International Contracts:

How has the global pandemic impacted international contracts?

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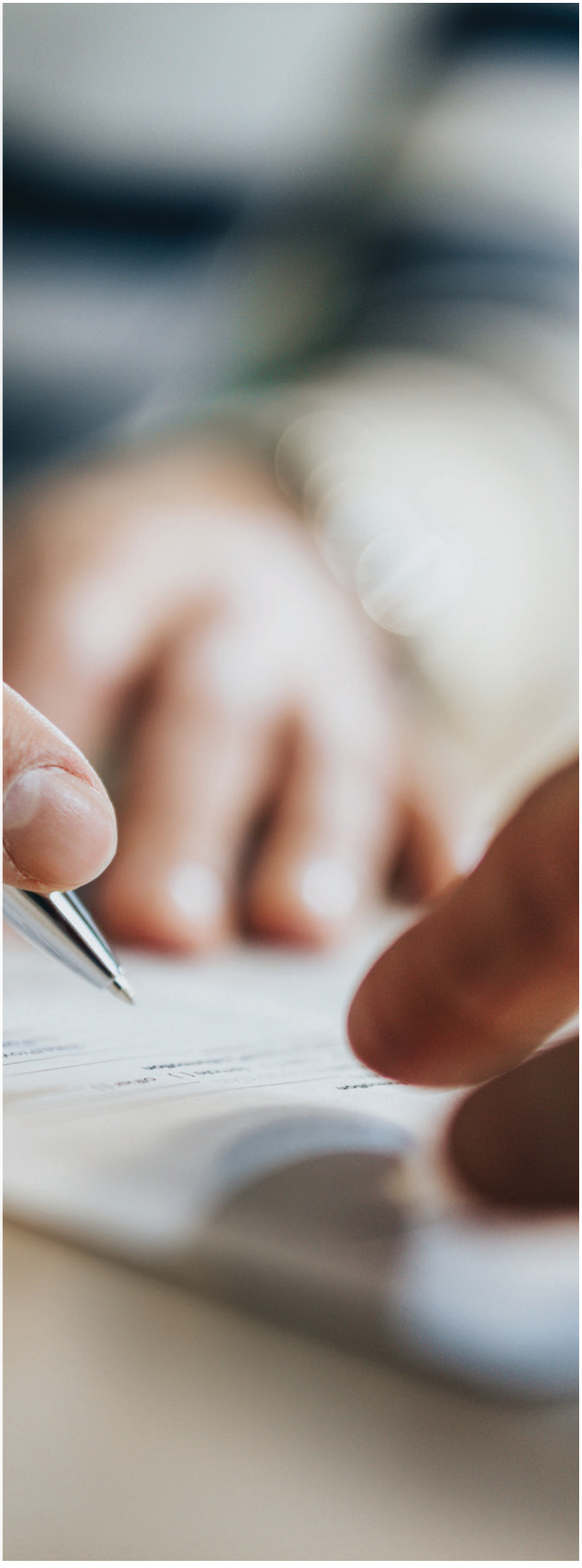

#IRPUBLICATIONS

THE VIEW FROM IR

Thomas Wheeler, Founder
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Our Virtual Series publications bring together a number of the network's members to discuss a different practice area-related topic. The participants share their expertise and offer a unique perspective from the jurisdiction they operate in.

This initiative highlights the emphasis we place on collaboration within the IR Global community and the need for effective knowledge sharing.

Each discussion features just one representative per jurisdiction, with the subject matter chosen by the steering committee of the relevant working group. The goal is to provide insight into challenges and opportunities identified by specialist practitioners.

We firmly believe the power of a global network comes from sharing ideas and expertise, enabling our members to better serve their clients' international needs.

International Contracts:

How has the global pandemic impacted international contracts?

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The COVID-19 pandemic is one of those once-in-a-lifetime events that few people predict but which affects everyone – individuals, businesses and governments.

During the past four months the pandemic has caused huge disruption to companies across the globe as many have suddenly found it impossible to fulfil their contractual obligations. From retail and the construction industry to hospitality and manufacturing, every area of the world economy has suffered.

As a consequence, lawyers and their clients are now rushing to look more closely at the force majeure doctrine as an option for businesses that are no longer able to perform their contractual obligations.

Different legal systems have different legislative definitions for force majeure. For instance, English common law – unlike in civil law – has no universal definition. The ability of a contracted party to invoke force majeure will depend on the presence of a force majeure clause and the particular terms set out in the contract.

In this example, a typical force majeure clause highlights circumstances – generally an unpredictable event – where a party is excused from performing its contractual obligations. Such clauses very often recommend a procedure the contracting parties have to follow to avoid liability for non-performance following the unpredictable event - in the most obvious recent case, COVID-19.

Meanwhile, in Germany, for example, the term is codified, but not in any particular section of the civil code, so the legal alternative is provided in the form of 'impossibility'. Similarly, in Italy no specific definition of force majeure exists and the alternative is referred to as 'hardship and impossibility'.

As a result of these interpretations, different jurisdictions either have a more narrow or much wider interpretation of force majeure and frustration and it's a point IR Global members talk through in detail in the following pages.

