# **ALLEN & OVERY**

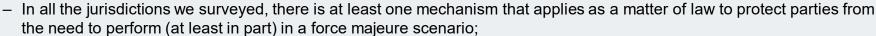
Covid-19 coronavirus: multi-jurisdictional survey on force majeure and equivalent doctrines



# Covid-19 – the impact on contractual relationships

One critical issue for clients considering their response to the Covid-19 crisis is the impact on their contractual relationships. Questions such as whether force majeure or related doctrines might apply to excuse, or suspend, performance obligations have been at the top of the agenda for many, for obvious reasons.





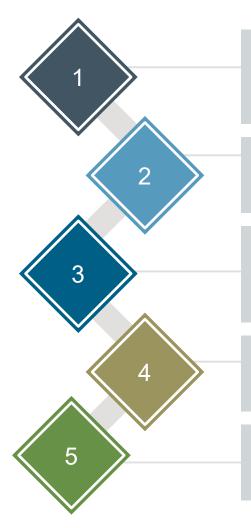
- In civil law jurisdictions, the most powerful of those mechanisms is commonly force majeure. In common law jurisdictions, it
  is frustration. In both cases, the threshold for relying on the relevant mechanism is high. The event must generally have
  been unforeseen and performance must have become impossible;
- In many civil law jurisdictions, there are additional remedies that are generally unavailable in common law jurisdictions, for example the right to seek an amendment to a contract in the event of unforeseen circumstances;
- In some jurisdictions, emergency legislation has been passed in response to Covid-19 which further interferes with private contractual obligations; and
- Aside from doctrines applicable as a matter of law, the courts of all the jurisdictions we have surveyed would give effect to
  express provisions in a contract aimed at allocating risk in a force majeure scenario.

If you would like to discuss how any of the regimes summarised in this presentation may impact your businesses now and going forward, please contact any of the people listed below or your usual Allen & Overy contact.

# The sixteen jurisdictions we surveyed

<u>Belgium</u>
The Netherlands
Luxembourg
United Arab Emirates
Slovakia
South Africa
Australia
Puggio
United Arab Emirates  Slovakia  South Africa  Australia

# Questions covered by the survey



Does the law in your jurisdiction provide a mechanism for dealing with the impact of an unforeseen event such as an epidemic or pandemic on contractual obligations (for example, a defence based on force majeure, frustration or change of circumstances) where this is not expressly provided for in a contract?

Does an epidemic or pandemic constitute such an event?

Do parties to contracts governed by your law commonly include an express mechanism in the contract for dealing with an unforeseen event such as an epidemic or pandemic that fundamentally changes the contractual bargain (for example, a force majeure clause)?

Does an epidemic or pandemic constitute such an event?

Are claims as a matter of law and claims under express terms of the contract mutually exclusive?





#### Hong Kong

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No.	Question	Answer
1.	Does the law in your jurisdiction provide a mechanism for dealing with the impact of an unforeseen event such as an epidemic or pandemic on contractual obligations (for example, a defence based on force majeure, frustration or change of circumstances) where this is not expressly provided for in a contract?	Yes. The common law doctrine of frustration applies where an intervening event renders the performance of a contract impossible in whole, illegal or radically different from what was contemplated at the formation of the contract.
2.	Does an epidemic or pandemic constitute such an event?	It depends on whether the test for frustration has been met. Mere inconvenience, hardship or material loss is not enough to constitute frustration. The performance of the contract in whole has to be significantly changed. The threshold is high. For illustration, in <i>Wong Lai Ying &amp; Others v Chinachem Investment Co Ltd</i> [1979] HKLR 1, the Privy Council held a contract of sale of property to be frustrated due to a major landslide which caused a long delay in the relevant building construction.
3.	Do parties to contracts governed by your law commonly include an express mechanism in the contract for dealing with an unforeseen event such as an epidemic or pandemic that fundamentally changes the contractual bargain (for example, a force majeure clause)?	Yes. A force majeure clause can be expressly included to excuse a party from performing part or whole of a contract, or to allow extra time for performance.  There may also be other clauses in the contract that would operate to allocate risk on the occurrence of a pandemic, for example, material adverse change, illegality or termination clauses.
4.	Does an epidemic or pandemic constitute such an event?	It depends on the language of the force majeure clause and the facts.
5.	Are claims as a matter of law and claims under express terms of the contract mutually exclusive?	Yes. Force majeure events cannot constitute a ground to frustrate a contract. Once an event is mentioned in a force majeure clause, it is within parties' contemplation, and therefore can no longer give rise to a frustration. The issue then becomes purely a matter of construing whether the relevant force majeure event has occurred.



