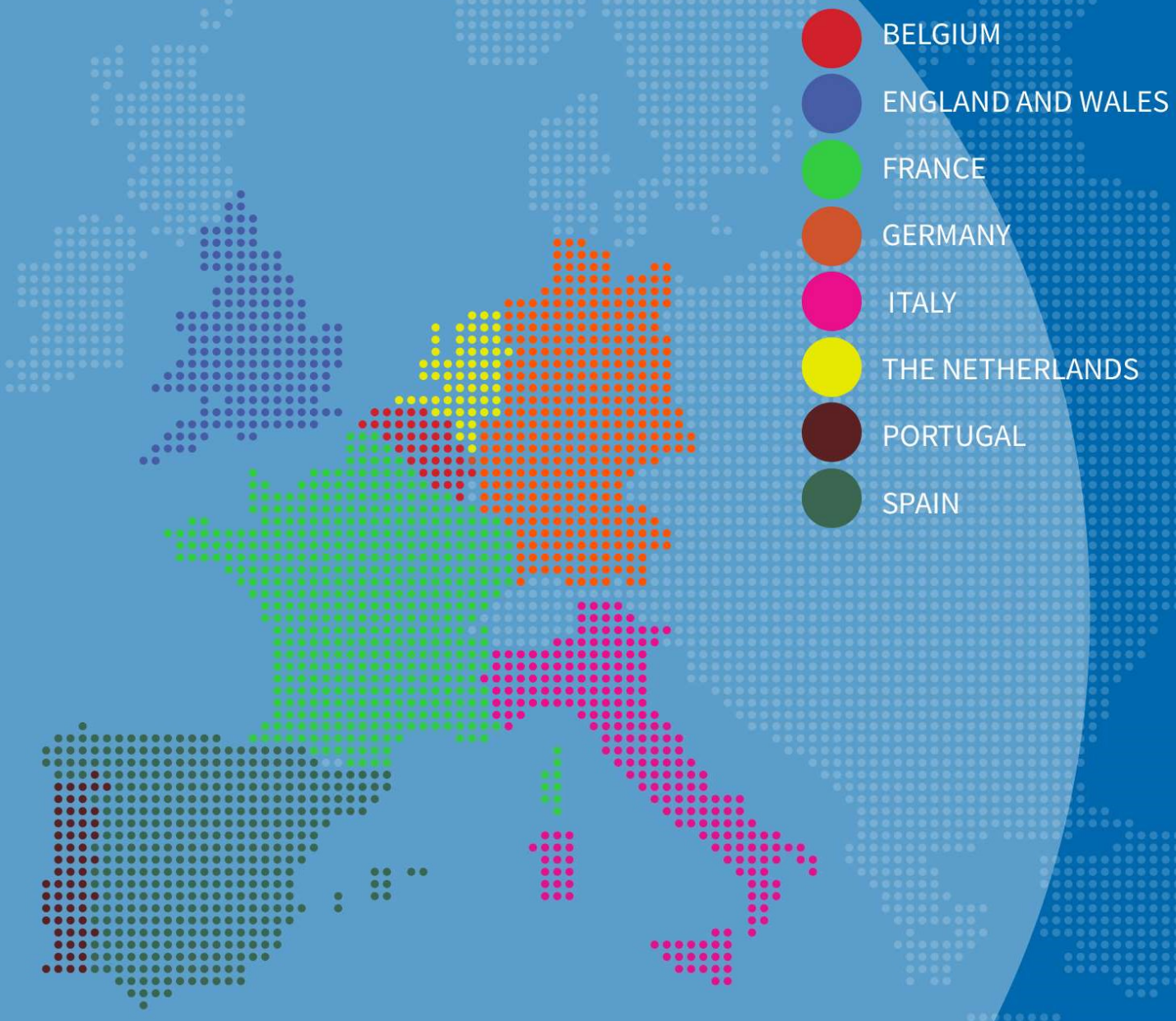
Loi&Stratégies
NICOLAS GENTY AVOCATS

presents a Distribution Law Network Guide

CRISIS MANAGEMENT MECHANISMS : COVID-19 AND COMMERCIAL CONTRACTS, EXISTING SOLUTIONS IN WESTERN EUROPE



COMPARATIVE STUDY

APRIL 2020

While this document has been prepared with the utmost care, it merely concentrates legal information and must therefore not be understood as legal advice. Hence, we exclude any liability that may arise out of the use or misuse of the information. Furthermore the situation concerning Covid-19 is unprecedented so that existing case law may not always be applicable. Please note that the contributions are up to date until 1 May, 2020.

This Distribution Law Network is an informal network of experienced lawyers with a passion for international distribution law and familiar with the specific issues raised by international negotiations.

The strength of our friendly network is the team spirit and pragmatic approach, which enables us to handle transnational issues efficiently.

The experience acquired through this network is also very useful in our daily practice as it allows us to be aware of the inevitable influences of foreign legislation and caselaw to propose relevant and innovative solutions to our clients.

On 11 March 2020, the WHO declared Covid-19 to be a global pandemic. In the days and weeks since, Europe has become the new epicentre of the COVID 19 pandemic.

Each country of the European Union is deploying its forces to fight against the virus, primarily through social and economic measures. Some of these measures have had a significant impact on commercial relationships.

Thus, when facing such a crisis, what are the contractual and legal solutions for contracting parties?

The main issues raised within companies across the globe have been around knowing how to deal with the pandemic and the exceptional and unprecedented measures taken by governments and, consequently, how to manage their contractual relationships.

We are aware that today more and more commercial contracts are executed abroad, and that legal systems foreign to one of the contracting counterparties is likely to be applicable to these relationships. To aid businesses in managing their contractual relationships, and to provide them with some of the tools they will need to better understand their contractual relationships during the COVID 19 crisis, we have conducted this comparative study on available crisis management mechanisms along with lawyers specialized in commercial contracts based in Belgium, England and Wales, France, Germany, Italy, The Netherlands, Portugal and Spain.

You will find in this short guide a summary of the legislations in each of the jurisdictions within the scope of this comparative study and a report detailing some of the legal specifics.

We hope you will find this study helpful and of use and, if you have any queries or would like further information on any of the laws mentioned, please do get in touch with the relevant lawyer.

Best regards,

The United Nations Convention on Contracts for the International Sale of Goods ("CISG")

This study introduces the applicable rules in the above-mentioned countries but contracting parties must keep in mind, in case of international sale of goods contract, that the CISG may also be applicable.

The CISG is currently in force in 91 countries including Belgium, France, Germany, Italy, the Netherlands and Spain. The United Kingdom and Portugal are not parties to the CISG.

The CISG applies to sales of goods contracts between business parties located in different contracting States or when the rules of private international law lead to the application of the law of a contracting state.

The contracting parties can exclude the application of the CISG through an express "option out" clause, or this exclusion can also be implied. If they haven't, the CISG may be applicable and provides for some useful rules.

For example article 79 provides for an exemption of liability resulting from unexpected risks without differentiating on whether the unexpected risks render the performance impossible or unreasonably burdensome.

"(1) A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it, or its consequences.

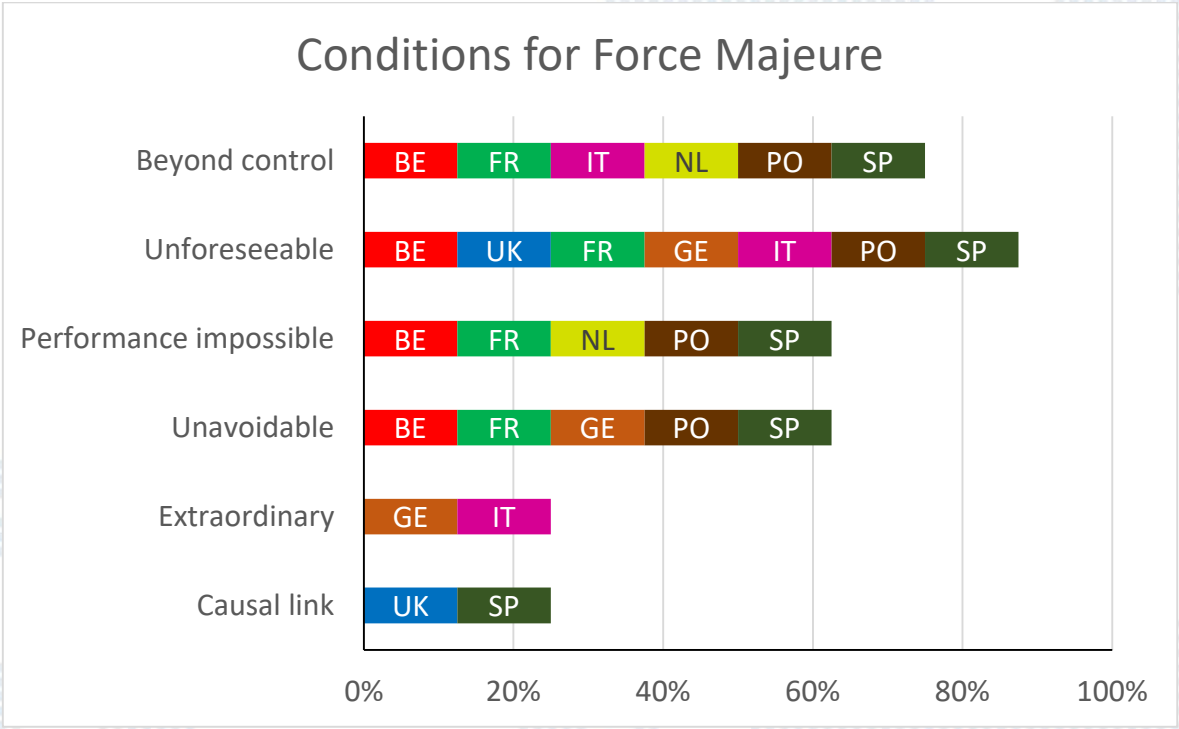
Article 71 also gives the opportunity to suspend the performance of ones obligation if the other party will not perform its own : ""(1) A party may suspend the performance of his obligations if, after the conclusion of the contract, it becomes apparent that the other party will not perform a substantial part of his obligations as a result of: (a) a serious deficiency in his ability to perform or in his creditworthiness; or (b) his conduct in preparing to perform or in performing the contract.[…]".