Nevertheless, most legal codes tend to have common factors regarding force majeure, which is when a party relies on the doctrine to demonstrate that it has been engaged in particular circumstances that have resulted in the non-performance of a contract. The party that cites force majeure will need to establish that an event such as war, natural disaster or acts of God have occurred. In this case the unforeseeable event in question is the COVID-19 pandemic. Once it is established that an event has occurred, the contracted party that wants to trigger force majeure has to show the court that the event has prevented, delayed or impeded its ability to perform any contractual obligations.

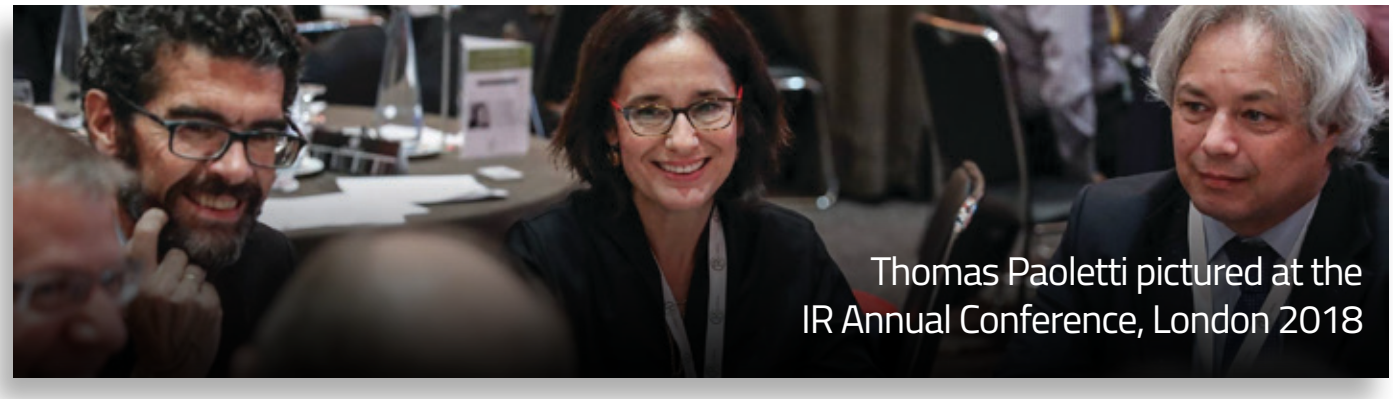
Unsurprisingly, as a result of the Coronavirus, businesses the world over are claiming that as a consequence of a force majeure event they are not able to perform their contractual obligations, and require an extension to fulfil their obligations, to renegotiate terms to terminate the contract altogether, among other factors.

One element that needs to be taken into account by legal teams is the question of whether the event could have been foreseen. Nobody could have predicted the sheer scale and effect of COVID-19 in all the jurisdictions, but pandemics have occurred in the past; for example, the SARS epidemic of 2003. For many businesses and lawyers, the issue involves the disruption to contracts resulting from COVID-19 triggering a force majeure clause. Under French law, for example, an event is not considered to be a force majeure if it could have been foreseen when the contract was signed, while in English law force majeure is not defined and does not apply unless the parties agree that it should (in the relevant contract).

In a world reeling from the COVID-19 pandemic, then, it would be advisable to extend the definition of force majeure to include pandemics and quarantines. Ultimately, the impact of the pandemic has highlighted the importance of defining specific force majeure clauses to contracts.

Different interpretations also cover the common law doctrine of frustration, if there's an absence of force majeure. With frustration, a contract is discharged if the event makes it impossible to perform. In common law, frustration is a narrow doctrine that is applied to prevent parties from using it to escape a bad contract, but in countries such as Italy frustration can be interpreted in broader terms.

In the following pages, x9 IR Global members give their insights into the issue of international contracts, force majeure (or impossibility) and risk in the age of the COVID-19 pandemic. For many different jurisdictions, issues around non-performance of contracts are still being discussed by legislators as businesses and governments come to terms with the pandemic.



Thomas Paoletti pictured at the IR Annual Conference, London 2018

Featured Members

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Matthias Voigt is a lawyer specializing in labor law, inheritance law, contract drafting, procedural law and corporate law. He is a partner at Kleinheisterkamp Voigt Partnerschaft mbB, which together with 4 other companies forms the FRTG Group.

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Dr. Lauri Railas is a Finnish attorney with a former career as a European Union official and an executive of the International Chamber of Commerce. Lauri´s practice ranges from private to public law aspects of international trade and he is also a renowned expert of logistics, distribution and insurance law. Moreover, Lauri is the statutory Average Adjuster in Finland and also acts as an arbitrator in commercial disputes.

Lauri also has academic credentials as an Adjunct Professor of Civil Law at the University of Helsinki and is a regular contributor of conferences organized by international organizations including as the International Chamber of Commerce, the UN suborganizations, and the OECD.

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Nicolò graduated in law at Trento University in 1997 and after being admitted to the Italian Bar in 2000 he started working with some leading Italian law firms becoming salary partner in one of them in 2012.