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## People's Republic of China



**Eugene Chen Yihan Zang** 

1		Eugene Chen Yinan Zang
No.	Question	Answer
1.	Does the law in your jurisdiction provide a mechanism for dealing with the impact of an unforeseen event such as an epidemic or pandemic on contractual obligations (for example, a defence based on force majeure, frustration or change of circumstances) where this is not expressly provided for in a contract?	<ul> <li>Yes, there are two regimes:</li> <li>Force majeure: This is a statutory exemption in the Contract Law of the People's Republic of China that is incorporated by operation of law into all contracts. Force majeure is defined under Chinese law as factual circumstances that could not be foreseen, avoided, and surmounted. The newly enacted Code of Civil Law, which will replace the Contract Law and come into force on January 1, 2021, has the similar rule.</li> <li>The doctrine of "fundamental change of circumstances": This doctrine is also recognised in China under a Supreme People's Court Interpretation (guidance document). This doctrine applies where a significant change in the objective environment has taken place after the formation of a contract which could not have been foreseen by the relevant parties at the time of entering into the contract, and which does not constitute commercial risk or force majeure, but which renders the continual performance of the contract manifestly unfair to the relevant party or renders it impossible to realise the goal of the contract. In such a scenario, the People's Court has the discretion to vary or dissolve the contract in accordance with the principle of justice, taking into account the actual circumstances. The newly enacted Code of Civil Law, which will come into force on January 1, 2021, also incorporates this doctrine.</li> <li>The two regimes are mutually exclusive.</li> </ul>
2.	Does an epidemic or pandemic constitute such an event?	<ul> <li>It depends on the following:</li> <li>In relation to force majeure, the answer turns on whether the epidemic or pandemic meets the statutory definition under the Contract Law and the Code of Civil Law: unforeseeable, unavoidable, and insurmountable objective circumstances. Moreover, if "epidemic" or "pandemic" is among expressly listed circumstances in the force majeure provision of the contract, it is more likely to be considered force majeure by a Chinese court.</li> <li>In relation to fundamental change of circumstances, the answer turns on whether the epidemic or pandemic meets the following criteria, namely: whether it constitutes a significant change of objective circumstances which (1) is unforeseeable at the time of the conclusion of the contract, (2) does not amount to commercial risk or force majeure, and (3) renders the continual performance of the contract manifestly unfair to the relevant party or renders it impossible to realise the goal of the contract.</li> <li>Notably, in 2003, the Supreme People's Court determined that Severe Acute Respiratory Syndrome (SARS) constituted a basis for asserting force majeure. The China Council for the Promotion of International Trade has recently been issuing certificates stating that Covid-19 also constitutes force majeure, although it is not clear what effect courts will give to such certificates.</li> </ul>





#### People's Republic of China (cont'd)



**Eugene Chen Yihan Zang** 

No.	Question	Answer
3.	Do parties to contracts governed by your law commonly include an express mechanism in the contract for dealing with an unforeseen event such as an epidemic or pandemic that fundamentally changes the contractual bargain (for example, a force majeure clause)?	Yes. Contract terms that seek to eliminate or circumscribe the statutory exemption of force majeure are unenforceable. However, contracting parties may stipulate specific circumstances that amount to force majeure, and such clauses are commonly found in contracts.
4.	Does an epidemic or pandemic constitute such an event?	It depends on the actual language of the contract. A court would still be obliged to conduct an analysis to determine if the epidemic or pandemic meets the conditions of force majeure or frustration of circumstances.
5.	Are claims as a matter of law and claims under express terms of the contract mutually exclusive?	As noted above, contractual terms can only be used to clarify and aid in the determination of force majeure, and not to abrogate the statutory claim.

<sup>\*</sup>Services in relation to the laws of the People's Republic of China are provided through Allen & Overy Lang Yue (FTZ) Joint Operation Office.



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Andrew Phys Davies Bradley Pensyl