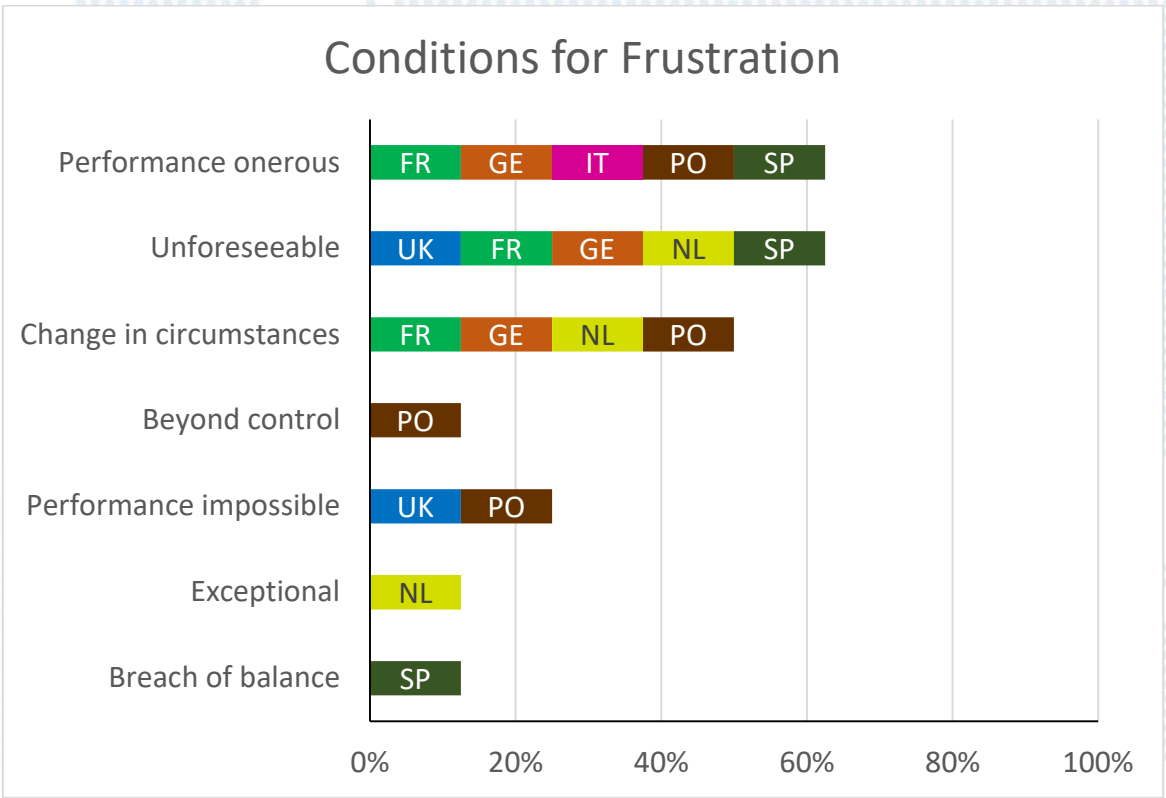
COMPARATIVE STUDY EXECUTIVE SUMMARY

	BELGIUM	ENGLAND AND WALES	FRANCE	GERMANY	ITALY	THE NETHERLANDS	PORTUGAL	SPAIN
"Force Majeure" or similar concept	Yes	Not unless contractually agreed.	Yes	Yes	Yes	Yes	Yes	Yes
Conditions of application	Event has to be : (i) not accountable to the party invoking it; (ii) unforeseeable and unavoidable; (iii) irresistibility results in an impossibility to fulfil the contractual obligation.	Depends on the drafting of the relevant clause and wording used. Other factors which a court may consider: (i) allocation of risk between parties provided for by the contract as a whole; (ii) the circumstances in which parties entered into the contract; and (iii) events which have arisen. Party seeking to rely on force majeure clause has to satisfy court that provision applies in circumstances.	Event must be: (i) beyond the control of the debtor, (ii) could not have been reasonably foreseen at the time of the conclusion of the contract, and (iii) the effects of which cannot be avoided by appropriate measures. This event must prevent the obligor from fulfilling its obligations.	No legal definition. Courts have developed different definitions depending on the type of contract, situation and applicable statutory law. Common ground seems to be that the occurrence must be extraordinary, unforeseeable and unavoidable.	Event must be: (i) extra-ordinary, (ii) not due to the debtor and (iii) not foreseeable at the time of the conclusion of the contract.	Party must show that its failure to perform cannot be attributed to it, by showing that the failure is neither its fault nor for its account pursuant to the law, a legal act or the relevant standards.	Event must be unforeseen, unpredictable, inevitable and beyond the control of the parties' and event affects the contractual obligations, assumed by the parties, namely by the debtor.	(i) Event must be unpredictable or, if predictable, unavoidable, insurmountable or irresistible; (ii) it does not result from the will of the parties but to external factors; (iii) event makes compliance with the obligation impossible; (iv) there must be a causal link between breach of the obligation and the event which gave rise to it, the latter being the impediment of the former.
Effects	Suspend or terminate the contract	Suspension, excuse of performance in whole or in part or termination.	Suspend or terminate the contract.	Without specific clause, statutory law applies: rules on impossibility or interference with basis transaction.	Modification or termination of the contract.	Suspend / terminate contract without payment of any default interest or compensation.	Suspend or terminate the contract without payment of any default interest or compensation.	Exemption of liability for the non-complying party.

	BELGIUM	ENGLAND AND WALES	FRANCE	GERMANY	ITALY	THE NETHERLANDS	PORTUGAL	SPAIN
"Frustration" or similar concept	No	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Conditions of application	N/A	The occurrence of an event, unforeseen by either party at the time the agreement was entered into and which makes performance of an agreement impossible.	Change in circumstances, unforeseeable at time of conclusion of contract, makes its performance excessively onerous for a party who had not agreed to assume the risk.	(i) Significant change of the circumstances on which a contract has been based, (ii) parties would not have entered into contract at all or would have concluded contract with different content had they foreseen such change, and (iii) one of the parties cannot reasonably be expected to uphold contract without alteration.	An event that makes it excessively onerous to fulfil the obligation for the debtor.	When the unforeseen circumstances are of such a nature that the other party cannot demand that the contract is maintained in an unmodified form. The threshold for relying on the unforeseen circumstances exception is high.	Obligation must become objectively and supervening impossible for reasons beyond control debtor, **or**, abnormal change in circumstances in a way that makes performance excessively onerous.	Unpredictability of the event and excessive hardship in performance of contractual obligations which is usually characterized as a serious breach of the balance of reciprocal obligations of the parties provided for in the contract.
Effects	N/A	When an agreement is frustrated, it operates automatically and the agreement is terminated by operation of law.	Party suffering change in circumstances can ask for renegotiation of contract. In case of refusal or failure, parties can terminate contract or ask judge to adapt it. In absence of agreement, judge may, at request of either party, revise / terminate contract.	Amendment of the contract. If an amendment is impossible or cannot be reasonably expected from the other party, the disadvantaged party can withdraw from the contract or terminate it.	Equitable modification or termination of the contract.	Party to a contract can request court to modify contract (or consequences) or to wholly or partially terminate contract. In its decision, court must stay as close as possible to what parties originally intended and to the risk distribution that was initially included in the contract.	Contract termination or its modification based on equity.	Authorizes the party suffering the alteration of concurrent circumstances to request the opposing party a modification of the terms of the contract, its suspension or termination.

	BELGIUM	ENGLAND AND WALES	FRANCE	GERMANY	ITALY	THE NETHERLANDS	PORTUGAL	SPAIN
Existence of other legal means to suspend the performance of contractual obligation	Yes	Depends on contract; what parties expressly agreed. Some other concepts may be of use to parties, such as mutual mistake, implied conditions around performance and doctrine of "quantum meruit" (obligation to pay a fair and reasonable price for services actually received).	Yes	Yes	Yes	Yes	Yes	Yes
Recommended precautions	Please see below: "8 steps to deal with Covid-19 pandemic and commercial contracts"							


Conditions for Force Majeure
Beyond control
BE FR IT NL PO SP
Unforeseeable
BE UK FR GE IT PO SP
Performance impossible
BE FR NL PO SP
Unavoidable
BE FR GE PO SP
Extraordinary
GE IT
Causal link
UK SP
0% 20% 40% 60% 80% 100%


Conditions for Frustration
Performance onerous
FR GE IT PO SP
Unforeseeable
UK FR GE NL SP
Change in circumstances
FR GE NL PO
Beyond control
PO
Performance impossible
UK PO
Exceptional
NL
Breach of balance
SP
0% 20% 40% 60% 80% 100%

8 STEPS TO DEAL WITH COVID-19 PANDEMIC AND COMMERCIAL CONTRACTS

Companies should ensure that, when they want to suspend, terminate or renegotiate their obligations, they will timely inform the other party. Preferable, they will motivate and substantiate any decision or request in detail and will record this in writing. Furthermore it is recommendable that companies will assess their legal position vis-à-vis their most important business partners and that they will take the following actions:

(i) Establish whether there is a contract in place with their most important suppliers/customers etc. and identify the law applicable to the contractual relationship in question and the legal mechanisms existing in this legal system that could be invoked;

(ii) Analyse the content of the contracts in force to ascertain whether they have clauses relating to events of force majeure and hardship clauses and review the scope and consequences of those clauses;

(iii) Check whether there are obligations to give notice in the event of a material adverse change with an impact on the economic activity of one of the parties or in case of a probable inability to perform a contract in due time. In any contract parties still have an obligation of good faith and general information on the other party;

(iv) Keep a detailed record of the impact that covid-19 and the government actions is having on the company and on the performance of its contractual obligations, as well as any benefits the other party could claim;

(v) Investigate whether the company (and/or its group companies) can apply for benefits in the countries where it operates, like for example relief for payments of salaries for employees, tax benefits, possibilities to apply for loans, suspension or discount possibilities for the payment of rent etc. and make sure the company applies for this in time;

(vi) Be aware that under several law systems, each party has the obligation to limit its damages in as far as possible. When a party does not fulfil this statutory duty, it will have to bear those damages itself;

(vii) Make sure that for all new contracts, or for contracts that are being renewed or amended, the parties will address the – consequences of – Covid-19 and will make sure it is clear what party will bear what risk(s); and

(viii) Check whether the insurance policies taken cover situations of pandemics and/or events of force majeure. If so, check what actions should be taken to ensure claims can be made in time and successfully.

We do not rule out that in the aftermath of Covid-19 there will be many commercial disputes. We also predict there will be - substantial - delays at courts (also as a result of many courts closing during the Covid-19 pandemic). In this light we think it is worthwhile for companies to try to agree to a mediation procedure, or to conduct settlement negotiations, with their business partners.

GENERAL REMARKS

In the chapters hereafter we will provide you with the country specific reports, distinguishing between the legal concepts force majeure, hardship and other, similar mechanisms.

It is important to realise that for those analyses we have assumed that the contracts were already concluded (or the relationships were already in force) before the Covid-19 outbreak.

For all contracts concluded or amended during the Covid-19 outbreak and for the situation thereafter, the pandemic is foreseeable/predictable. This means that it will most likely not qualify anymore as hardship/an unforeseeable circumstance. Therefore it is advisable that the contract parties will address the situation – and especially the distribution of risks – in the contract.

If a company wishes to invoke any of these circumstances in light of the Covid-19 virus, please note that it is of importance to do so sooner rather than later in order to avoid the forfeiture of rights. The longer a party waits to invoke those rights, the more difficult it will be to do so successfully. As the Covid-19 pandemic is unprecedented and companies worldwide are being affected enormously, the legal consequences are not always straightforward and any steps need to be taken carefully and diligently.

Finally we want to bring under your attention that in many countries the courts are currently closed. This will lead to substantial delays of existing and new court proceedings. We further predict that in the aftermath of Covid-19 there will be many commercial disputes. The combination hereof could lead to substantially longer lead times of court proceedings. Court proceedings are costly and take a lot of management time. In the current situation, where budgets and management time will be required to rebuild and re-invent the business of companies, this may be an unwelcome burden. Therefore we would like to give you into consideration, when you end up in a commercial dispute with your business partner(s), to try to reach an out-of-court agreement with your business partner(s) through a mediation procedure or through settlement negotiations.

BELGIUM

1. Are there any specific measures taken, concerning commercial contract, in your country to deal with Covid-19 epidemic?

With regard to all public procurement contracts, the Federal State will refrain from imposing fines or sanctions on service providers or companies for performance delays or non-implementation due to the Covid-19 epidemic. Companies suffering from a slump in turnover, orders or reservations may request delayed repayments, exemptions from interest payments and reduced fines for non-payment.

The Belgian Government approved on April 24, 2020 a Royal Decree imposing restrictions on B to B creditors' rights. From April 24 to May 17, 2020 :
- unilateral or judicial cancellation of any agreement due to a payment default under the relevant agreement it made impossible. One exception : employment agreements.
- with the exception of immovable property, no precautionary or enforceable seizure may be carried out and no execution may be pursued or carried out on the company's assets.
It should be noted that this temporary moratorium does not constitute in any way a derogation from the obligation to pay the debts due, nor from contractual sanctions.

2. Is there a concept of *force majeure,* in your national law?

Yes.

If yes:

a. Is it a legal or jurisprudential concept?

It is a legal concept according to article 1148 of the Belgian Civil Code.

