate (see above), questions may still arise as to whether parties' exchange of positions or entry into informal negotiations could amount to a waiver of their contractual rights (or otherwise create an estoppel that might inhibit the enforcement of such rights). Under English law, where a contract contains a "No Oral Modification", "No waiver by conduct" or similar clause, the risk of waiver ought to be of manageable concern given such clauses will

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<sup>159</sup> E.g., *General Electric Capital Corp. v. FPL Services Corp.*, 986 F. Supp. 2d 1029, 1036 (N.D. Iowa 2013), which concerned payment obligations under leases of photocopiers. The payment obligation was said to have been unconditional, notwithstanding the fact that the photocopiers in issue were destroyed in Hurricane Sandy. See also <https://www.jdsupra.com/legalnews/enforceability-of-hell-or-high-water-12171/>.

<sup>160</sup> *Equitex, Inc. v. Ungar*, 60 P.3d 746, 750 (Colo. App. 2002).

<sup>161</sup> *ACG Acquisition XX LLC v Olympic Airlines SA* [2010] EWHC 923 (Comm).

<sup>162</sup> *Bremer Handels GmbH v Vanden Avenne Izegem PVBA* [1978] 2 Lloyd's Rep 109.

<sup>163</sup> For an overview of such terms from a Canadian perspective, see Dentons, "Best efforts" - "reasonable efforts" - "commercially reasonable efforts" - what do these terms mean?, 7 June 2010, <https://www.lexology.com/library/detail.aspx?g=6a4c20dc-594d-4756-b710-7a2dc213e8c0>.

<sup>164</sup> "Commercially Reasonable Efforts" in a COVID-19 and Low Oil Price World, 8 May 2020, <https://oilmanmagazine.com/article/commercially-reasonable-efforts-in-a-COVID-19-and-low-oil-price-world/>.

generally be strictly enforced.<sup>165</sup> Parties can limit the risk of informal negotiations affecting their contractual positions by ensuring that they are on a “without prejudice” basis. In any case, if negotiations fail, or solutions unravel, the law should be slow to find that the negotiations have resulted in waiver, or otherwise prejudiced the parties’ contractual rights, since this could have a chilling effect on parties’ willingness to compromise.

## The future

73. In times of uncertainty, the law must provide a solid, practical and predictable foundation for the resolution of disputes and the confidence necessary for an eventual recovery. As stated above, this Concept Note focuses on commercial contracts, particularly international contracts, which are major facilitators of global commerce. Arguably, an outcome which leaves one party a winner, and the other a loser, will not take full account of the market/social contextualisation of the crisis. In this regard, the same considerations do not necessarily apply to all types of contract. In the case of financial market contracts, for example, as already stated, financial supervisors nationally and internationally are best placed to assess the risk.

74. With those points in mind, in this pandemic:

- (1) The law should support negotiated solutions reached by parties to make viable contracts, blighted by the pandemic, work. The simplest solution will often be a short “breathing space”, until it becomes possible to resume performance. The onus at least in the first instance would be for the continuance of a viable contract rather than bringing it to an immediate end.
- (2) Similarly, the law should support negotiated solutions bringing contracts made unviable by the pandemic to an end in an equitable manner. This will not be appropriate in the case of all contracts particularly those with detailed termination provisions, but it will be in the case of many others.
- (3) To that end, if negotiations fail, or the solutions unravel, the law should be slow to find that the negotiations have resulted in waiver, or otherwise prejudiced the parties’ contractual rights, since this could have a chilling effect on parties’ willingness to compromise.
- (4) Contractual rights are to be evaluated by applying settled legal principles to the contract in question. Legal certainty remains paramount and gives the surest basis for resolution, but there will inevitably be questions as to how existing doctrine is to be applied in such circumstances. It will take some time for this to be authoritatively settled by the courts.
- (5) In some cases, applying settled principle, common law courts may be open to finding that a term implied by necessary implication into a commercial contract obliges a party to allow a short “breathing space” until it becomes possible to resume performance –