Justin Ormand

1		Jacob Pultman	Andrew Rhys Davies	Bradley Pensyl	Justin Ormand
No.	Question	Answer			
1.	Does the law in your jurisdiction provide a mechanism for dealing with the impact of an unforeseen event such as an epidemic or pandemic on contractual obligations (for example, a defence based on force majeure, frustration or change of circumstances) where this is not expressly provided for in a contract?	Yes, the common law defence of fruit narrow doctrine with limited applicative were the foundation of the contract. A party asserting the defence of fruit — a contingency — something unar — the risk of the unexpected occur — both parties can perform the corperformance by one party, would bargain in the first instance.  A party may also be able to rely on require an unforeseeable superseding perform, the central purpose of the known before executing the agreement In general terms, however, New Your obligations in the absence of expressing a party from performing is disfavour being to allocate the risks that migh only in extreme circumstances.  In contracts for the sale of goods, the goods may assert an impracticability contracts that do not have a force mondelivery by a seller may be excluding to allocate the contract who impracticable by the occurrence of a assumption on which the contract who foreign or domestic governmental reverse impracticable. The party invoking the impacted its ability to perform. As a	tion. The defence is available to longer exist.  stration of purpose must destration of purpose must destration of purpose must destrated, unforeseeable of the longer exist.  It is a result of the longer give the other longer give the longer give the longer give the longer give l	demonstrate three electron unexpected — has ated by the agreement e occurrence of the departy what induced ability. Generally, the destroys, or makes a must be of a magniture have entered into a parties from their ermitting such dischaurts view the purpose at performance should be compared by the comp	ements:  occurred; nt; and contingency it to make the  se doctrines impossible to itude where, if o the agreement.  contractual arge. Discharging e of a contract as uld be excused  that the seller of 615 applies in ny in delivery or n made is a basic any applicable is to be invalid". commercially ncy proximately





## New York (cont'd)

		Jacob Pultman	Andrew Rhys Davies	Bradley Pensyl	Justin Ormand
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No.	Question	Answer
2.	Does an epidemic or pandemic constitute such an event?	Only if the central purpose of the contract has been destroyed.  When considering the defence of frustration of purpose, New York courts give effect to the intent of the parties as reflected in the language and structure of their agreement. An analysis of the facts of the case is necessary to determine whether the parties contracted on a basic assumption that a particular contingency would or would not occur such that the event turning out differently than their assumption frustrated the purpose of their contract. Changes in market conditions or economic hardship do not excuse performance. A reduction in the profitability of a transaction also does not support a frustration of purpose defence.  However, if a government authority intervenes in response to the epidemic or pandemic in such a way to render performance impossible, such as closing airports and ports, or holding individuals in mandatory quarantine, then an epidemic or pandemic may allow for the frustration (or impossibility/impracticability) of purpose defence.
3.	Do parties to contracts governed by your law commonly include an express mechanism in the contract for dealing with an unforeseen event such as an epidemic or pandemic that fundamentally changes the contractual bargain (for example, a force majeure clause)?	Yes, via the inclusion of a force majeure clause.  There may also be other clauses in the contract that would operate to allocate risk on the occurrence of a pandemic, for example, material adverse change, illegality or termination clauses.





#### New York (cont'd)



Jacob Pultman

**Andrew Rhys Davies** 

**Bradley Pensyl** 

**Justin Ormand** 

No.	Question	Answer
4.	Does an epidemic or pandemic constitute such	It depends on the wording of the force majeure clause.
	an event?	In general, New York courts will interpret a force majeure clause narrowly. When the parties define the contours of force majeure in their agreement, those contours dictate the application, effect, and scope of force majeure. If the force majeure clause provides for an enumeration of specific causes of relief followed by a general "catch-all" clause such as "other causes beyond control", "hindrances" and "unavoidable causes", New York courts apply the rule of <i>ejusdem generis</i> . <i>Ejusdem generis</i> is the rule that general words, phrases, or expressions are held to refer to causes of relief of the same kind of nature as those specifically mentioned. As an example, if a force majeure clause lists "floods, drought, or any other unavoidable cause", the phrase "or any other unavoidable cause" would be limited to weather phenomena.
		Applying these principles, if a force majeure clause expressly lists as an example either an epidemic, pandemic, or similar kind of occurrence (disease or plague), then the event might qualify as a force majeure event.
5.	Are claims as a matter of law and claims under express terms of the contract mutually exclusive?	Yes. If a force majeure clause exists in a contract, then it supplants all other common law legal defences such as impossibility, impracticability and frustration of purpose. In the event that the parties did not include a force majeure provision, then a party seeking to be excused from performance may try and establish a common law defence.