***b.* What are the conditions of application?**

A force majeure event exempts the debtor from an obligation when such event shows the following characteristics :
- is unaccountable to the party invoking it;
- is unforeseeable and unavoidable;
- irresistibility results in an impossibility to fulfil the contractual obligation.

It is useful to note that in a recent judgment, the Belgian Court of Cassation confirmed that the financial incapacity cannot constitute a force majeure event, even if such incapacity is due to external circumstances which constitute a case of force majeure for the debtor.

***c.* Is covid-19 epidemic, or the government actions taken, considered as a *force majeure* event in your country?**

Covid-19 and the related governmental measures are considered as a *force majeure* if
- the performance of the contractual obligation became impossible because of the epidemic (and/or related governmental measures) ;
- the parties concluded the relevant agreement before the epidemic outbreak ;
- the debtor took all reasonable measures to ensure the performance of its obligations after the outbreak became known.

The successive governmental measures directly impacting the activity of companies in Belgium are all elements beyond the control of companies and remain unpredictable and irresistible after the outbreak of the epidemic. These measures may be considered as unforeseeable since no one was able to predict the government's timeline for the monitoring of the Covid-19 epidemic.

In order to know whether your company is entitled to invoke a force majeure event, we must first and foremost, refer to the contract between the parties.

If the contract provides for a specific clause which organizes and mentions the events constituting force majeure, such shall be the definition of force majeure applicable between the parties. Thus, the contract may (1) provide for a definition of force majeure different from the legal definition and/or (2) establish a list of specific events considered as *force majeure*.

If the epidemic or the governmental measures lie within one of these two hypotheses, the contracting party suffering from the effects of a force majeure event may suspend the execution of his contract due to *force majeure* or terminate the contract, depending on the actual effects of *force majeure*.

If the contract provides for a standard clause which refers to *force majeure* such as interpreted by law and jurisprudence, or in the absence of contractual provisions, article 1148 of the Belgian Civil Code shall apply in order to determine whether governmental measures have effects which cannot be avoided by appropriate measures and thus prevent the performance of its obligations by the party invoking it.

If the contract excludes the application of *force majeure*, which is rare, then the parties cannot invoke the application of these rules to suspend their obligations and will thus have to perform them. However, if a contracting party considers that it has been forced to exclude the application of *force majeure* in the contract, this provision may still be disputed on the grounds that it creates a significant imbalance between the parties' respective obligations but it will be up to the judge to decide whether such an imbalance exists or not.

3. Is there a concept of Frustration in your national law?

No.

Belgian courts have traditionally rejected the doctrine of hardship, pursuant to which contracts should be adapted where unforeseen circumstances make their performance more onerous (rather than impossible, as it is the case for force majeure). In the absence of legal recognition of hardship, some courts have attempted to use related concepts, such as abuse of rights or the concept of good faith to modify or adjust contracts following a supervening and unforeseeable change of circumstances during their performance.

4. Is there any other options/provisions under your national law allowing to:

- **stop executing a contract during such a crisis?**

Force majeure allows a party to stop executing a contract in case of an epidemic crisis, provided that the conditions are met.

The parties shall pay attention to the effects suffered which may, depending on the obligations concerned, be permanent or temporary.

Thus, if the impediment is only temporary, performance of the contract is suspended and must resume once the cause of the impediment has disappeared.

On the contrary, if the impediment is permanent, the contract may be terminated *ipso jure*.

- **withhold payments for a limited period of time?**

In Belgium, we have a general principle of law called "*exception d'inexécution*" allowing a party to stop performing its obligations if the other party does not perform its own obligations. For this mechanism to be used, the non-performance must be serious enough to justify such a suspension.

One must keep in mind that it is only a temporary solution since, as soon as the other party resumes the performance of its obligations, the party that has raised the exception must also resume.

- **cancel orders if there are no client anymore?**

The question is to know whether a customer is entitled to cancel his orders placed with his suppliers based on the fact that he has had to close his business due to the lock-down.

First of all, the answer depends on what is provided for in the contract between the supplier and the customer regarding cancellation of orders.

If the contract allows a party to cancel orders in this kind of situation, then it is complicated to refuse it.

The parties will also need to check if the contract provides for a commitment on purchase volumes, and if so, the cancellation could be considered as a breach of contractual obligations and incur contractual liability.

Besides, depending on the facts, such cancellation may be disputed on the ground of abrupt termination of established business relationship if no prior notice has been given but, again, if the reason for the cancellation is considered as an event of *force majeure* or if it is due to the loss of business, the absence of prior notice may be justified.

- **renegotiate the commercial conditions applicable during the crisis (for example in terms of bonus, return of goods, etc.)?**

In the absence of legal recognition of hardship, one party may invoke the concept of good faith to ask for the renegotiation of the commercial terms and conditions if a change in circumstances, unforeseeable at the time of the conclusion of the contract, makes its performance excessively onerous for the party who had not agreed to assume such risk. If the other party does not agree, the party has to convince the court of the need to adapt the contract by claiming the abuse of rights of the other party.

5. What precautions can be taken today to face Covid-19 consequences in contractual relationships?

Notification

The first step is to inform the co-contractor of the effects of the Covid 19 on the contract. This is not expressly provided for by law but may be based on article 1134 paragraph 3 of the Belgian Civil Code, which provides for the principle of good faith in the performance of agreements. For example, the customer who intends to refuse deliveries shall sent a prior written notice to inform its supplier.

Obligation to limit one's own damage

In accordance with the principle of good faith, the contracting parties are required to make every effort to remove and/or limit the difficulties and damage caused by *force majeure*.

6. Are the courts still open to the public and the hearings held? If no, what are the available alternatives to settle contractual disputes?

The Courts are closed except for emergency procedures.

All cases before the Courts which are scheduled at a hearing from April 11, 2020 up to and including June 3, 2020, and in which all parties have filed submissions, shall be taken under advisement on the basis of the documents submitted, without pleadings. Written procedure thus becomes the rule during this derogation period unless otherwise agreed between the parties.

ENGLAND AND WALES

1. Are there any specific measures taken, concerning commercial contract, in your country to deal with the Covid-19 epidemic?

- Whilst Her Majesty's Government has set out various measures to aid both businesses and individuals affected by the virus, it has not introduced any legislation at the time of writing which alters or in any way amends the law insofar as it applies to contracts. That said, there is relief available for tenants to pay their rent, and loans for businesses who are struggling to meet their financial obligations. For more information, please see: https://www.gov.uk/government/collections/financial-support-for-businesses-during-coronavirus-covid-19

2. Is there a concept of *force majeure,* in your national law?

No.

If yes:

a. Is it a legal or jurisprudential concept?

N/A

b. What are the conditions of application?

The effect of the force majeure provision in an agreement will depend on the wording of the relevant provision, in the first instance. If there is a dispute around the effect of the wording or if the language used is unclear, the court can look "behind" the clause and attempt to determine the intention of the parties at the time that the force majeure clause was agreed.

c. Is the COVID 19 pandemic, or the government actions taken, considered as a *force majeure* event in your country?

This will depend on the language used in the relevant force majeure provision of the agreement, if there is one, and if the events which have arisen as a result of the pandemic, or government actions taken in response to the pandemic, fall within the scope of the events contemplated in the force majeure clause.

3. Is there a concept of Frustration in your national law?

Yes.

If yes:

a. Is it a legal or jurisprudential concept?

It is a legal concept which was developed by the English courts in the middle of the 19th century to ensure fairness in contractual dealings.

b. What are the conditions of application?

Lord Radcliffe's dictum in the case of *Davis Contractors Ltd. V Fareham* UDC [1956] UKHL 3 has been taken to embody the modern test for the applicability of the doctrine of the frustration in English contract law:

"*So, perhaps, it would be simpler to say at the outset that frustration occurs whenever the law recognises that, without the default of either party, a contractual obligation has become incapable of being performed because the circumstance 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.*" [underlining added]

c. Could the COVID 19 pandemic, or the government actions taken, imply the application of the frustration mechanism.

The starting point for the English courts when analysing a dispute to an agreement is to stay away as much as possible from interfering with the parties' freedom of contract. In other words, the courts are reticent to interfere in what is, at essence, a private agreement between two parties. A finding of frustration, with the consequence that the agreement in question is terminated, is thus an extraordinary and unusual remedy, and each case is assessed on its own merits (that is, the facts peculiar to each case). As put by Lord Reid in the *Davis* case, "*[t]he question is whether the contract which they did make is, on its true construction, wide enough to apply to the new situation: if it is not, then it is at an end.*"

Some events which have given rise to findings of frustration are:

- destruction of the subject matter of the agreement;
- supervening illegality;
- incapacity or death; and
- delay.

4. Are there any other options/provisions under your national law allowing to:

- **stop executing a contract during such a crisis?**

As can be seen from what has been written above, English contract law is relatively "hands off", in line with the principle of allowing individuals (which includes companies etc.) absolute freedom of contract, provided of course that the contract is not illegal or otherwise unlawful. If no provision has been made for force majeure within the agreement, or the force majeure provision does not encompass the events experienced by one of the parties, then any failure to perform will be a breach of the contract, and the remedies available to the non-defaulting party, both under the agreement and at law, will be available to the non-defaulting party.

This will include a scenario where one of the counterparties anticipated breaching the agreement. In such circumstances, the non-defaulting party can:

(i) treat the agreement as terminated for breach and claim damages; or

(ii) apply to court for an order of specific performance (compelling the other party to perform) or an injunction (demanding that the defaulting party cease to act in a particular manner which is at odds with the agreement.

- **withhold payments for a limited period of time?**

Again, this will not be permitted under English law unless:

(i) the parties agree to this;

(ii) performance has not taken place, and performance is a pre-requisite (a *sine qua non*) for payment; or

(iii) under the doctrine of quantum meruit, if partial performance has been made under the contract then a portion of the price (representing a fair and reasonable amount for the performance received) may be paid.

- **cancel orders if there are no clients anymore?**

Again, this will not be possible as a matter of law, but it may have been provided for under the agreement; for example, orders may be dependent upon demand or orders being placed with the party to the agreement.

That said, many parties are being pragmatic and sensible in the current climate as the entire supply chain is affected: in these circumstances, we are seeing many parties agreeing to suspend the obligations (both on the performance and payment sides) under their agreements.

- **renegotiate the commercial conditions applicable during the crisis (for example in terms of bonus, return of goods, etc.)?**

This will depend on the terms of the agreement and, failing provision being made for that, the parties' willingness to agree to renegotiate the agreement and the terms of that renegotiation.

5. What precautions can be taken today to face Covid-19 consequences in contractual relationships?

Under English law, there is no inherent duty to act in good faith, and so it is important that force majeure provisions are drafted widely enough to cover pandemics, and to permit a suspension of the obligations under the agreement for a certain period of time or for the duration of the event giving rise to the event of force majeure. Parties may also wish to consider drafting in a right to terminate for the non-affected party (or both) if the event continues for a period of time exceeding a certain specified number of days.

6. Are the courts still open to the public and the hearings held? If no, what are the available alternatives to settle contractual disputes?

The Courts are closed except for emergency procedures but parties can still use mediation to settle their contractual disputes if they agree to do so, and can agree on the terms of that mediation, including how it is to be conducted in the current environment. Some courts are conducting hearings via video conference. For further information, and for regular updates, please see: https://www.gov.uk/guidance/coronavirus-covid-19-courts-and-tribunals-planning-and-preparation

FRANCE

1. Are there any specific measures taken, concerning commercial contract, in your country to deal with Covid-19 epidemic?

The government has taken an Ordonnance n°2020-306 dated March 25th, 2020 which suspends the effects of periodic penalty payments and resolutory clauses for a period starting on March 12th, 2020 and ending on June 24th, 2020 (which should be extended until August 10th).
Besides, for contracts that are supposed to end during this specific period, the text gives to the Parties the chance to end it until august 24th (which should be extended until october 10th).