As from July 2019 he is Partner at IPG Lex.

Nicolò's main focuses are corporate and company law and banking. He has a vast expertise in litigation and arbitration. Nicolò has also developed relevant experience in law of contracts, both national and international, in international law and in agroindustrial law and wine laws.

From 2007 he assisted the number one privately owned wine company in Italy in terms of volume (90 million bottles/year).

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Joanna specialises in civil, commercial and business law. She provides comprehensive legal services to companies and other business entities in the field of ongoing corporate services, obtaining necessary permits and concessions, drawing up legal opinions, drafting contracts as well as negotiating them. Joanna participates in conducting audits and deals with the implementation of compliance procedures. She also advises in complex restructuring projects of companies and specialises in transaction advisory, with a particular focus on mergers and acquisitions. She also works in the field of public procurement law, offering legal assistance at every stage of the process of both granting and obtaining public procurement.

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Since joining SSEK in July 2002, Fahrul has been heavily involved in helping clients establish corporations and with foreign investment deals, mergers and acquisitions, and various restructurings. Aside from general corporate and commercial matters, much of his work is related to securities, debt restructuring, and antitrust matters.

His projects have included acting as Indonesian counsel to Alibaba Group in its US$1 billion purchase of a controlling stake in Southeast Asian online retailer Lazada Group, advising Grab Inc. on the acquisition of Uber's business and assets in Indonesia and representing Didi Chuxing as Indonesian counsel in the acquisition of a substantial stake in Grab Inc. in a transaction valued at over US$1 billion.

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Abiodun Owonikoko Esq., SAN is the exclusive IR member for Banking & Finance. He is also well versed in; Dispute Resolution through Advocacy (in both trial and appellate courts), Arbitration & other Alternative Dispute Resolution Mechanisms (ADR); Corporate, Secretarial, Commercial and Investment Services (including but not limited to incorporation of companies, registration of business names and incorporated trustees, filing, processing and obtaining Certified True Copies of necessary Forms at Corporate Affairs Commission); Corporate reconstructions with particular emphasis on industrial relations and labour issues; Foreign Judgment/Awards enforcement; Solicitor's advisory support service on the legal aspect of emerging local and international investment opportunities such as power, oil & gas, telecommunication as well as International Finance Law; Statutory reform advocacy and legislative lobby; Constitutional litigation and advisory services.

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Joram specialises in corporate law, M&A and banking. In addition, he defends cases of civil and administrative law in court and covers labour law, immigration law and debt collection matters.

Before joining M&S as a founding partner Joram was a sole practitioner for his own firm, working in the corporate department for a well-established Luxembourg business law firm for several years, worked as legal counsel of a Luxembourg trust company and managed a boutique law firm specializing in corporate and tax law.

Joram has represented Fortune 500 companies and private clients with respect to M&A transactions. He also advised international businesses on, inter alia, corporate restructuring, partnerships, internal financing, international sale of shares, and acquired significant experience in commercial litigation and cases of labour and immigration law.

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In his twenty years of legal practice, Thomas has assisted clients in both domestic litigation cases and international cases including the United Kingdom, United Arab Emirates and Oman.

In 2008 he joined Al Bahar Law Firm, concentrating his activities on drafting contracts and in particular commercial contracts and company related contracts and advising clients on corporate and company law as well as commercial agreements advising both domestic and international clients.

He has acquired specific expertise in the Gulf States, assisting companies in terms of overseas investment and internationalization in the Middle East, offering legal support throughout the planning stage and specialist assistance in the establishment and running of the overseas business.

In 2014 he founded the Paoletti Legal Consultant and he is currently the owner and the managing partner.

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Gautam is a Senior Partner and head of Maritime and Commercial disputes practice in the Firm and his areas of expertise include Offshore, Maritime and Shipping, Insurance, Environment, Dispute Resolution and ADR. Gautam has graduated from University of Goa and is a registered Solicitor with the Law Society of England and Wales.

Gautam's admiralty practice includes both dry and wet shipping. During his professional career, Gautam has acted for several prestigious clients including International Banks, Ship Owners and Charterers, Yards, Cargo Owners, Insurers and P&I clubs, Bunker suppliers etc. He regularly advises on disputes pertaining to mortgage claims, marine insurance, bills of lading, charter parties, ship building & ship repair contracts, collision & limitation of liability, salvage, general average and marine pollution and has represented several multinational and reputed domestic clients on complex maritime and off-shore projects. Gautam is well known in the Maritime Sector for providing practical solutions to various complex shipping issues. Gautam has been regularly advising Private Port operators in India on various compliance related issues and regularly advises and represents disputes under Concession Agreement under the Public Private Partnership of BOT, BOOT, BOO, BTO etc.

SESSION ONE

Can force majeure justify a suspension of performance or the unilateral imposition of new deadlines or cancellations of purchase orders?

Matthias Voigt - Germany (MV) There's an issue worth defining here between the civil code and common law. We have doctrines that are named differently but work in a similar way. While the common law legal system originates from a precedent standpoint, the German legal system has evolved by statute. Nowadays I think that both systems are fairly similar.