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## England & Wales



Karen Birch Jason Rix

1		Karen Birch Jason Rix
No.	Question	Answer
1.	Does the law in your jurisdiction provide a mechanism for dealing with the impact of an unforeseen event such as an epidemic or pandemic on contractual obligations (for example, a defence based on force majeure, frustration or change of circumstances) where this is not expressly provided for in a contract?	Yes. Under English law, a contract can be discharged on the grounds of frustration where a supervening event occurs after the contract is in place which makes it impossible for the parties to perform the contract or results in the obligations being so different from those agreed that it would be unjust to hold the parties to them. A contract is discharged on occurrence of the event that causes the frustration.  Broadly, there are three main types of frustrating event: impossibility; illegality and change of circumstances. Frustration arises as a matter of law rather than pursuant to a term in the contract. There are statutory provisions which provide for the consequences of the contract being discharged.
2.	Does an epidemic or pandemic constitute such an event?	It depends. Mere inconvenience, hardship or material loss is not enough to constitute frustration. As indicated above, the performance of the contract as a whole has to be significantly changed or rendered impossible. The threshold is high.
3.	Do parties to contracts governed by your law commonly include an express mechanism in the contract for dealing with an unforeseen event such as an epidemic or pandemic that fundamentally changes the contractual bargain (for example, a force majeure clause)?	Yes, force majeure clauses are commonly included in English law contracts.  Parties may also include other clauses in their contracts that would operate to allocate risk on the occurrence of a pandemic, for example, material adverse change, illegality or termination clauses.
4.	Does an epidemic or pandemic constitute such an event?	It depends on whether (as a matter of the usual rules of contractual interpretation) an epidemic or pandemic would fall within the scope of the relevant clause.  Most force majeure clauses contain a list of events, or types of events which will constitute a force majeure event under the contract. Where the clause refers expressly to epidemics or pandemics (or measures put in place to deal with such events), the position will be relatively straightforward (but see further below). Where there is no express reference and the list of events is drafted non-exhaustively, the ejusdem generis principle (lit. "of the same kind") may apply, meaning that an epidemic or pandemic (or measures put in place to respond to it) will be held to be within the scope of a force majeure clause only if it is of the same "type" as the events listed in the clause. However, this is ultimately a matter of interpretation and the principle can relatively easily be disapplied.





## England & Wales (cont'd)



Karen Birch Jason Rix

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No	Question	Answer
4.	Cont'd	Unless the clause clearly provides otherwise, generally an event will only be a force majeure event if it is beyond the reasonable control of the relevant party. It is generally also necessary to show that, as a result of the event, performance has become physically or legally impossible, and not just more difficult or unprofitable. This is a high threshold to meet. However, some clauses may have a different trigger.
		It will also be necessary to comply with any relevant mechanics, for example in relation to giving notice of the force majeure event. The consequences of invoking force majeure may differ depending on the way the clause is drafted. In some cases, it will result in the contract being terminated. In others, the effect may be only suspensory.
5.	Are claims as a matter of law and claims under express terms of the contract mutually exclusive?	If a contract contains a force majeure clause that deals fully and completely with an event that would otherwise frustrate the contract, the doctrine of frustration will generally be excluded.



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#### France



Erwan Poisson Geoffroy Pascaud Quentin Mautray

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No.	Question	Answer
No. 1.	Question  Does the law in your jurisdiction provide a mechanism for dealing with the impact of an unforeseen event such as an epidemic or pandemic on contractual obligations (for example, a defence based on force majeure, frustration or change of circumstances) where this is not expressly provided for in a contract?	Yes. There are three potentially applicable regimes:  - Force majeure: This is a statutory exemption found in Article 1218 of the French Civil Code. Under French law, for an event to qualify as force majeure, it must meet cumulatively all the following conditions: (i) it must be out of the debtor's control, (ii) it must not have been reasonably foreseeable at the time of entering into the contract, (iii) its effects may not be avoided by appropriate measures, and (iv) it must prevent the debtor from performing its obligations. Where the debtor is temporarily prevented from performing its obligations because of a force majeure event, it is exonerated from such performance and from damages for non-performance for as long as the force majeure event prevents the debtor's performance. Where the force majeure event definitively prevents the debtor from performing or where the contract is deprived of its essence (due to late performance resulting from a temporary force majeure event), the debtor is definitively exonerated from performance and the contract is terminated automatically. This may give rise to reciprocal restitutions between the parties, depending on the nature of the contract at issue. The statutory regime of force majeure only
		applies where the event in question makes the performance of the obligation absolutely impossible. It does not apply where performance is simply made more difficult or more onerous, unless the parties provide otherwise in a force majeure clause stipulated in their contract.  - Imprévision: For contracts entered into from 1 October 2016, the mechanism of unforeseeable change of circumstances (imprévision) may be available if the following conditions are cumulatively met (Article 1195 of the French Civil Code): (i) there is a change of circumstances that was unforeseeable at the time the contract was entered into, (ii) such change of circumstances makes the performance of the debtor's obligation excessively onerous for that debtor, (iii) the debtor did not agree contractually to bear the risks of the change of circumstances, and (iv) the obligations at issue do not result from transactions on financial bonds or contracts listed in paragraphs I to III of Article L. 211-1 of the French Monetary and Financial Code. Where these conditions are met, the debtor may ask the counterparty to renegotiate the contract. The debtor must, however, continue to perform the contract during the renegotiation. If the renegotiation fails or if the debtor's counterparty refuses to renegotiate, the parties may agree to terminate the contract or jointly ask the court to adapt the contract. Absent such agreement between the parties, the court may, upon either party's request, revise the contract or terminate it.