2. Is there a concept of *force majeure,* in your national law?

Yes.

If yes:

a. Is it a legal or jurisprudential concept?

It is a legal concept provided for in article 1218 of the French civil code.

***b.* What are the conditions of application?**

Force majeure in contractual matters is an event:

- beyond the control of the debtor,
- which could not reasonably have been foreseen at the time of the conclusion of the contract, and
- the effects of which cannot be avoided by appropriate measures,

that prevents performance of the obligation by the debtor.

***c.* Is covid-19 epidemic, or the government actions taken, considered as a *force majeure* event in your country?**

The government announced on February 28th, 2020 that Covid-19 epidemic will be considered as a *force majeure* event but this statement only applies to contracts signed with the French state. For contracts between private parties, the question to know whether covid-19 epidemic can be considered as a *force majeure* event is very sensitive.

There is a debate as to whether the Covid-19 outbreak per se can constitute a *force majeure* event. Indeed, some consider that the epidemic situation was declared in France on February 29th, 2020 and that since that date, this epidemic can no longer be considered a case of *force majeure*, as this event loses its unpredictable nature.

Actually, if the epidemic has been common knowledge since February 29th, 2020, what is beyond the control of companies and remains unpredictable and irresistible are the successive measures taken by the government directly impacting the activity of companies in France. We can consider it as unforeseeable since no one was able to predict the calendar followed by the government regarding these measures.

In order to know whether your company is entitled to invoke a case of force majeure, first of all we have to refer to the contract signed between the parties.

If the contract provides for a specific clause organising and citing the cases constituting force majeure, this is the definition of force majeure that applies between the parties. Thus, the contract may (1) give a definition of force majeure different from the legal

definition and/or (2) establish a list of specific events considered as *force majeure*.

If the epidemic, or the government measures taken, fall into one of these two hypotheses the contracting party who suffers the effects of it may suspend the execution of its contract due to *force majeure* or terminate the contract, depending on the actual effects of *force majeure*.

If the contract provides a standard clause that refers to *force majeure* as interpreted by law and jurisprudence or in the absence of contractual provisions, we refer to article 1218 of the Civil Code to determine whether government measures are beyond the control of the debtor, unforeseeable and have effects that cannot be avoided by appropriate measures and thus prevent the performance of its obligations by the party invoking it.

If the contract excludes the application of *force majeure*, which is rare, then the parties cannot invoke the application of these rules to suspend their obligations and will have to perform them in any case. However, if a contracting party considers it has been forced to exclude the application of *force majeure* in the contract, it is always possible to dispute this provision on the grounds that it creates a significant imbalances between the parties respective obligations but that will be for the judge to decide whether there is such an imbalance or not.

3. Is there a concept of Frustration in your national law?

Yes.

If yes:

a. Is it a legal or jurisprudential concept?

It is a legal concept that we call "Imprévision" provided for in article 1195 of the French civil code.

b. What are the conditions of application?

This article applies if a change in circumstances, unforeseeable at the time of the conclusion of the contract, makes its performance excessively onerous for a party who had not agreed to assume the risk. Then, the party supporting this extra cost is entitled to ask the other a renegotiation of the contract from the other party.

In case of refusal by the other party or failure to renegotiate, the parties can terminate the contract or ask jointly the judge to adapt it. If no agreement is reached within a reasonable period, the judge may, at the request of either party, revise or terminate the contract on the date and under the conditions he fixes.

This provision has been subject to much criticisms as it authorizes the judge to intervene to revise the contract which is contrary to the contract's binding force. Thus, most contracts exclude the application of article 1195 of the French civil code or at least the possibility of judicial intervention.

c. Could covid-19 epidemic, or the government actions taken, imply the application of the hardship mechanism?

Here too, the first thing to do is to refer to the contract signed between the parties as they may have agreed to exclude the application of this provision to their contractual relations.

If the contract completely excludes the application of *imprevision*, then the parties cannot invoke the provisions of article 1195. However, if a contracting party considers it has been forced to exclude the application of *imprevision* in the contract, it is always possible to dispute this provision on the grounds that it creates a significant imbalances between the parties respective obligations but that will be

for the judge to decide whether there is such an imbalance or not.

If the contract does not exclude this concept, it can be assumed that the government measures taken to contain the epidemic were unforeseeable at the time the contract was concluded. If these measures make the performance of the contract excessively onerous for one party, that party is entitled to request an adaptation and therefore a renegotiation of the current contract from the other party.

4. Is there any other options/provisions under your national law allowing to:

- **stop executing a contract during such a crisis?**

The force majeure allows a party to stop executing a contract because of a crisis like the epidemic provided that the conditions of force majeure are met. Indeed the parties shall pay attention to the effects suffered that may, depending on the obligations concerned, be permanent or temporary. In any case, to invoke a *force majeure* event, the said event must prevent the party from performing its obligations.

Thus, if the impediment is only temporary, performance of the contract is suspended and must resume once the cause of the impediment has disappeared. On the contrary, if the impediment is permanent, the contract may be terminated ipso jure.

Besides, contracting parties must keep in mind that the ordonnance 2020-306 freezes the application of contractual "resolutory clauses" the parties may have agreed on, for a specific period of time. It means that the parties are not allowed to apply this clause if the unperformed obligation was supposed to be performed during a "protected period" starting on March 12th, 2020 and ending on June 24th, 2020 (which may be extended until August 10th).

- **withhold payments for a limited period of time?**

In France we have a mechanism called "*exception d'inexécution*" allowing a party to stop performing its obligations if the other party does not perform its own obligations (article 1219 of the French civil code) or if it is obvious the other party won't perform its obligation (article 1220 of the French civil code). The condition to use this mechanism is that the non-performance must be serious enough to justify such a suspension.

It must be kept in mind that it's a temporary solution since, as soon as the other party resumes the performance of its obligations, the party that has implemented the exception must also resume.

- **cancel orders if there are no client anymore?**

The question is to know whether a client can cancel its orders toward its suppliers because it has had to close due to the lock-down.

First of all, the answer depends on what is provided for in the contract between the supplier and the client regarding cancelation of orders.

If the contract allows a party to cancel orders in this kind of situation, then it is complicated to refuse it. However, it is always possible to dispute this provision of the contract on the grounds that it creates a significant imbalances between the parties respective obligations but that will be for the judge to decide whether there is such an imbalance or not.

The parties shall also check if the contract provides for a commitment on purchase volumes, thus the cancelation could be considered as a breach of contractual obligations and incur contractual liability.

Besides, depending on the facts, this cancelation may be disputed on the ground of abrupt termination of established business relations if no prior notice has been given but here as well, if the reason for the cancelation is considered as an event of *force majeure* or if it's due to the lack of business the absence of prior notice can be justified.

- **renegotiate the commercial conditions applicable during the crisis (for example in terms of bonus, return of goods, etc.)?**

The concept of "*imprévision*" allows a party to renegotiate the contract if a change in circumstances, unforeseeable at the time of the conclusion of the contract, makes its performance excessively onerous for a party who had not agreed to assume the risk. Then, the party supporting this extra cost is entitled to ask the other a renegotiation of the contract from the other party.

5. What precautions can be taken today to face Covid-19 consequences in contractual relationships?

Besides the "8 steps to deal with Covid-19 pandemic in commercial contracts" on page 10, every company must ensure that each action taken, or decision made, gives rise to prior information to the other party. For example, the client who intends to refuse deliveries shall sent a prior written notice to inform its partner. Indeed, even in times of crisis, the parties still have an obligation of good faith and general information on the other party.

We also recommend documenting all circumstances affecting the contractual obligation's performance to be able to justify it in case of litigation.

6. Are the courts still open to the public and the hearings held? If no, what are the available alternatives to settle contractual disputes?

The Courts are closed except for emergency procedures but parties can still use mediation to settle their contractual disputes.

Mediation has the advantage of being confidential while being quicker than traditional judicial proceedings. Besides, hearings can easily be held remotely by video conference.

GERMANY

1. Are there any specific measures taken, concerning commercial contracts, in your country to deal with Covid-19 epidemic?

On 25 March 2020, the German Federal Parliament (*Deutscher Bundestag*) adopted the so-called "Act to Mitigate the Impact of the COVID-19 Pandemic in Civil, Insolvency and Criminal Procedural Law" (*Gesetz zur Abmilderung der Folgen der COVID-19-Pandemie im Zivil-, Insolvenz- und Strafverfahrensrecht*). The Act entered into force retroactively as of 1 March 2020.

As the name suggests, the Act is meant to avoid certain hardships that would otherwise arise as a result of the coronavirus pandemic. To this effect, it provides for certain temporary adjustments in civil, insolvency and criminal procedure law. In particular, the Act contains the following measures:

- suspension of the obligation to file for insolvency until 30 September 2020 if the insolvency reason is a consequence of the covid-19 pandemic;
- certain simplifications of the decision-making processes for companies, associations, trusts and cooperatives;
- moratorium for consumers and small companies as regards the fulfilment of certain long-term contracts that have been concluded prior to 8 March 2020 and
- protection against the termination of lease agreements.

The Act to Mitigate the Impact of the COVID-19 Pandemic in Civil, Insolvency and Criminal Procedural Law is part of a broader "package" of initiatives taken by the Federal Government. Other measures in this regard include providing liquidity assistance and different forms of financial support, such as loans and tax deferrals.

2. Is there a concept of force majeure in your national law?

Yes. However, it has to be noted that in contrast to other civil law jurisdictions the concept of *force majeure* is somewhat less pronounced and less developed in Germany.

If Yes:

a. Is it a legal or jurisprudential concept?

It is both a legal and a jurisprudential concept.

The German Civil Code (**"GCC"**) does not contain a definition of *force majeure*, neither does it mention the concept as a "general principle". However, the concept of *force majeure* is being referred to in several provisions of the GCC (as well as other statutes), for example in

- section 206 GCC which provides for a suspension of limitation in case of *force majeure*;
- section 651h(3) GCC according to which a tour operator may not claim compensation in case of a termination of the contract if unavoidable and exceptional circumstances occur at the place of destination or in its vicinity which significantly affect the package or the transport of persons to the place of destination;
- sec. 701 GCC which provides that there is no liability of an innkeeper if damages were caused by *force majeure*.

The fact that the concept of *force majeure* is somewhat less pronounced in German statutory law compared to other jurisdictions is usually explained by the fact that as a general rule the obligor is only responsible for intention and negligence and in situations that can be considered as *force majeure* there is generally neither intention nor negligence and therefore no fault of the obligor. Thus, it was

apparently felt that the concept of *force majeure* would only have to be introduced into statutory law where the liability of the obligor did not require fault.

In any event, German law provides for solutions in *force majeure* situations by means of applying the concept of impossibility (*Unmöglichkeit*) in sec. 275 GCC or the concept of "interference with the basis of the transaction" (*Störung der Geschäftsgrundlage*) in sec. 313 GCC.

b. What are the conditions of application?

As mentioned above, the GCC does not contain a definition and the statutory law does not explicitly acknowledge the concept as a general principle. Therefore, the conditions for the application of the concept of *force majeure* vary depending on the type of contract and claim you are dealing with. German courts have developed different definitions and standards for different types of contracts, situations and different sections of the statutory law.

In the context of the German Liability Act (*Haftpflichtgesetz*), the German Federal Court of Justice has defined *force majeure* as

- an external event,
- which is not related to the company and is caused from the outside by elementary natural forces or by actions of third parties,
- which is unforeseeable on the basis of human insight and experience,
- which cannot be prevented, avoided or remedied by economically acceptable means even with the utmost care reasonably to be expected in the circumstances and
- which has not to be condoned by the company due to its frequency.