We've come from a statutory state basis and we need case law to interpret this. The statutes that we're applying in cases of force majeure have been around for quite a while. Consequently, what we call an 'impossibility to perform' is very much like 'frustration'. We're talking about the primary obligations under contract that are the duty to perform; for example, with the supply obligation of the contract where this is an obligation to pay an agreed price. Whenever there's a disruption in the supply chain, we have to assess whether this was imposed on the parties from the outside and how this was imposed on the contracting parties. For the COVID-19 pandemic we would argue or plead that this was imposed on the parties by force majeure, as the name says, by a higher force. An event like this pandemic (hopefully) is not permanent, so you can't argue that this obligation will be lifted forever so as long as the pandemic endures; the obligation to deliver the goods will be halted, but not entirely lifted.

This is particularly true if you have a contract for a fixed term with a delivery on a fixed schedule and you can argue that it was impossible to meet because of the pandemic. You can claim that this contract was frustrated in a way that the delivery was impossible to perform at the due time.

As for secondary claims, that is damages especially, neither party had an influence over this event, so neither party bears any responsibility. However, the latter is an element of such claims.

In any case other than providing for strictly agreed points of delivery a contract amendment will be likely to prevail over the doctrine of impossibility. So we are more likely to plead a contract adjustment allowing for new delivery deadlines, for instance. If, under any circumstances, the adjustment is not feasible under the contract, the breach of the obligation to delivery may entitle the other party to the cancellation of the contract.

Nicolo Manzini - Italy (NM) The doctrine of force majeure is very common in international contracts and is commonly defined as an unforeseeable event, outside the control of the parties, which makes it impossible or too onerous for one or either party to provide the performance of the contract obligations. Compared to the Italian legal system it is therefore a mix of different concepts which are specifically and distinctively provided for by the Italian Civil Code. Indeed, the Italian Civil Code does not specifically provide for a definition or regulation of force majeure by itself. However, in relation to contracts, the Civil Code contains different and separate, albeit similar, provisions in relation to "supervening impossibility" ("impossibilità sopravvenuta" – namely articles 1218, 1256, 1463, 1464 C.C.), on the one hand, and hardship ("eccessiva onerosità sopravvenuta" – article 1467 C.C.), on the other hand. Although the notion of "supervening impossibility" is wider than the one of force majeure (as it can be inclusive, for instance, of impossibility caused by the non-defaulting party's conduct), it is commonly established by either doctrine and case law that the doctrine of force majeure and "frustration" are comprised in it. Hardship can be based solely on unexpected events and occurrences, while impossibility doesn't necessarily have to be as a result of an unpredictable event.

It is likely that most contracts in Italy, where there are obligations on both parties, will be affected by the COVID-19 pandemic and we are already seeing it happening. You'd have to look at all this on an individual basis, so we can't be exact unless we look into the contracts and because of impossibility and hardship it might not be applicable in every case. It is something that you need to carefully evaluate for each contract and for each specific case. This is confirmed also in the light of the sole general provision the Italian Government has adopted in relation to contracts and COVID-19, namely article 91 D.L. 18/2020 according to which the respect of the restrictive measures providing for "lockdown" "shall always be assessed for the purposes of excluding, pursuant to and for the purposes of articles 1218 and 1223 of the Italian Civil Code, the liability of the debtor, also in relation to the application of any forfeiture or penalties related to delayed or omitted fulfilment of obligations". On the very practical standpoint, also as a result of the lack of clarity of provisions set out by our Government, particularly when it comes to the pandemic, from our experience most parties are working responsibly to resolve issues. Everybody understands that this is a once-in-a-lifetime event. And, in my opinion, this then gives the opportunity for both parties to open the door for mediation so you do not have to go to court and hopefully find a solution that is somewhere in the middle with decent timing.

Lauri Railas - Finland (LR) The occurrence of a force majeure event justifies the suspension of the performance of contractual obligations by the affected party and this depends, obviously, on how your contract has been drafted. A unilateral imposition of new deadlines sounds harsh, but it could be possible after invoking force majeure and provided that the length of the impediment is known. You would not have to negotiate new deadlines. Force majeure clauses in the contract preserve the continuity of the contract up to the agreed time after which termination is possible.

If you depend on the law only – and I'm referring to the Vienna Convention and the UK is not a party – under the CIC convention non-performance could be a fundamental breach of contract, even if you avoid paying damages based on force majeure. Consequently, you don't have to pay damages because your delivery is delayed but, in any case, if you are delayed this constitutes a fundamental breach. According to the CIC convention, as defined by Article 25 of the convention, then you might cancel the contract and if you have a force majeure clause, then the second clause regulates when you can terminate. The cancellation of purchase orders would require the possibility of termination. Again, a force majeure clause dates when termination is possible; whether the buyer is entitled to hold back payment if the seller cannot deliver due to force majeure again depends on the force majeure clause and applicable law. Therefore, I would say give a cautious, yes, to that question.

In Finland and the Nordic countries it is extremely rare that the court might adjust contracts. It is obviously possible to use arbitrators and even the arbitrators could also adjust contracts.