## France (cont'd)



Erwan Poisson Geoffroy Pascaud Quentin Mautray

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No.	Question	Answer
1.	Cont'd	<ul> <li>Excessive imbalance: For certain types of contract (such as distribution and commercial representation contracts) which were entered into before 1 October 2016 and which have become excessively unbalanced, French case law provides that the supplier has a duty to renegotiate the contract in good faith in order to allow the counterparty to offer competitive prices to its own customers. If the supplier breaches this duty to renegotiate, it is liable to pay damages.</li> <li>In addition to these mechanisms, pursuant to Laws no. 2020-290 and 2020-546 of 23 March 2020 and 11 May 2020 respectively, the French Parliament declared a state of health emergency until 10 July</li> </ul>
		2020 in light of the Covid-19 pandemic. This has been followed by three Ordinances which contain a series of provisions affecting contracts. Among other things, these provisions suspend (for a specified period) rights to take certain steps following non-performance of contractual obligations by a counterparty; these are rights arising pursuant to French laws on penalties (astreintes) as well as rights arising under contractual penalty clauses, termination clauses and forfeiture clauses (including acceleration clauses). They also provide that, when a contract can only be terminated within a specific period of time or is automatically renewed absent a formal termination by a specific deadline, and that period of time or deadline expires between 12 March 2020 and 23 June 2020 inclusive, this period/deadline is extended by an additional two months after 23 June 2020. However, these provisions are not applicable to certain obligations imposed by the French Monetary and Financial Code, the French Insurance Code and the French Commercial Code and the parties are free to exclude the application of these rules by express clauses. These rules apply to French law governed contracts. Moreover, according to the French Ministry of Justice, the rules described above with respect to astreintes, as well as contractual penalty clauses, termination clauses and forfeiture clauses, constitute overriding mandatory provisions that French Courts (should they have jurisdiction) would apply irrespective of the foreign law otherwise applicable to the contract. However, this is subject to confirmation by French courts in future case law and this question will remain unclear until it is finally clarified by the courts.
2.	Does an epidemic or pandemic constitute such an event?	Whether an epidemic or pandemic could be relied on to trigger the mechanisms mentioned above will depend on whether, in light of the specific facts of each individual case, the necessary conditions are met. An epidemic or pandemic will not automatically qualify as an event which allows for the application of such mechanisms.





#### France (cont'd)



Erwan Poisson Geoffroy Pascaud Quentin Mautray

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No.	Question	Answer
3.	Do parties to contracts governed by your law commonly include an express mechanism in the contract for dealing with an unforeseen event such as an epidemic or pandemic that fundamentally	extending the scope of circumstances which fall within force majeure and modifying the effects of force majeure).  The parties may also include a hardship clause in their contract stipulating that the contract will be revised in case of a change of economic circumstances and setting out the nature of such change as well as the procedure to follow for the revision of the contract.  Where the parties have stipulated a force majeure clause in their contract, it will be necessary to look at
	changes the contractual bargain (for example, a force majeure clause)?	revised in case of a change of economic circumstances and setting out the nature of such change as
4.	Does an epidemic or pandemic constitute such an event?	Where the parties have stipulated a force majeure clause in their contract, it will be necessary to look at the wording of the clause and determine whether the parties have defined epidemic or pandemic and whether the parties' intent was to include such epidemic or pandemic as falling within the scope of force majeure. Where it can be demonstrated that the parties intended the clause to cover an epidemic or pandemic, the terms of the clause will apply.
5.	Are claims as a matter of law and claims under express terms of the contract mutually exclusive?	As indicated above, a force majeure clause may have the effect of reducing or extending the scope of circumstances which fall within force majeure or otherwise modifying the effects of the statutory regime on force majeure. However, absent such a clause (or to the extent not covered by it where such clause only partially deviates from the statutory regime), the statutory force majeure regime will apply. Similarly, a hardship clause may modify the effects of the statutory rules on <i>imprévision</i> .