This is one of the more complex and "verbose" definitions of *force majeure* developed by the courts. In the context of package travel contracts, the German Federal Court of Justice has used the somewhat simpler definition of *force majeure* as

- an external event,
- which has no operational connection to the company and
- which cannot be averted even with the utmost care that can reasonably be expected.

In the context of sec. 206 GCC, i.e. the suspension of the limitation period, *force majeure* requires an unavoidable event, i.e. an event which prevented a party from pursuing his rights even with the utmost diligence and effort that can reasonably be expected.

Thus, as is illustrated by these three examples, there are indeed differences in the requirements set by the decision practice in different contexts. In any event, the common ground seems to be that the occurrence must be extraordinary, unforeseeable and unavoidable.

c. Is covid-19 epidemic, or the government actions taken, considered as a *force majeure* event in your country?

There is no legislation or other guidance from the legislator giving an indication as to whether the covid-19 pandemic constitutes *force majeure*. So far, there is also no case law dealing with the question of whether the disruptions due to the coronavirus constitute *force majeure*.

The starting point for the analysis will be the contractual arrangement of the parties. If the parties have defined the term *force majeure* in their contract, this is the definition of *force majeure* that will apply between the parties.

In case the contract includes a *force majeure* clause but such clause does not specify

whether an epidemic, pandemic or quarantine measures constitute *force majeure*, the contract and such clause will be subject to interpretation.

There are several German court cases dealing with the question whether an epidemic constitutes *force majeure*. The cases deal with the SARS epidemic in China in the years 2002/2003 as well as a cholera epidemic and the plague. In those cases, it was generally acknowledged than an epidemic can constitute *force majeure*. In their assessment, the courts took the following factors into consideration:

- the situation was an epidemic,
- the disease in question was not innocuous,
- the risk to catch the disease was not only remote,
- assessments of public authorities, such as cautions by the department of foreign affairs.

Taking these factors into account, there seem to be good arguments to consider the covid-19 pandemic as a *force majeure* event.

However, given the large number of different issues and scenarios brought about by the coronavirus crisis, the question always has to be assessed for each individual case and in each individual contract. By way of example, consider the following scenario: Company A's supplier cannot deliver a necessary input due to a shutdown of its production facility ordered by the government. However, there are other suppliers of the input and Company A would be able to acquire the input from a third party supplier. In this case, the supplier subject to the shutdown could invoke *force majeure*. However, Company A could not as it has to option to procure the product from third party suppliers.

3. Is there a concept of Frustration in your national law?

Yes.

If Yes:

a. Is it a legal or jurisprudential concept?

It is a legal concept. It is referred to as "interference with the basis of the transaction" (*Störung der Geschäftsgrundlage*) and is contained in sec. 313 GCC.

b. What are the conditions of application?

According to sec. 313(1) GCC,

- if circumstances on which a contract has been based change significantly after the conclusion of the contract and
- if the parties would not have entered into the contract at all or would have concluded a contract with a different content had they foreseen such change,

an adaptation of the contract may be demanded to the extent that, taking account of all the circumstances of the specific case, in particular the contractual or statutory distribution of risk, one of the parties cannot reasonably be expected to uphold the contract without alteration.

Sec. 313(3) GCC provides for the possibility of the disadvantaged party to withdraw from the contract or terminate it if an adaptation is not possible or one party cannot reasonably be expected to accept an adaption.

Thus, the concept of interference with the basis of the transaction allows for an adjustment of the contract, withdrawal or termination depending on the situation.

c. Could covid-19 epidemic, or the government actions taken, imply the application of the hardship mechanism.

First of all, it has to be noted that a party can only invoke the concept of interference with the basis of the transaction pursuant to sec. 313 GCC if there are no contractual arrangements between the parties or more special statutory provisions available to deal with the issue as these would take precedence. In this regard, also the concept of impossibility would generally take precedence (even if there is some debate as to the relation between the concept of interference with the basis of the transaction and the concept of impossibility).

As with the concept of *force majeure*, there seem to be good arguments to consider the covid-19 pandemic as an event in which the concept of interference with the basis of the transaction can be invoked. In particular, it seems fair to say that in cases of contracts that have been concluded before the covid-19 pandemic escalated in Europe, the parties could not have foreseen the significant changes brought about by the pandemic and government actions to contain it.

However, whether the concept is indeed applicable will again depend on the circumstances in the individual case.

4. Is there any other options/provisions under your national law allowing to:

- **stop executing a contract during such a crisis?**

Yes.

Depending on the situation, parties can either rely on the the rules on impossibility (sec. 275 GCC) or interference with the basis of the transaction (sec. 313 GCC).

Pursuant to sec. 275 GCC a contractual party is released from its performance obligations insofar as the performance becomes impossible for the obligor or for everyone. The obligor may also refuse performance if the efforts required are objectively seen as unreasonable, i.e. if the performance requires expenses and efforts which, taking into account the subject matter of the obligation and the requirements of good faith, are grossly disproportionate to the interest the obligee has in the performance.

However, it has to be noted that the possibility to refuse performance does not mean that there are no other consequences for the obligor. Rather, the obligor is liable for damages if he has culpably caused the impossibility, i.e. in case of fault. Thus, in order not to be liable for damages, the obligor has to proof that he has neither intentionally nor negligently caused the impossibility. Furthermore, it has to be noted that the contract partner is released from his performance obligation as well pursuant to sec. 326(1) GCC. Thus, the party that invokes impossibility will not have to perform but will also not receive its consideration, e.g. if a good cannot be supplied due to impossibility, the purchase price will also not have to be paid.

As mentioned above, there is also a possibility to withdraw from the contract or terminate it under the concept of interference with the basis of the transaction if an adaptation of the contract is not possible or one party cannot reasonably be expected to accept an adaption (sec. 313(3) GCC). This concept would, however, only apply in cases in where the performance is not impossible.

- **withhold payments for a limited period of time?**

If the obligor is not obliged to perform due to impossibility, he is not entitled to consideration. Thus, the contract partner does not have to pay if there is no performance (sec. 326(1) GCC).

It has to be noted that there is no "impossibility" as far as payments are concerned. Thus, a company does generally not have the right to withhold payments

because of financial difficulties and lack of liquidity even if that has been caused by the covid-19 pandemic.

As mentioned above, the Act to Mitigate the Impact of the COVID-19 Pandemic in Civil, Insolvency and Criminal Procedural Law provides for a moratorium for consumers and small companies as regards the fulfilment of certain long-term contracts as well as a protection against the termination of lease agreements (including commercial lease agreements) in cases the rent is not paid due to financial difficulties caused by the covid-19 pandemic. In these - albeit limited - scenarios, payments can be withheld for a limited period of time.

Of course, parties can always renegotiate the terms of their contract and e.g. agree on deferred payments. This would in particular make sense if there is no (final) impossibility of performance.

- **cancel orders if there are no clients anymore?**

As a general rule, the risk as to whether he can actually use the contract goods or services lies with the obligee. Thus, the obligee cannot simply cancel orders just because he cannot use the ordered goods/services as he had originally planned. However, the obligee could invoke the concept of interference with the basis of the transaction pursuant to sec. 313 GCC in order to cancel orders if there are extraordinary circumstances.

As mentioned above, sec. 313 GCC allows for an amendment of a contract if there has been a significant change as regards circumstances on which the contract has been based and the performance of the contract as originally agreed has become unreasonable for one of the contractual parties. If an adaptation is not possible or one party cannot reasonably be expected to accept an adaption, the disadvantaged party can withdraw from the contract or terminate it.

When applying sec. 313 GCC, it has to be noted that the expectations of one party alone are not considered as forming the "basis of a contract". Rather, it is generally required that both parties recognized the importance of the circumstances for at least one of parties. However, as regards the covid-19 pandemic in can be argued that some of the consequences faced by companies are outside of the typical contractual risks and that the disadvantaged party should therefore have recourse to sec. 313 GCC. This applies in particular in cases in which a company does not require the goods or services anymore because it was forced to close on the basis of a government order.

- **renegotiate the commercial conditions applicable during the crisis (for example in terms of bonus, return of goods, etc.)?**

As mentioned above, sec. 313 GCC allows for an amendment of a contract if there has been a significant change as regards circumstances on which the contract has been based and the performance of the contract as originally agreed has become unreasonable for one of the contractual parties. If these requirements are met, the parties can use this concept to renegotiate conditions during the coronavirus crisis.

5. What precautions can be taken today to face Covid-19 consequences in contractual relationships?

Should a company not be able to fulfil its contractual obligations at all, not fully or not in a timely manner due to the impact of the covid-19 pandemic, it is important to take the following steps:

- Document as precisely and detailed as possible why your performance has been

impaired, e.g. have there been official orders to shutdown the facility, could employees not come to work due to quarantine measures, were there supply chain issues that could not be remedied by turning to third party suppliers etc. Such documentation will be necessary to prove the presence of *force majeure*, impossibility or interference with the basis of the transaction and lack of fault.

- Inform contractual partners as soon as possible of any performance issues. As already pointed out, even in times of crisis, the parties still have an obligation of good faith and general information to the other party. Moreover, informing the contractual partner allows him to take measures to avert or minimize damages.

Given the fact that the GCC does not provide for a definition of *force majeure* and that the concept is not mentioned as a "general principle", going forward it is advisable to include *force majeure* clauses in your contracts if your company has not done so in the past.

6. Are the courts still open to the public and the hearings held? If no, what are the available alternatives to settle contractual disputes?

In Germany, the courts are generally open and there can also be public hearings. However, there are of course restrictions and limitations due to public health considerations and the judicial system overall has significantly slowed its operations down.

Many presidents of different courts have issued recommendations according to which court hearings should generally be postponed and there should only be hearings in urgent cases that cannot be deferred. This should basically only apply to hearings which - even taking into account the current situation in which everyone's health is at stake - are absolutely necessary and cannot be postponed in order to avoid imminent considerable disadvantages for a party or a participant. However, due to the independence of the judges, each judge can ultimately decide himself whether he heeds these recommendations or not.

ITALY

1. Are there any specific measures taken, concerning commercial contract, in your country to deal with Covid-19 epidemic?

The government has taken measures with Law Decree of March 17, 2020, no. 18 concerning:

- contracts for transport by air, sea and land by declaring the termination for supervened impossibility to fulfil the obligation according to art. 1463 of the Civil Code with right to the reimbursement of the sum paid or grant of a voucher of the same amount to be used within one year

- contracts with public entities, and according to some authors also contracts between private entities, in which the measures for the containment of the pandemic COVID-19 must be taken into account in order to exclude the liability of the debtor according to art. 1218 and 1223 of the Civil Code, also relating to the application of possible forfeitures or penalties connected to late or non-fulfilment.

2. Is there a concept of force majeure, in your national law?

Yes

If yes:

a. Is it a legal or jurisprudential concept?

Even if there isn't a legal definition of force majeure, the notion can be derived from art. 1218 (responsibility of the debtor), 1256 (definitive or temporary impossibility to fulfil the obligation) and 1463 (supervened impossibility to fulfil the obligation) of the Civil Code.

b. What are the conditions of application?

The event must be:

- extra-ordinary,

- not due to the debtor and

- not foreseeable at the time of the conclusion of the contract.

c. Is covid-19 epidemic, or the government actions taken, considered as a force majeure event in your country?

In addition to what is mentioned at point 1 above, the Ministry of the Economic Development on March 26 2020 sent the following a communication to the Chambers of Commerce:

Subject: Chamber of Commerce certificates, based on declaration of the enterprises, on subsistence of force majeure for enterprises due to emergency COVID-19

Acknowledging the need expressed to the Chambers of Commerce, by several enterprises, to have to document by means of a Chamber of Commerce certificate the conditions of force majeure resulting from the current phase of the health emergency by COVID-19.

Taking into account that the clauses in many supply contracts with foreign countries require such certificate to be produced in order to be able to invoke force majeure and to face the breach of obligations.