Thomas Paoletti - United Arab Emirates (TP) From a UAE perspective we rely either on the contract clause that is related to force majeure or we can rely on article 273 of the civil law that clearly states: regarding contracts binding on both parties, if force majeure supervenes which makes the performance of the contract impossible, the corresponding obligation shall cease and the contract should be automatically cancelled. Force majeure was last tested during the financial crisis of 2008-09 and, as a result, there were a few companies that used the force majeure clause to exit from their contractual obligations. Furthermore, the UAE Courts have interpreted the uncontrollable.

Consequently, according to those precedents, a force majeure clause cannot be not be invoked.

As of today, new cases have been brought to the attention of the court and recently we have seen this particularly in rental disputes for residential apartments. Usually if a tenant wants to terminate, the contract has a two months' penalty to be paid. Now, the court says that if you lose your job then you can invoke the clause of force majeure to terminate the tenancy contract and you are not liable to pay that two months' penalty. This is what is happening in terms of applying force majeure. As a result of the pandemic we will need to test each contract individually.

Fahrul Salam Yusuf - Indonesia (FSY) In Indonesia we are based on civil law and force majeure is provided for in our civil code, which regulates contracts in Indonesia. Consequently, contracts provide for force majeure and include certain items, incidents and events that can come before the courts. That's the theory, but in practice what happens in court can be a different story. As you all know, litigators can be very creative, they can force judges to deny the force majeure claim or even accept the force majeure claim, so it depends on the litigator. In principle, whenever there is a force majeure clause, it's usually acceptable as long as it is clearly specified in the contract. It will have to specify the kind of force majeure event and how both parties could claim it is indeed force majeure.

As a result, the parties will have to prove there is the possibility of a sudden and unexpected event that has made the performance of the contract impossible. It's worth noting that it's not always successful for a company to claim force majeure in the courts. But in most of the successful cases, the agreements are very clear as to what constitutes force majeure or not and what procedures should be followed by a party, to be able to successfully claim that force majeure has happened.

In the case of COVID-19, there has not been a case yet but if we learn from what's happened in previous cases before the pandemic, I'm sure that COVID-19 is not a guarantee that the court will honour the force majeure claim. To date there have not been many cases submitted to the court and it's still a developing situation.

Abiodun Owonikoko - Nigeria (AO) Nigeria is a common law country and the doctrine of force majeure derives largely from English law. In principle the case of force majeure is ordinarily in the contract where it has to be defined what events constitute a force majeure. If it is not expressly provided for in the contract, you may have to fall on the doctrine of frustration, which is implied and imposed by law. Most international contracts in Nigeria tend to be governed by the law of contracts and force majeure is essentially understood to be an event that significantly changes in nature the contractual rights of the parties.

Where problems occur is when you have to define those issues as part of the force majeure event. It's very clear that a pandemic such as COVID-19 was never contemplated by anybody. The essential elements are there to cover the COVID-19 pandemic, so there's every reason that an agreement can be made between both parties. If you don't have a force majeure clause, in any new agreement, you may need to look at the Legal State law Contract Reform Act of 2015. Section eight of it defines events of frustration and how the rights of parties can be adjusted. But it does not specifically mention anything. Any particular contract in general should contain the possibility of uncertain events.

Gautam Bhatika - India (GB) When you look at force majeure as an event – particularly when trying to define force majeure – it's an event that is neither anticipated nor do people have control over it.

There are a few points that are relevant when it comes to actually dealing with force majeure, particularly in courts and particularly when it comes to negotiating with the parties. Or trying to come up with some sort of stopgap arrangement that needs to be arrived at during the period, ie, of the pandemic.

The first point is that the World Health Organization has called COVID-19 a global pandemic, so there's no doubt it is a force majeure event. The second point would come as to whether a so-called force majeure event has been referred to in part of the contract. If it is a part of the contract and it spells out anything to do with an act of God, this then is very much a force majeure. Also, you need to understand if the force majeure event is a temporary measure; for instance, in the case of the supply or a product. Is the failure to supply the product temporary or permanent? As a result of force majeure is that a work stoppage and is it temporary or permanent?

If a force majeure event has occurred, then if the seller is ready to supply and the buyer is unable to buy, then the contract would be terminated because it's impossible to fulfil the contract. As with my other colleagues, the COVID-19 pandemic was so unforeseen that many of the cases will have to be looked at individually.

Joram Moyal - Luxembourg (JM) Under Luxembourg law an external event alone will not be enough to qualify it as force majeure; other conditions must be met.If force majeure is not contractually defined between the parties, then it must fulfil three criteria:

- extériorité (exteriority) – meaning that the event was external and not connected to either the contracting parties;
- irrésistibilité (unpreventability) – meaning that the impact of the event could not be mitigated by taking appropriate measures; and
- imprévisibilité (unpredictability) – meaning that the event could not have been foreseen at the time of the conclusion of the agreement and that there was no reason to believe that it would happen.

Imposing a new deadline would, however, only be possible if the delivery was not time sensitive. Otherwise, the purchase order needs to be cancelled.