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Marc Zimmerling Anna Masser

1			<u>Marc Zimmerling</u> <u>Anna Masser</u>
ı	No.	Question	Answer
	1.	Does the law in your jurisdiction provide a mechanism dealing with the impact of an unforeseen event such as an epidemic or pandemic on contractual obligations (for example, a defence based on force majeure, frustration or change of circumstances) where this is not expressly provided for in a contract?	Yes. The following regimes may apply:  Force majeure: There are certain specific statutory provisions dealing with force majeure. For example, under section 426 of the German Commercial Code (HGB), a carrier is exempt from liability to the extent that the loss, damage or delay in delivery is due to circumstances which the carrier could not avoid even with the greatest care and the consequences of which the carrier was unable to prevent. Also in travel law, section 651h of the German Civil Code (BGB) provides a right, both for the traveller and for the travel agent, to withdraw from a contract in a force majeure scenario. However, there is no generally applicable provision on force majeure in German statutory law.  "Wegfall der Geschäftsgrundlage": This principle is set out in section 313 BGB. The principle kicks in if the circumstances that form the basis of a contract have changed so drastically that adhering to the agreement in an unchanged manner would be against good faith. Generally, the bar to invoking this principle is high. This provision in general only gives rise to a claim to amend the contract. Under extreme circumstances it might lead to a right to withdraw from or terminate a contract. Withdrawal from or termination of a contract is considered to be ultima ratio. There is jurisprudence of the Federal Supreme Court dating back to after the Second World War holding that the question of whether state aid is available might be relevant: if and to the extent a party can rely on state aid, a recourse to section 313 BGB can potentially be excluded.  Section 275 BGB: If the obligation at stake is to perform in kind, a party might also rely on section 275 BGB. Section 275 para. 2 BGB allows the debtor to refuse performance to the extent that performance requires expense and effort, which (taking into account the subject matter of the obligation and the requirements of good faith) is grossly disproportionate to the interest in performance of the creditor. If these high prerequisites are met, a claim for per







#### Marc Zimmerling Anna Masser

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No.	Question	Answer
1.	Cont'd	With regard to consumer contracts or contracts with micro-enterprises, the consumer or micro-enterprise can rely on a right to withhold performance if – broadly speaking – performance is not possible without endangering its subsistence due to the Covid-19 pandemic. Rent and lease agreements cannot be terminated due to rent or lease default in the period between 1 April 2020 and 30 June 2020 if the default results from the Covid-19 pandemic. Repayments from a consumer loan agreement in the period between 1 April 2020 and 30 June 2020 will be deferred for three months, if the consumer cannot reasonably pay its loan due to the Covid-19 pandemic and this deferral is not unacceptable to the lender. Moreover, regarding leisure events that could not or cannot take place and leisure facilities that were to close due to the Covid-19 pandemic, a voucher solution was incorporated on 20 May 2020. Instead of reimbursement, a voucher can be handed over, if the admission ticket or right of use was acquired before 8 March 2020 and the voucher is not unreasonable for the receiver. If the voucher is not redeemed by 31 December 2021 the value of the voucher will have to be paid upon request.
2.	Does an epidemic or pandemic constitute such an event?	An epidemic or pandemic can constitute force majeure for the purposes of the laws described above.  In general, force majeure is an external, exceptional, unforeseen and inevitable event. The event will be considered to be inevitable if the highest possible level of diligence could not avoid it occurring. General examples of force majeure include natural catastrophes, nuclear accidents, and war. Also, the former SARS epidemic was considered an event that might trigger force majeure (on a case-by-case basis).  Whether a party can rely on force majeure also depends on the timing. The event must be unforeseen. Thus, once an epidemic or pandemic has already started spreading, it might have been foreseeable that it could affect business relations. In this case, force majeure is likely to be inapplicable.
3.	Do parties to contracts governed by your law commonly include an express mechanism in the contract for dealing with an unforeseen event such as an epidemic or pandemic that fundamentally changes the contractual bargain (for example, a force majeure clause)?	This depends on the type of contract, but it is generally not very common for parties to include a force majeure clause in their contract.





#### Germany (cont'd)



#### Marc Zimmerling Anna Masser

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	No.	Question	Answer
	4.	Does an epidemic or pandemic constitute such an event?	This depends, on a case-by-case basis, on the wording of the relevant clause.
	5.	Are claims as a matter of law and claims under express terms of the contract mutually exclusive?	That depends on the force majeure clause the parties agreed on and its interpretation. Generally, party agreements prevail over statutory provisions. There might be instances where an interpretation of a force majeure clause leads to the conclusion that the parties did not or did not fully exclude or extend the application of section 313 BGB.