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<sup>165</sup> *Rock Advertising Ltd v MWB Business Exchange Centres Ltd* [2018] UKSC 24, *Sumitomo Mitsui Banking Corporation Europe Ltd v Euler Hermes Europe SA* [2019] EWHC 2250 (Comm) [64]. See also *GPP Big Field LLP v Solar EPC Solutions SL (formerly Prosolia Siglio XXI)* [2018] EWHC 2866 (Comm), [203], where the *Rock Advertising* decision was applied, by analogy, to a ‘no waiver’ clause. As to estoppel, see J O’Sullivan, ‘Party-agreed formalities for contractual variation – a rock of sense in the Supreme Court?’ (2019) 135 LQR 1, and *Kabab-Ji S.J.L. (Lebanon) v Kout Food Group (Kuwait)* [2020] EWCA Civ 6 [71]–[81].

whether this is so will depend on the facts. Civil law systems have wider doctrines potentially applicable in such circumstances: again, the outcome will depend on the particular facts, causation being one important issue.

- (6) Where negotiations fail to reach a solution, and legal proceedings are brought, at an early stage the courts should encourage, and where appropriate, require, parties to undertake alternative dispute resolution. Mediation already has established procedures in many jurisdictions, and other ADR methods are available.
  - (7) Not all disputes can or should be settled. Where court proceedings are required, the skills and technology required for online hearings are progressing by leaps and bounds, and online hearings will have a much more important role in the future even when no longer necessary for health reasons. But remote trials of complex cases require careful preparation on the technical side, and it will be desirable to identify what screens etc are required by judges, to continue to develop common protocols, develop common technical standards (for example) for easily navigable electronic files of documents, establish means to assist self-represented litigants, and give proper access to the public.
  - (8) The avoidance of backlog will be important though difficult to achieve. With that in mind, expedited procedures should be encouraged. In common law systems, summary procedures have been standard for many years where there is no arguable defence – arbitrators should be supported by the courts<sup>166</sup> when applying similar early dismissal or summary procedures where appropriate.
  - (9) Much of the above applies to commercial arbitration, where electronic document systems and remote hearings are familiar to practitioners given the nature of many arbitration disputes. Major arbitral institutions are consistently and rightly encouraging parties and arbitrators to avoid unnecessary delay, though as with litigation, given the effect of the pandemic some will be inevitable.
75. As the MD of the IMF, Kristalina Georgieva, has put it, “a global crisis like no other needs a global response like no other”<sup>167</sup>. This applies just as much to the law and to dispute resolution within the law as to anything else. The “plethora of defaults” that Mario Draghi feared can be mitigated by encouraging a legal environment which is conducive to optimism and a global recovery. These ideas will be taken forward in Concept Note 3, with practical guidelines which might be adopted to encourage a more conciliatory approach to disputes that may arise, and which seek to avoid and/or minimise protracted legal disputes, without prejudicing or altering parties’ legal rights.

**Sir William Blair, Eva Lein, Louise Gullifer, Judy Fu, September 2020**

**This concept note arises out of a meeting hosted by the British Institute of International and Comparative Law on 7 April 2020, and work subsequently taken forward by Lord**

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<sup>166</sup> *Getwick Engineers Ltd v Pilecon Engineering Ltd* [2002] 1020 HKCU 1; *Travis Coal Restructured Holdings v Essar Global Fund Limited* [2014] EWHC 2510 (Comm) at [50], *Weirton Medical Center Inc v Community Health Systems Inc* (N.D. W. Va. Dec. 12, 2017). The SIAC, ICC, and Stockholm Chamber of Commerce have all introduced summary procedures in various forms. See Charlie Caher & Jonathan Lim, *Summary Disposition Procedures in International Arbitration*, Ch 1, International Comparative Legal Guide to International Arbitration 2018, 15th Ed, <file:///C:/Users/WB/Downloads/20180725-ICLG-summary-disposition-procedures-in-international-arbitration.pdf>.

<sup>167</sup> <https://blogs.imf.org/2020/04/20/a-global-crisis-like-no-other-needs-a-global-response-like-no-other/>.

**Phillips of Worth Matravers, Lord Neuberger of Abbotsbury, Sir David Edward, Sir William Blair, Professor Louise Gullifer, Professor Spyros Maniatis, Professor Eva Lein, Professor Malik Dahlan, Keith Ruddock, and Judy Fu.**

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