Joanna Bogdanska - Poland (JB) The occurrence of a force majeure event may exclude liability for non-performance or incorrect performance of the agreement. What is more, in cases of changes in circumstances caused by a pandemic, the code rules governing the consequences of a specific type of non-performance in the form of impossibility to perform may apply. If one of the counterclaims has become impossible as a result of circumstances for which neither party is responsible, the party who was to provide it cannot claim the counterclaim and, if it has already received it, is obliged to return it in accordance with the provisions on unjust enrichment.

However, it does not justify the unilateral imposition of new deadlines of cancelation of purchase orders.

If, due to an extraordinary change in relations, the performance of a benefit would be associated with undue difficulty or would threaten one of the parties with a gross loss, which the parties did not foresee when concluding the contract, the court may, after weighing the interests of the parties, in accordance with the principles of social coexistence, determine the manner of performance, the amount of benefit or even decide to terminate the contract. When terminating the contract, the court may, if necessary, rule on the parties' accounts (rebus sic stantibus clause).

SESSION TWO

Does the COVID-19 crisis and possible breach of international contracts fundamentally alter assumptions surrounding risk allocation, supply chains and access to markets?

Germany - MV I think from a risk allocation point of view, the risk for the initial phase of the pandemic is largely past. But that doesn't mean there will not be a second wave and if that's the case companies will need to factor this into their business operations going forward. There are going to be a lot of insolvencies, so businesses need to be extra careful how they plan ahead in the next few months.

Regarding the second wave, companies with international supply chains will be the most affected. For instance, particularly in Germany, there's the automotive industry and it will be impacted by a second wave disrupting supply chains once again. You need to understand what you mean by the force majeure clause when it comes to analysing risk. Everyone conducting business globally right now has to think about this.

For most businesses the pandemic is very new and is very ill defined. Many will have to look carefully at the future and also understand what is really pretty unforeseeable in the courts. For example, in the future you can't possibly argue that any pandemic of the kind we are experiencing right now was unforeseeable ever again. Supply contracts have been providing for abstract "unforeseeable" events. Any pandemic of the current dimensions probably used to be unforeseeable, but now that it has occurred, businesses will be held liable for not regulating this from this point forward. And so how a court views force majeure will be different in the future so that the outcome of lawsuits will depend very much on the force majeure clauses that will be drafted in present or future contracts. That is why we strongly advise to have all those contracts reviewed for an adjustment to the current situation.

Italy - NM Regarding risk allocation, we are talking about a problem that is, theoretically at least, going to be over soon. Real risk assessments should have been made a few months ago, but COVID-19 was never going to be predicted like that. As far as I can see, most of the Italian enterprises are back in business now. I don't think there is a huge risk allocation issue right now, at least in Italy, but that would still be applicable if you, say, do business with the US. We've been seeing huge problems in the supply chain, particularly in the automotive industry. At the height of the pandemic no one wanted to buy anything that was made in Italy – and no one could ever have predicted that.

At the start it was very difficult for businesses when all production stopped. What they are doing now is getting production going again and the government is helping to fund that growth. These problems will continue and there is no doubt that there will be a lot of insolvencies into 2021 because we had a number of corporations that were already experiencing problems. For them COVID-19 was the final nail in the coffin and no amount of risk allocation would have saved them.

The above does not consider the possible impact of a second wave that could have a big impact on enterprises and on contracts, also considering that it could hardly be considered as an unforeseeable event.

Finland - LR We are very much dependent on exports, producing investment commodities such as power plants, machines and so forth.

At the moment we haven't experienced that many problems, but obviously the order books are relatively empty right now, particularly in areas such as ship building – cruise ships, for example. That creates problems if nobody is going on cruises. The government has subsidised big and small businesses, but as my colleagues have said, no one could have predicted the type of risk analysis ahead of COVID-19. That initial phase has already passed.

Nevertheless, heavy industry will need to import components from countries such as China and those supplies have all but dried up in the past few months. And if you don't have any components, you cannot make the product and that has created big problems. From a risk point of view, I think companies will want to mitigate risk by ensuring that components are closer to the locations of production. That's really important.

Many businesses will now be considering this possibility and make risk management a key aspect of their operations. I've tried to understand about the consequences of that risk-based approach in terms of law and it's very difficult to invoke changing circumstances in contractual relationships in general.

We can predict that COVID-19 will cause trouble in the future, but we cannot build on general clauses. I think that companies will have to draft more carefully prepared contracts to try to understand unpredictable circumstances.

UAE - TP If you have a purchaser and a seller and the purchaser is unable to receive the products because they closed the restaurant, for example, that's going to have a big impact. No one can foresee it. If you're unable to receive the products in the restaurant, you will not be able to perform the contract. Similarly, we have court cases where tenants are unable to pay for their tenancies in shopping malls.

Here in the UAE as soon as the pandemic was announced, the government decided to shut down all the shopping malls and all shops closed. This caused a number of issues related to tenancy contracts. Some landlords were keen to help their tenants and provided free rent for two months, for example. Others were much more reluctant to negotiate with their tenants.