In view of the fact that the impossibility of submitting such a certificate, to support for the existence of force majeure, would result in immediate damages to national enterprises, that would be in a position to suffer the termination of contracts, with payment of penalties and non-return of costs of the order already incurred.

In view of the above, at the request of the enterprise, in support of international trade, the Chambers of Commerce, within the powers granted to them by law, may issue certificates in English on the state of emergency in Italy following the

epidemiological emergency due to COVID-19 and on the restrictions imposed by law for the containment of the epidemic.

With the above mentioned declarations the Chambers of Commerce will be able to certify that they have received from the applicant enterprise a declaration in which, with reference to the restrictions imposed by the authorities of government and in the current state of emergency, the enterprise itself claims not to have been in the position to fulfil in time the contractual obligations previously assumed for unpredictable reasons, beyond the enterprise's control and ability.

3. Is there a concept of Frustration in your national law?

Yes

If yes:

a. Is it a legal or jurisprudential concept?

Italian law has the notion of supervened excessive onerousness according to art. 1467 of the Civil Code.

b. What are the conditions of application?

Art. 1467 of the Civil Code establishes that, in the contracts with a duration, if the obligation of the party has become excessively onerous for extraordinary and not foreseeable events, the same party can ask for the termination of the contract. The party against which the termination has been asked can avoid the termination by offering an equitable modification of the conditions of the contract.

c. Could covid-19 epidemic, or the government actions taken, imply the application of the hardship mechanism

It is possible to apply the hardship mechanism if both parties want to execute the contract, provided that they agree on an equitable modification of the conditions of the same.

4. Is there any other options/provisions under your national law allowing to:

- **stop executing a contract during such a crisis?**

According to art. 1256 Civil Code an obligation can be considered as not to be fulfilled anymore when, for a cause not due to the debtor, the fulfilment of the obligation becomes impossible. If the impossibility is temporary, the debtor cannot be considered liable for the non-fulfilment of its obligation until the impossibility is in place, thereafter the fulfilment must take place.

- **withhold payments for a limited period of time?**

In Italy we have a mechanism called "*exception d'inexécution*" allowing a party to stop performing its obligations if the other party does not perform its own obligations; however, the fulfilment of the obligation cannot be refused if, given the circumstances, the refusal is contrary to good faith (Art. 1460 of the Civil Code).

- **cancel orders if there are no client anymore?**

According to the specific case both remedies of supervened impossibility to fulfil the obligation according to Art. 1463 of the Civil Code or supervened excessive onerousness according to Art. 1467 of the Civil Code could find application to justify the cancellation of orders.

- **renegotiate the commercial conditions applicable during the crisis (for example in terms of bonus, return of goods, etc.)?**

In case of supervened excessive onerousness according to Art. 1467 of the Civil Code the commercial conditions can be renegotiated.

5. What precautions can be taken today to face Covid-19 consequences in contractual relationships?

Art. 1375 of the Civil Code contains a general principle of the execution of the contracts in good faith. Therefore: a) execution of a further supply not foreseen by the contract which does not imply a relevant economic burden for the supplier; b) modification of the obligation to prevent damages to the other party; c) duty of information to the other party concerning relevant circumstances for the execution of the contract that imply for a party a possible rise of the burden.

6. Are the courts still open to the public and the hearings held? If no, what are the available alternatives to settle contractual disputes?

The Courts are open but all hearings and deadlines have been postponed after May 11. Such postponement does not apply to particular proceedings, both civil and criminal. Contractual disputes can be settled through (1) private arbitration or (2) a special negotiation foreseen by Law 162/2014, during which the party is assisted by the lawyer.

THE NETHERLANDS

1. **Are there any specific measures taken, concerning commercial contracts, in your country to deal with the Covid-19 epidemic?**

Not specifically concerning commercial contracts. However due to Covid-19 the Dutch government decided to take extra economic measures to protect jobs and income and to mitigate the impact on the self-employed workers, the small and medium-sized enterprises (SMEs) and large enterprises. These measures are taken on top of the measures already taken by the Dutch government to mitigate the consequences of the coronavirus for entrepreneurs. These measures include for instance payment of employees, issuing loans, delayed payment of taxes etc.

Besides those governmental measures, a so-called "*Steunakkoord*" (support agreement) has been reached between interests groups from retail and real estate organisations operating in The Netherlands, backed by financial institutions/banks and also supported by the Dutch government. The core of the agreement is that the rent payments for the months of April, May and June 2020 will be suspended for retailers with a turnover decrease of at least 25% over this period. The minimum suspension is 50%, but can be as high as 75% to 100% for the more severely affected retailers and / or craft stores that have a complete lockdown. The "support agreement"' is non-binding, however should still offer important guidance for negotiations between retailers and their landlords.

2. **Is there a concept of *force majeure,* in your national law?**

Yes.

If yes:

a. **Is it a legal or jurisprudential concept?**

It is a legal concept under article 6:75 of the Dutch Civil Code.

b. **What are the conditions of application?**

The article on *force majeure* provides that the party relying on force majeure must show that its failure to perform cannot be attributed to it, by showing that the failure is neither its fault nor for its account pursuant to the law, a legal act or the relevant standards.

c. **Is covid-19 epidemic, or the government actions taken, considered as a *force majeure* event in your country?**

We have to make a distinction between whether there is a clause in the agreement dealing with force majeure, specifying force majeure events and the situation where this is not the case.

In the event there is a contract between the parties in which force majeure has been described and/or where force majeure events have been specified (the latter is often the case), it depends on the wording used whether Covid-19 or the government actions taken, qualify as force majeure. This said, it is still up to debate whether those events should be interpreted broadly or strictly.

Then there can be a situation, which still often occurs, (i) there is no contract in place; (ii) there is a contract in place but it does not include a provision on force majeure; or (iii) the provision on force majeure in the contract refers to the statutory definition as included in the Dutch Civil Code. In all of those situations, the statutory definition and the case law will decide whether Covid-19 or the government actions are to be considered as force majeure events.

Both the Covid-19 pandemic, as well as the measures taken by various governments, may constitute force majeure ("overmacht") under the Dutch Civil Code (DCC), meaning that specific performance of a contract can no longer necessarily be expected. Whether this is the case ultimately depends on the circumstances of the particular case. Generally, force majeure events relieve the debtor from the duty of specific performance as well as the duty to pay damages.

Under Dutch contract law and absent any specific contractual arrangement, the parties to a contract can generally claim specific performance to the extent that performance is not definitively or temporarily impossible. Performance may be deemed impossible in the event the imposed governmental measures preclude performance. Economic inability to pay debts does not, by itself, qualify as impossibility under Dutch contract law. Performance will not generally be considered impossible if the obligor has other options available to fulfil his obligations. To some extent, this is a risk the obligor is simply expected to bear, provided that the obligor's efforts must not become disproportionate. Ultimately, it depends on the specific facts and circumstances of a case.

The measures taken by the Dutch and other governments to address the outbreak and further spread of the Coronavirus could constitute a legal impossibility to perform under commercial contracts. It is up to the obligor to explain in sufficient detail and, if sufficiently disputed, to prove that this is indeed the case.

All of the above is applicable in the event that, at the time of conclusion of the contract, Covid-19 and/or the government actions were not known yet. Of course when a contract has be concluded with this knowledge, it will not easily fall under the definition of force majeure (unless clearly after the conclusion of the contract new circumstances occurred which were not known yet at the time of conclusion).

Finally, when a certain obligations has been guaranteed in a contract, it will generally not be possibly any more to claim it is not possible to perform based on force majeure, as such risk will be for the account of the debtor. However it may in exceptional circumstances still be possible to argue that holding the debtor to the contract is unacceptable according to the principle of reasonableness and fairness and/or that this is abuse of rights. It will then be up to the court's discretion whether such claim will be awarded or not.

3. Is there a concept of Frustration in your national law?

Yes.

If yes:

a. Is it a legal or jurisprudential concept?

It is a legal concept called "*unforeseen circumstances*", based on article 6:258 of the Dutch Civil Code.

Under Dutch law, a contract may be amended or terminated due to unforeseen circumstances. This provision can only be relied upon if the unforeseen circumstances are of such a nature that the other party cannot demand that the contract is maintained in an unmodified form. The threshold for relying on the unforeseen circumstances exception is high.

b. What are the conditions of application?

On the basis of unforeseen circumstances, a party to a contract can request a Dutch court to modify a contract (or its consequences) or to wholly or partially terminate a contract. In its decision, the court must stay as close as possible to what the parties originally intended

and to the risk distribution that was initially included in the agreement. With long-term contracts, a temporary change (including a suspension) or partial dissolution is more obvious than a permanent change or complete dissolution. After all, the influence and consequences of the coronavirus on the fulfilment of contracts is temporary.

c. Could the Cvid-19 epidemic, or the government actions taken, imply the application of the hardship mechanism.

Here too, the first thing to do is to investigate the contract signed between the parties, as the contract may already specify that circumstances like Covid-19 or government actions will be for the risk and account of one of the parties. If this is the case, the interpretation of the contract will be leading, unless this is clearly unacceptable according to the principle of reasonableness and fairness.

If the contract has not foreseen in situations like this, which will often be the case, the statutory definition and case law will be leading. Dutch courts have generally been reluctant to apply this remedy in the context of the 2008 economic crisis on the grounds that such 'normal' economic risks are to be borne by businesses themselves. Nevertheless, courts may decide that the extreme distorting effects of the pandemic on contractual relationships indeed go beyond normal commercial risks and, as such, qualify as unforeseen circumstances. This may lead to suspension, modification or termination of the contract or give rise to a duty to renegotiate, thereby finding a new balance in the contractual relationship between the parties to share the burden that results from the Covid-19 situation. I deem it likely that the unprecedented Covid-19 situation qualifies as a unforeseen circumstance under Dutch laws.

4. Is there any other options/provisions under your national law allowing to:

- **stop executing a contract during such a crisis?**

Under Dutch law, the performance of an agreement is governed by the principle of reasonableness and fairness (articles 6:2 and 6:248 of the Dutch Civil Code). Reasonableness and fairness mean that the parties, including commercial parties, must take into account each other's legitimate interests.

To claim continued performance of your contract party could under certain circumstances be seen as unacceptable according to the principle of reasonableness and fairness, or, in exceptional circumstances could even be seen as an abuse of rights.

The above is besides the options a contractual party may have to suspend its obligations based on force majeure, or to renegotiate the conditions based on unforeseen circumstances.

- **withhold payments for a limited period of time?**

Under the Dutch Civil Code (article 6:52 and further) a party is allowed to suspend the performance of its obligations if the other party does not perform its own obligations or if it is obvious the other party won't perform its obligation. The condition to use this mechanism is that the non-performance must be serious enough to justify such a suspension.

The above is besides the option a contractual party may have to renegotiate the conditions based on unforeseen circumstances. Please note that the impossibility to pay generally is for the risk and account of the debtor and a debtor generally will not be able withhold payments based on force majeure.

- **cancel orders if there are no clients anymore?**

The question is whether a company has been forced to lock down as a result of government actions, which is clearly an absolute impossibility to perform, or that there are other reasons why a company has decided to close its business. For instance when due to sick leave or forced childcare at home, there is simply too little occupation by employees. Also because many store employees stopped working because of fear of contamination. Therefore it is not always a voluntarily choice for retailers, or simply a lack of customers, it can be the accumulation of several (severe) problems at the same time, as a direct result of the – unprecedented - Covid-19.

On the other hand, the company may be able to benefit from government actions, recovering payment of employees or substantial discounts in rent. Furthermore, the other party may also suffer from loss or turnover etc. This will all have to be taken into account to be able to assess whether a renegotiation of the business terms and risks is in order (including the cancellation or orders).