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#### Italy



- Does the law in your jurisdiction provide a mechanism for dealing with the impact of an unforeseen event such as an epidemic or pandemic on contractual obligations (for example, a defence based on force majeure, frustration or change of circumstances) where this is not expressly provided for in a contract?
- Article 1256 of the Italian Civil Code: This article provides that a party that fails to fulfil a
  contractual obligation will be liable for damages unless it proves that performance is impossible
  for a reason not attributable to it (i.e. an unforeseeable and unavoidable event). The following
  conditions must be met:
  - The required performance must have become impossible.
  - The inability to perform must result from a cause which cannot be ascribed to the party that has failed to perform. It is not enough for the obligor to prove that it acted in a diligent manner; the event must be an unforeseeable and unavoidable event. Where the obligor has relied on third parties, it must be proved that the event was unforeseeable and unavoidable for them too.
  - Force majeure events are generally considered among the causes not attributable to a
    party. Acts of a governmental authority (legislative, administrative or judicial) and natural
    disasters are considered to be force majeure events.
  - If it is permanently impossible to fulfil the obligation, the obligation is considered discharged. If it is temporarily impossible, the party must fulfil the obligation when the impossibility comes to an end (unless the other party no longer has an interest in the performance of that obligation). If the impossibility is partial, the relevant party must fulfil the part of the obligation that can be performed.
  - The party whose obligation has been discharged due to the supervening impossibility is not entitled to require the counterparty to perform and must return what has already been received. If only a portion of the obligation of a party has become impossible to perform, the counterparty is entitled to a reduction of its obligation or may terminate the contract if it has no significant interest in the other party's partial fulfilment.
- Article 1467 of the Italian Civil Code: This article provides that, when performance of an
  obligation by a party becomes excessively burdensome due to events that were not foreseeable
  or not avoidable (as an event of force majeure is), the party is entitled to ask the court to
  terminate the agreement.
- The "causa in concreto" doctrine: This doctrine applies where it becomes impossible to
  achieve the essential purpose of the contract, in which case the party claiming the supervened
  lack of "causa in concreto" is entitled to ask the court to terminate the agreement.





#### Italy (cont'd)

1	I	Massimo Greco Tommaso D'Andrea di Pescopagano Giulia Guerini Martina Rossi					
No.	Question	Answer					
2.	Does an epidemic or pandemic constitute such an event?	In general terms, according to Italian case law, epidemics and pandemics can be considered unforeseeable and unavoidable events and thus force majeure events. There are court preceder which provide that force majeure includes both natural disasters and measures issued by the pu authorities (factum principis).					
3.	Do parties to contracts governed by your law commonly include an express mechanism in the contract for dealing with an unforeseen event such as an epidemic or pandemic that fundamentally changes the contractual bargain (for example, a force majeure clause)?	The Italian law provisions described above relating to force majeure are not mandatory in nature. It is therefore possible for the parties to regulate force majeure events in their agreements (for example, by determining the events considered as force majeure and regulating the effects of the occurrence of such events).					
4.	Does an epidemic or pandemic constitute such an event?	It depends on the wording of the force majeure clause and the relevant factual circumstances, so an analysis on a case-by-case basis is recommended.					
5.	Are claims as a matter of law and claims under express terms of the contract mutually exclusive?	In general terms, Italian law provisions would not override contractual provisions. The Italian law provisions described above might apply in the event the parties did not include a force majeure clause in the contract at all. If a force majeure clause is included in the contract, much depends on the wording of this specific clause and the party's intention at the time of the conclusion of the contract.					



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## Spain



Javier Castresana

Javier Mendieta

1		<u>Javier Castresana</u> <u>Javier Mendieta</u>
No	. Question	Answer
1.	Does the law in your jurisdiction provide a mechanism for dealing with the impact of an unforeseen event such as an epidemic or pandemic on contractual obligations (for example, a defence based on force majeure, frustration or change of circumstances) where this is not expressly provided for in a contract?	<ul> <li>Yes, there are three regimes:</li> <li>Force majeure: Force majeure is dealt with in Article 1,105 of the Spanish Civil Code (SCC). In principle (unless otherwise provided for by the law or an agreement), it exonerates a party from complying with or incurring a liability when the party cannot fulfil an obligation due to a force majeure event. Under Spanish law, for an event to qualify as "force majeure" (fuerza mayor), the relevant event must be: (i) unpredictable and unavoidable, (ii) subsequent to the agreement, (iii) objectively unavoidable, irrespective of the diligence employed, and (iv) outside the scope of control of the party that invokes force majeure. Negligence or wilful misconduct are incompatible with force majeure, so the party alleging it must not have previously breached its obligations or the agreement. The occurrence of force majeure is decided on a case-by-case basis, assessing the normal and reasonable expectation required in each situation, and also the allocation of risks in the relevant agreement.</li> <li>Frustration: According to Articles 1,182 et seq. of the SCC, the legal or physical impossibility to comply with a contractual obligation results in the extinction of the obligation or entitles the parties to terminate the agreement provided that the obligation in question was the fundamental obligation in such agreement.</li> <li>Change of circumstances (doctrine of the clause rebus sic stantibus): Under the doctrine established by the Spanish Supreme Court regarding the so-called rebus sic stantibus clause, (i) when an unpredictable and unexpected change in circumstances occurs that (ii) makes it impossible to achieve the purpose of the agreement or results in its frustration, or destroys the economic balance of the contract (so that there is no correspondence between the respective consideration provided by the parties), and (iii) the nature or covenants of the agreement do not assign the risk of the change of circumstances to one of the contracting parties, t</li></ul>