That is when a lot of tenants decided to vote for force majeure to try to terminate the contracts. Going forward in the hospitality industry, from restaurants and hotels to shopping malls, all will need to look at the risk involving tenants' contracts. These are difficult times. With the leisure industry, for instance, people need to understand how they can't go back to how it was with new social distancing measures in place. Leisure, hospitality, health and fitness; trying to mitigate risk in these industries is very difficult.

Indonesia - FSY Our civil code actually requires that the party must observe what's happening in reality before they can conclude in any dispute resolution. With COVID-19, I suspect that the court should honour what's really happening in practice because the pandemic has caused the non-performance of all parties. But, again, it's not been tested yet.

My expectation is that the courts will honour any party that claims they could not perform because of COVID-19. It's happening everywhere and not just in the retail industry, but in manufacturing and also in e-commerce. It's almost across the board here in Indonesia.

Nicolò Manzini pictured at the Dealmakers Conference, Rome 2019

It's something that is not normal, not expected, and it's impossible to perform the objectives of the contract because of that particular situation. I don't know what will be happening after the pandemic. Just like my answer to the first question, it's still a wait-and-see period. We lawyers are still waiting for major cases where the judges would actually honour the force majeure by the non-performing parties. Risk allocation is so difficult to define in such circumstances.

Nigeria - AO In Lagos regarding rentals and leases, courts are about to determine whether 'frustration' via force majeure operates in rentals depending on the specific nature of the lease agreement. The COVID-19 pandemic renders it impossible, for instance, to use the property for its intended use. We have a lot of shopping malls with number of franchises from abroad and they have had to shut down during this period. As a result, tenants, too, are unable to operate and will press for some kind of force majeure accommodation for a reprieve from their contracted obligations.

Another point I believe likely to become contentious will be in terms of expatriate employees. Many of them are usually paid in a foreign currency and most expat dominated businesses have suffered. The oil and gas industry, for instance, has all but shut down and people can no longer work on site. But the oil companies have to continue to accrue salaries for many workers in forex as well as suffering oil price cuts. This is going to be a big deal in Nigeria and something that nobody could have foreseen. The law here is very strict about employment and once you employ someone, you must pay for employees willing to work. How will this work with force majeure? I foresee that employees and employers may find this a very risky thing to try in court and it may be better for them to work towards some kind of negotiated settlement.

All this was never taken into account pre COVID-19, but will need to be factored in going forward.

India - GB In India by the end of March it was declared that everyone should work from home. There are two aspects here to think of when addressing the situation. The first aspect is logistics and supply chain and the second is the whole gamut of this supply as it is broken down into essential and the non essential commodities.

Essential commodities involve food, healthcare, medical supplies and access to the Internet. The government, looking at the initial risk issues, decided to step in and ensure essential commodities were available including Internet, connectivity, IT support and banking on the Internet. All these were taken care of, including, to a large extent, insurance cover. One interesting element to this pandemic has been that legislators have been looking back at a law associated with the plague during the British era in India. This was the Epidemic Act of 1897. Nobody had even looked at it since then but suddenly we have a pandemic and there's the invocation of the Epidemic Act and the Disaster Management Act, which gives power to local authorities to deal with the situation on the ground.

Once all this has been addressed the government and companies are going to have to look at the level of disruption that has occurred, particularly when it comes to supply chain and logistics, how we get back to some kind of new normal. There will have to be significant risk allocation regarding this new normal, but at the moment no one knows what this looks like.

Luxembourg - JM With the current pandemic, contractors should take the possibility of the pandemic into account and which was an unpredictable event now becomes predictable, ruling out the recourse to a force majeure event.

Poland - JB The impact of an event such as a pandemic and the associated constraints imposed by public authorities, and thus generally speaking the impact of changes in circumstances on contractual relations, are sometimes regulated in the contracts themselves.

Usually the parties do not attach much importance to such provisions, on the assumption that these provisions will not apply anyway in the course of performance of the contract. In addition, the practice of applying these types of clauses in Polish civil law transactions is of a residual nature and did not seem promising in the period preceding the pandemic.

However, it seems possible to use the suspensive, adaptive or even exceptionally extensive (termination of the agreement with the settlement of the consequences for the parties - distribution of costs, minimisation of losses, deductions, damages) schemes (mechanisms) provided for in such clauses to regulate the relationship between the parties. Both scenarios involving ex post and ex ante settlements will be considered. In the latter case, it will be a continuation of the agreement supplemented by new clauses, created to resolve disputes that may arise in the future in connection with the performance of the agreement maintained in force (although most often amended-adapted to the new conditions).

SESSION THREE

Where a contract does not contain a force majeure clause, how simple is it for parties to consider the doctrine of frustration? In which jurisdictions would this apply?

Germany - MV This overlaps with the first question. Coming back to that, we do essentially have that doctrine but we don't call it 'frustration' in Germany. We call it an 'impossibility', referring to an impossibility to perform your obligations under the contract and then we differentiate between the different kinds of impossibility, which can affect you individually or everybody as a whole. For instance, you could be able to procure a shipment from another source, but this one supplier that you have entered into a contract with is unable to deliver because there are different restrictions in different countries. For your supplier, performance of his duties may be considered impossible due to closed borders while suppliers based in less restricted countries would still be ready for shipment.