- **renegotiate the commercial conditions applicable during the crisis (for example in terms of bonus, return of goods, etc.)?**

The concept of "*unforeseen circumstances*" allows a party to renegotiate the contract if a change in circumstances, unforeseeable at the time of the conclusion of the contract, makes its performance excessively onerous and when it has not agreed to assume the risk hereof. Of course this does not answer the question what a reasonable outcome of the renegotiation will be. Especially when the other party also bears material disadvantages as a result of Covid-19 and/or the government actions.

Some Dutch scholars argue that, as both parties cannot be blamed for the corona crisis, the setback must be shared equally (on a 50-50 basis) between both parties. However, the contractual risk distribution initially agreed between the parties must be maintained. A party may not profit commercially from the adjustment of the contract. Anyone who has concluded a commercially advantageous or unfavourable contract must proportionally retain that advantage or disadvantage in the event of changes or termination. That is one reason for the 50/50 distribution of the disadvantage to deviate. In determining the disadvantage, any benefits must also be taken into account as a result of any compensatory government measures. This may necessitate a readjustment (retroactively) once a party has enjoyed this benefit.

5. What precautions can be taken today to face Covid-19 consequences in contractual relationships?

Companies should ensure that, when they want to suspend, terminate or renegotiate their obligations, they will timely inform the other party. Preferable, they will motivate and substantiate any decision in detail and will record this in writing. This is especially important under Dutch law, where a court will look at the justified interests of both parties and the circumstances of the matter and where contracts are governed by the principle of reasonableness and fairness.

Furthermore it is recommendable that companies will assess their legal position vis-à-vis their most important business partners and that they will take the following actions:

(ix) Establish whether there is a contract in place with their most important suppliers/customers etc. and identify the law applicable to the contractual relationship in question and the legal mechanisms existing in this legal system that could be invoked;

(x) Analyse the content of the contracts in force to ascertain whether they have clauses relating to events of force majeure and hardship clauses and

review the scope and consequences of those clauses;

(xi) Check whether there are obligations to give notice in the event of a material adverse change with an impact on the economic activity of one of the parties or in case of a probable inability to perform to perform a contract in due time. In any contract parties still have an obligation of good faith and general information on the other party;

(xii) Keep a detailed record of the impact that covid-19 and the government actions is having on the company and on the performance of its contractual obligations, as well as any benefits the other party could claim;

(xiii) Investigate whether the company (and/or its group companies) can apply for benefits in the countries where it operates, like for example relief for payments of salaries for employees, tax benefits, possibilities to apply for loans, suspension or discount possibilities for the payment of rent etc. and make sure the company applies for this in time;

(xiv) Be aware that based on Dutch law, each party has the obligation to limit its damages in as far as possible. When a party does not fulfil this statutory duty, it will have to bear those damages itself; and

(xv) Check whether the insurance policies taken cover situations of pandemics and/or events of force majeure. If so, check what actions should be taken to ensure claims can be made in time and successfully.

6. Are the courts still open to the public and the hearings held? If no, what are the available alternatives to settle contractual disputes?

The Dutch courts are currently closed except for emergency procedures, at least until 28 April 2020 and this may be further extended. Also, up to the court's discretion, some court hearings are held remotely. Parties can still use mediation or binding expert decisions to settle their contractual disputes.

Mediation has the advantage of being confidential while being quicker than traditional judicial proceedings. Besides, hearings can easily be held remotely by video conference.

PORTUGAL

1. Are there any specific measures taken, concerning commercial contract, in your country to deal with Covid-19 epidemic?

The government has taken no specific measures concerning commercial contracts, although some of the measures taken to contain the outbreak have a direct impact in such contracts, namely:

- Decree-Law no. 10-J/2020, of 26 March – grants a moratorium in financing agreements, allowing companies to deferred payment until 30 September 2020 under the conditions stipulated;
- Law no. 4-C/2020, of 6 April – stipulates rent moratoriums and the suspension of agreements in the case of non-residential tenancies and other contractual forms of operation of properties for commercial purposes in the months in which the state of emergency is in place and in the first subsequent month.

2. Is there a concept of *force majeure,* in your national law?

Yes.

If yes:

a. Is it a legal or jurisprudential concept?

It is a jurisprudential and doctrinal concept, applied in some legal documents.

***b.* What are the conditions of application?**

A case of *force majeure* occurs when an unforeseen, unpredictable, inevitable and beyond the control of the parties event affects the contractual obligations, preventing performance of the obligation by the debtor. These can lead to the termination or suspension of the contract.

The relevance of *force majeure* depends on specific contractual prevision. Thus, we must check whether the contract whose performance has been called into question contains a *force majeure* clause. Then it is necessary to analyse what cases it covers and what consequences are associated with it. Obviously, if these examples include the mention of epidemics or pandemics, covid-19 can be considered as a *case of force majeure* that is provided for in the contract.

In contrast, if there is no express reference to such situations, we face a problem of contractual interpretation. Thus, it will be necessary to understand the extent to which similar cases (specifically, the existence of the covid-19 pandemic and the government measures to contain it) can be included in the existing contractual provision.

Even if there is no specific clause in the contract, is arguable if a case of *force majeure* can be relevant, entitling the parties to recourse to legal mechanisms to achieve the same effect: the objective impossibility and change in circumstances.

***c.* Is covid-19 epidemic, or the government actions taken, considered as a *force majeure* event in your country?**

Until now, no official government decision has been issued considering covid-19, as well all government measures taken following the outbreak as a *force majeure* event. Also, it is too early for any court decisions to have been issued.

In any case, the covid-19 outbreak is an unforeseen, unpredictable, inevitable and outside the control of the parties' event; it is,

in fact, an unknown virus, which is spreading around the world and was not expectable. Moreover, it is outside their sphere of control of the parties and it is completely independent of their will. As are the measures implemented by the government to contain the outbreak.

However, the occurrence of an event with these characteristics is not sufficient for a party to immediately invoke against the other the existence of a *case of force majeure* with implications on contractual obligations. In effect, the party must prove the existence of a causal link between the event in question (the covid-19 outbreak or the government measure) and the impossibility of compliance and, also, that it could not reasonably foresee the event in question or its consequences at the time the contract was made.

3. Is there a concept of Frustration in your national law?

Yes.

If yes:

a. Is it a legal or jurisprudential concept?

The Portuguese legal system distinguishes two situations that may lead to the frustration of a contract: the "*impossibilidade objetiva*" under article 790 of the Portuguese Civil Code and "*alteração das circunstâncias*" under article 437 of the Portuguese Civil Code.

b. What are the conditions of application?

Under article 790 of the Portuguese Civil Code, the contracting parties can terminate the contract when the obligations become objectively and supervening impossible for reasons beyond their control. In these cases, the impossibility must be supervening, objective, absolute, definitive and total. As a result, the debtor is released from its responsibility and the creditor can't demand the performance of the obligation or the payment of compensation for any loss or damage suffered.

If the enforcement of the obligation become "*more onerous*", the parties can terminate or modify the contract accordingly with the rules set out in article 473 of the Portuguese Civil Code:

- there is a modification of the basis of the business (i.e. of the circumstances in which the parties made their decision to contract);
- the change in circumstances is abnormal, i.e., unforeseeable at the time of the conclusion of the contract,
- the continuation of the contract as concluded causes injury to one of the parties (or both);
- the performance of the obligations as established in the contract seriously affects the principle of good faith (disturbing the contractual balance in a serious way makes its performance excessively onerous for a party);
- the change is not covered by the risks inherent in the contract;
- the injured party is not in default at the time of the change of circumstances (which results from Article 438 of the Portuguese Civil Code).

c. Could covid-19 epidemic, or the government actions taken, imply the application of the hardship mechanism.

Firstly, it is necessary to check whether the contract whose performance has been called into question contains any hardship clauses; risk distribution determinations; specific termination rules.

We can state in general that the covid-19 outbreak and the measures taken to contain it justify the application of both legal regimes

explained above. However, the regimes have very strict requirements and case-by-case analysis is essential.

For example, the holding of an event in an establishment closed by the government is, in principle, objectively impossible.

Also, the covid-19 pandemic – and the scale of its consequences –is part of the so-called 'big business base', since it is an event that disturbs the general economic and social order, constituting an abnormal and unpredictable change to the circumstances on which the parties based their decision to contract, and has even led to the unexpected halt and/or abrupt reduction of much economic activity in terms never before seen in modern history and which certainly have not been considered by most (if not all) contracting parties. Nevertheless, the remaining requirement must be met.

4. **Is there any other options/provisions under your national law allowing to:**

   - **stop executing a contract during such a crisis?**

If the enforcement of the obligations become objectively impossible because of an event beyond the parties control, but the impossibility is merely temporary, the debtor may suspend its performance without having to answer for the delay, applying the rule of objective impossibility set out in articles 790 and 792 of the Portuguese Civil Code.

Also, if the enforcement of the contractual obligation clearly exceeds the limits of good faith, is arguable that the requirement to perform the contract is abusive and therefore illegitimate, in accordance with the rules on abuse of rights, in Article 334 of the Portuguese Civil Code.

   - **withhold payments for a limited period of time?**

The Portuguese system provides a mechanism called "*exceção de não cumprimento*" which allows a party to stop performing its obligations if the other party does not perform its own obligations (article 428 of the Portuguese Civil Code). The conditions to use this mechanism are (i) the contract is bilateral; and (ii) there are no different time limits for the performance of the obligations.

Outside this scope, even though there is no provision under the national law, the government approved some exceptional measures following the impact of the outbreak in the economy that allow companies to withhold payments, namely:

- Decree-Law no. 10-J/2020, of 26 March – grants a moratorium that allows specific Beneficiary Entities (determine in the decree) to obtain the suspension of payment obligations until 30 September 2020 (including repayment of principal, payment of interest and fees) under the financing agreements eligible in the decree;
- Law no. 4-C/2020, of 6 April - deferment of payment of rents in the case of non-residential tenancies and other contractual forms of operation of properties for commercial purposes due in the months in which the state of emergency is in place and in the first subsequent month. The rent must be paid in the 12 months after the end of that period, in monthly instalments of not less than one twelfth of the total amount, without any penalties based on late payment.

   - **cancel orders if there are no client anymore?**

Firstly, the answer depends on what is provided for in the contract between the supplier and the client regarding cancelation of orders. If the parties do not waive the legal mechanisms mentioned above, the purchaser may terminate the supplier's obligation due to

the lock-down by resorting to the rules of objective impossibility or change of circumstances.

In this context, it is also relevant the creditor's default regime set out in Articles 813 to 816 of the Portuguese Civil Code. In a situation where the supplier can and wants to fulfil its contractual obligation, but it is necessary the creditor's cooperation (for example for opening the premises) and such cooperation is prevented by Covid-19's containment measures, not only the order can't be cancelled, but the risk of the obligation is transferred to the creditor and he has to compensate the supplier for higher expenses in which it occurs.

Note that this is not a consensual solution, since many Portuguese authors consider that the existence of a justified motive (such as covid-19) sets aside this regime.

- **renegotiate the commercial conditions applicable during the crisis (for example in terms of bonus, return of goods, etc.)?**

In the Portuguese legal system there is no general legal duty to renegotiate the contract conditions during crisis, but the parties are legally bind by the general duty of good faith (article 762(2) of the Portuguese Civil Code).

As mentioned above, the rules of "*alteração das circunstâncias*" under article 437 of the Portuguese Civil Code allow a party to renegotiate the contract if a change in circumstances, unforeseeable at the time of the conclusion of the contract, makes its performance excessively onerous. In this scenario, an accordingly with the law, negotiation is a preferred solution to contract termination.