Any Chinese supplier, for instance, may have their goods ready for shipment while the country may still be in lockdown but you need the shipment. In this case, the Chinese supplier would be considered impossible to perform his contractual supply obligation.

As a result, the obligation would lapse along with the buyer's obligation to pay for the lost supply if the delivery date was agreed as a fixed date beyond which the shipment would be considered (and contractually agreed) useless by the buyer. However, this will be held as nobody's responsibility in that case and consequentially damages will likely result for neither party. But in general, that is, with no strict supply time agreed, this is only true if you can argue that this impossibility is of permanent nature.

These cases would not fall under "frustration", but under a doctrine that you might translate into a "disturbance" of the basis of the contract with the basis being the parties' initial motivation to enter into the contractual relationship. This doctrine allows us to amend the obligations of both parties to ensure the contract survives the pandemic because this will be the major goal for German legislators. This goal, by the way, is the doctrine "pacta sunt servanda" (contracts are to be fulfilled) deriving from ancient Roman legislation. The German legal system values this doctrine over any rights to claim damages.

Italy - NM How simple is it for parties to consider the doctrine of frustration, which we've mentioned previously? Again, we need to refer to Civil Code and basically the concept of 'hardship' and 'impossibility' which, as mentioned before, apply also in the event a specific clause is not provided for in the contract. On this basis, the answer is quite simple – you need to prove your claims are related to force majeure in turn caused by COVID-19.

Finland - LR Frustration is an English law doctrine. It generally means that the non-performance of the contract is not attributable to the parties and, as a result, there is a valid excuse for non-performance. The contract becomes, in a way, null and void through the operation of law and frustration provides one party with the defence in an action brought by the other. It kills the contract itself and discharges both parties automatically.

Finish law does not contain frustration as such, nevertheless, similar results might be reached. I now refer to our contract act, which is a pan-Nordic contract act involving all the Nordic countries, Denmark, Finland, Norway and Sweden and Section 36 of this act makes it possible for the parties to have their contracts adjusted on the basis of changing circumstances. A judge or arbitrator may adjust or set aside unfair contract terms.

UAE - TP With the UAE you have to consider that we have two independent jurisdictions with their own judicial systems. One is Dubai International Financial Centre (DIFC) for Dubai and the other one is Abu Dhabi Global Market for Abu Dhabi. Dubai has its own legal system that is similar to English law – but is not English law. While Abu Dhabi is just English law. In both jurisdictions if you don't have force majeure in the contract, you can then refer to the frustration clause.

Indonesia - FSY Our laws do not recognise the doctrine of frustration but since we recognise the freedom of principle doctrine, we can have that specified in the contract to the same effect. If that particular doctrine is clearly specified in the contract, we could have the same effect and we also allow parties to govern their contracts using other laws, assuming that there is a sufficient nexus between the parties and the foreign laws.

We could include the doctrine in the contract as long as the dispute resolution is using arbitration, not a court judgment, because Indonesia does not recognise foreign court judgments. If the contract is based on foreign law, maybe a country with a common law and then using the doctrine of frustration, and if it is disputed and is using arbitration in that country, an award of arbitration is going to be recognised in Indonesia as long as the country is a member of the New York Convention, 1960.

Nigeria - AO Nigeria is a common law country and there is no difference regarding frustration between the UK and Nigeria. It's more or less mirrored after the UK. Frustration can only apply to events that occur after the contract has been agreed. Generally, it only applies where events occur that make the performance of the contract impossible, illegal or something radically different from that originally envisioned by both parties.

India - GB In India we have the doctrine of frustration as part of the contract. I think there are two aspects to look at. The first would be whether this so-called frustration is a temporary frustration in nature or is it something that is permanent and it makes the contract impossible to perform in future.

If it's a temporary issue then there is always the possibility that we'll renegotiate the contract and look at a new time limit for the contract. These additional days can be added to the contract prior to completion. This then overcomes frustration and completes the contract. The second issue is if the contract is an impossibility to perform. Then the contract becomes void.

These are the two basic concepts that are part of the doctrine of frustration. Now, looking at all of the contracts with that in mind, what's happened in India is that most parties have to go through negotiations to eventual settlements. These are not normal times and most companies and the government are working towards resolutions despite the difficulties. But we'll have to see what the new normal looks like in the long term.

Luxembourg - JM As outlined above, force majeure is part of Luxembourg law and could be taken into account even if not part of a contract.

Poland - JB Under Polish law the doctrine of frustration does not apply. The institution that is most similar is clause rebus sic stantibus. However, in contrast to frustration, the rebus sic stantibus clause causes another effect. To the extent that frustration causes the obligations to lapse (combined with possible settlements of the parties), then the effect of invoking the clause (e.g. on the basis of the Polish Civil Code) is the possibility to demand a ruling on the existing undertakings under changed circumstances. Sometimes the legislature also decides to regulate separately the adjustment of cash benefits.

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