5. What precautions can be taken today to face Covid-19 consequences in contractual relationships?

Companies can take some practical actions such as:

(xvi) Analyse the content of the contracts in force to ascertain whether they have clauses relating to events of force majeure, hardship clauses, MAC and similar; and review the scope and consequences of those clauses;

(xvii) Check whether there are obligations to give notice in the event of a material adverse change with an impact on the economic activity of one of the parties or in case of a probable inability to perform to perform a contract in due time. In any contract parties still have an obligation of good faith and general information on the other party;

(xviii) Identify the law applicable to the contractual relationship in question and the legal mechanisms existing in this legal system that could be invoked;

(xix) Keep a detailed record of the impacts that the Coronavirus is having on the company and on the performance of its contractual obligations;

(xx) Check whether the insurance policies taken cover situations of pandemics and/or events of force majeure. If so, check what actions should be taken to ensure claims can be made successfully.

6. Are the courts still open to the public and the hearings held? If no, what are the available alternatives to settle contractual disputes?

In Portugal were established several exceptional and temporary measures

applicable to courts, which have been in constant change and update.

The Courts are closed to the public and time limits for the performance of procedural acts in non-urgent cases are suspended. Nevertheless, when all the parties consider that they can ensure proceedings and in person acts through means of remote communication, their practice is possible (for example, hearings can be held remotely by video conference). Also, automatic acts can be performed, and final decisions rendered.

Urgent proceedings shall continue without suspension or interruption. Although, proceedings requiring physical presence of the parties shall be carried out by means of remote communication; where it is not possible to do so and the life, physical integrity, mental health, freedom or immediate subsistence of the interveners is at stake, the proceedings may be carried out in person, provided that this does not involve the presence of more persons than provided for by the recommendations of the health authorities. When it is neither possible nor appropriate to carry out acts or steps in accordance with the above, the proceeding is suspended.

Nevertheless, contractual disputes can be solved by alternative dispute resolution mechanisms, such as assisted negotiation, mediation or expert determination.

SPAIN

1. Are there any specific measures taken, concerning commercial contracts, in your country to deal with Covid-19 epidemic?

The Spanish Government approved Royal Decree-Law 8/2020 (Real Decreto-ley 8/2020, de 17 de marzo, of urgent measures to confront the economic and social impact of the COVID-19) (**RDL 8/2020**) to ease some of the negative economic effects stemmed from the coronavirus outbreak.

RDL 8/2020 has introduced measures having a direct impact on contracts entered into by companies and Spanish public entities (both at regional and national level). Particularly, public contracts that cannot be complied with or obligations arising from therein that cannot be performed as a result of the coronavirus outbreak will not enable the contracting entity from terminating the contract. Performance of the contract may be suspended by the contracting authority following a request by the contractor subject to the terms and requirements specified in the provision and may even allow the affected company to claim compensation to the public entity for the reliably verified damages caused.

A specific regime is provided with regard to services and construction concession contracts. According to Article 34.4 of RDL 8/2020, the concession holder may be entitled to a right to restore the economic balance of the contract by means of an extension of the original contract term of up to 15% or an amendment of the economic terms and conditions of the contract to cover the loss of income and increase of costs (*i.e.* workers' salaries).

In connection with commercial contracts, the timelines for limitation of rights and legal actions are suspended pursuant to Royal Decree 463/2020 of 14 March (**RD 463/2020**) while the state of alarm (still in force at the moment of edition of this document) is in place.

2. Is there a concept of *force majeure,* in your national law?

Yes.

If yes:

a. Is it a legal or jurisprudential concept?

It is a legal concept under article 1105 of Spanish civil code.

***b.* What are the conditions of application?**

In accordance with the Civil Code, a person cannot as a general rule be found liable for not fulfilling its contractual obligations when facing "*events that could not have been foreseen or are unavoidable*". For *force majeure* to be applicable, the following conditions must be met: *(i)* the event must be unpredictable or, if predictable, unavoidable, insurmountable or irresistible; *(ii)* it does not result from the will of the parties but to external factors; *(iii)* the event makes compliance with the obligation impossible; *(iv)* there must be a causal link between the breach of the obligation and the event which gave rise to it, the latter being the impediment of the former.

If the abovementioned conditions are met, the contractor shall not be held liable for non-compliance with the contract's provisions that have resulted from force majeure. In other words, *(i)* the debtor is released from its obligation due to the impossibility to comply with it and *(ii)* the debtor is not liable for damages for said non-compliance.

The current situation is likely to lead to many claims that contracts cannot be fulfilled under the *force majeure* exception.

However, *force majeure* is not applicable to all types of contracts. For instance, the Supreme Court has held that *force majeure* clauses are not applicable to monetary obligations due to the fact that money is a generic obligation and, therefore, right to payment always exists as such (see, amongst others, the Judgment of the Supreme Court of 19 May 2015, appeal number 721/2013). Thus, the debtor cannot claim that it can no longer fulfil its obligations (payment) as a result of the unforeseeable event.

c. Is covid-19 epidemic, or the government actions taken, considered as a *force majeure* event in your country?

For a contract between private parties, the question to know whether covid-19 epidemic can be considered as a *force majeure* event is highly controversial. There is a debate as to whether the Covid-19 outbreak *per se* can constitute a *force majeure* event. According to the Supreme Court, force majeure means the materialization of an extraordinary and unforeseeable event which could not have been avoided even if the party had acted with the most care and, therefore, there is no liable or wilful attitude attributable to the party invoking the exception. Thus, the two requirements are key: *(i)* unpredictability and *(ii)* unavoidability of the event. Even if there are precedents where courts had interpreted a pandemic as a premise of *force majeure* in cases of travel packages (for instance, with regard to the SARS pandemic – see Judgment of the Provincial Court of Madrid of 2 November 2006, appeal number 358/2006), not every sector and contract is likely to be affected in the same way.

As stated above, a party could not invoke said figure to refuse to comply with a payment obligation (for instance, payment of the rent of a commercial premise which has been locked down as a result of the state of alarm and the declared lockdown in Spain).

It is also worth noting that the state of alarm was declared in Spain on 14 March 2020 and that since that date, this epidemic can no longer be considered a case of *force majeure*, as this event loses its intrinsically unpredictable nature.

Under Spanish Civil law, the principle of *pacta sunt servanda* is applicable (articles 1091, 1255 and 1258 of the Spanish Civil Code) which basically entails that contracts have the force of law between parties and must be complied with.

For this reason, in order to know whether a company is entitled to invoke the exception of *force majeure*, it must first be verified if a contract regulates such a situation and if the measures adopted by the Spanish Government as a result of the pandemic fall into the definition and situations included in the contract. Hence, if the contract provides for a specific clause defining and listing the situations constituting *force majeure*, this definition of *force majeure* shall apply to the parties. In the absence of an express contractual provision, the general legal regime provided for in the aforesaid Article 1105 of the Spanish Civil code shall apply to the execution of the contract as described above.

3. Is there a concept of Frustration in your national law?

Yes.

If yes:

a. Is it a legal or jurisprudential concept?

The concept comes under the roof of the general principle of *rebus sic stantibus* clause (all contracts are binding unless there is an exceptional change in circumstances). This provision allows for the suspension, modification or termination of the contract due to an alteration of concurrent

circumstances or a serious breach of the balance of reciprocal obligations in the contract.

b. What are the conditions of application?

This *rebus sic stantibus* clause applies if a change in circumstances, unforeseeable at the time of the conclusion of the contract, makes its performance excessively onerous for a party who had not agreed to assume that risk. The party claiming this excessive hardship is entitled to ask the other a renegotiation of the contract from the other party. The Supreme Court requires two assumptions to be met for its application: *(1)* unpredictability of the event and *(2)* excessive hardship in the performance of contractual obligations which is usually characterized as a serious breach of the balance of reciprocal obligations of the parties provided for in the contract. However, there must be a direct link between the unforeseeable situation (*i.e.* the state of alarm) and the excessive burden in complying with the contract.

This provision has been highly controversial as it basically authorizes the courts to intervene and revise the terms of the contract which is a breach of the *pacta sunt servanda* principle referred above. Firstly, attention should be paid to what has been determined by the law or the contract, which may have attributed the risk to one of the parties even in situations of unforeseeable and unavoidable events. If nothing has been expressly or implicitly agreed by the parties in this regard, said clause may be applicable.

If this is the case, the parties must negotiate a modification of the contract or its termination. If no agreement is reached within a reasonable period, the judge may, at the request of either party, revise or terminate the contract under the conditions he deems appropriate in application of the principle of equity.

c. Could covid-19 epidemic, or the government actions taken, imply the application of the hardship mechanism.

Here, too, it is necessary to refer on the first place to the contract signed between the parties as they may have agreed to exclude the application of *the rebus sic stantibus* clause to their contractual relations. However, if the clause is not expressly excluded by the parties, it may be applicable. It is also worth noting that the courts have interpreted the application of this clause in a very restrictive manner (for instance, during the 2009 global financial crisis – see Judgment of the Supreme Court of 15 January 2019, appeal number 3291/2015).

4. Is there any other options/provisions under your national law allowing to:

- **stop executing a contract during such a crisis?**

The *force majeure* allows a party to stop executing a contract because of a crisis such as the epidemic provided that the conditions are met. However, the Spanish Civil Code requires that the measures applied are proportionate to the effects stemmed by the pandemic. For instance, if the situation is only temporary, performance of the contract shall be suspended and must resume once the cause preventing compliance has disappeared (*i.e.* the lockdown of the commercial establishments declared by the Spanish Government). The parties shall only resort to the termination of the contract if its compliance is virtually made impossible (for instance, flights booked in a situation where airports are closed as a result of the state of alarm).

- **withhold payments for a limited period of time?**

In accordance with the *exceptio non adimpleti contractus*, the non-performance by a party of its obligation entitles the other party to

withhold its performance until the other has complied with the contract. For instance, in the case of a sale of goods, the party can withhold payment for the goods until the other party delivers them. It should be noted that the aforesaid exception is a temporary solution since, as soon as the other party resumes the performance of its obligations, the party that has implemented the exception must also resume.

- **cancel orders if there are no client anymore?**

As asserted, cancelling orders may be acceptable if the legal requirements of *force* majeure are fulfilled (for instance, cancelling the orders with suppliers for the organization of a concert which can no longer take place as a result of the state of alarm). However, the company must give notice of the impossibility to execute the contract as soon as possible and, where feasible, renegotiate the contractual conditions adapting them to the new situation (for instance, delaying the organization of the concert to an alternative date instead of cancelling all orders undertaken with suppliers). Thus, it depends on the terms of the contract and, if no provision regulates this situation, on whether the legal requirements for *force majeure* are met in the case at hand.

- **renegotiate the commercial conditions applicable during the crisis (for example in terms of bonus, return of goods, etc.)?**

The *rebus sic stantibus* clause allows a party to renegotiate the contract if a change in circumstances, unforeseeable at the time of the conclusion of the contract, makes its performance excessively onerous for a party who had not agreed to assume the risk. Then, the party facing this excessive hardship is entitled to ask the other party to renegotiate terms of the contract.

5. What precautions can be taken today to face Covid-19 consequences in contractual relationships?

The parties must duly inform the other party of the difficulty or impossibility to comply with the contractual obligations as a result of the pandemic and suggest possible ways of finding a solution (modifying the terms of the contract, extending the time limits for compliance with the contractual obligations). It is also very important to try to minimize the damages resulting from non-compliance, by choosing the alternative less damaging for the other party in accordance with the principles of proportionality and good faith. A negotiated solution must be sought by all means and only if reaching an agreement is impossible, the parties may bring an action before the courts.

6. Are the courts still open to the public and the hearings held? If no, what are the available alternatives to settle contractual disputes?

The declaration of the state of alarm included the suspension of judicial proceedings and court deadlines, with the exception of urgent proceedings. Nevertheless, parties can still resort to other alternative dispute resolution (**ADR**) processes such as mediation or arbitration to settle their contractual disputes. For instance, the Arbitral Court of Madrid continues to operate, with all its staff working remotely.

ADR systems have not been suspended as a result of the coronavirus outbreak and can give rise to benefits for the parties to the contract in terms of flexibility and time (court proceedings in Spain are generally very slow).

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