## Spain (cont'd)



Javier Castresana

Javier Mendieta

1		<u>Javier Castresana</u> <u>Javier Mendieta</u>
No.	Question	Answer
2.	Does an epidemic or pandemic constitute such an event?	Epidemic events have been considered force majeure causes by the Spanish Supreme Court (Spanish Supreme Court Judgment of 1 December 1954) and there are several judgments of provincial courts that have resolved cases of frustration of contracts due to the influence of epidemic outbreaks involving the H1N1 virus in Mexico or SARS in Toronto, declaring the exoneration of responsibility and recognising the existence of force majeure rights. Accordingly, the same criterion should apply to a pandemic.
	The frustration of a contract will depend on whether the epidemic or pandemic has effectively made it impossible to comply with an obligation or purpose of the contract in the relevant case.	
		Depending on the particular case and agreement, the effects of an epidemic or pandemic may be considered an unpredictable and unexpected change of circumstances that could be grounds for the application of the doctrine of the clause <i>rebus sic stantibus</i> .
3.	Do parties to contracts governed by your law commonly include an express mechanism in the contract for dealing with an unforeseen event such as an epidemic or pandemic that fundamentally changes the contractual bargain (for example, a force majeure clause)?	The parties very often include a specific clause in their contract that regulates force majeure events, as it is expressly permitted by Article 1,105 of the SCC. The parties can reach agreements in relation to the definition or effects of an event of force majeure. For example, they can agree that the debtor will assume the risks of the event of force majeure and therefore that the debtor must comply irrespective of its occurrence. The parties could also agree that the event of force majeure entitles one of them or both to terminate the agreement. If the parties do not include any specific clause in the contract, the general regime of Article 1,105 of the SCC will apply.





### Spain (cont'd)



**Javier Castresana** 

**Javier Mendieta** 

1		
No	Question	Answer
4.	Does an epidemic or pandemic constitute such an event?	An epidemic or pandemic can be a cause of force majeure if it temporarily prevents compliance with the obligation, but it can also lead to frustration, or produce a significant change in the circumstances that would allow the application of the doctrine of the clause <i>rebus sic stantibus</i> . It will depend on the content of the obligation, the allocation of risks between the parties contemplated in the agreement, the circumstances when the agreement was executed and the consequences of the epidemic or pandemic that affect the obligation or agreement. As indicated above, the occurrence of force majeure or frustration, or the possibility of applying the doctrine of the clause <i>rebus sic stantibus</i> must be analysed on a case-by-case basis.
5.	Are claims as a matter of law and claims under express terms of the contract mutually exclusive?	To the extent that the parties have included a particular clause dealing with one of these matters in the contract, each party can judicially claim for the enforcement of the relevant stipulation but that party can secondarily request the application of the general legal regime (where the relevant covenant is not considered applicable).



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#### Belgium



**Tom Schoors** 

**Thales Mertens** 

This could be the case, for instance, when the advantage sought by the non-defaulting party causes much greater prejudice to the defaulting party and the non-defaulting party is fully aware of this.

**Camille Leroy** 

**Evelien Van Espen** 

7				Tom Schoors	I naies Mertens	Camille Leroy	Evellen van Espen	
	No.	Question	Answer					
	1.	Does the law in your jurisdiction provide a mechanism dealing with the impact of an unforeseen event such as an epidemic or pandemic on contractual obligations (for example, a defence based on force majeure, frustration or change of circumstances) where this is not expressly provided for in a contract?	<ul> <li>Yes, there are three potential applicable mechanisms:</li> <li>Force majeure: If a contract is governed by Belgian law, the doctrine of force majeure will be impleven if the contract does not contain an express force majeure clause. Pursuant to Articles 1147 a 1148 of the Belgian Civil Code, a non-performing party shall be excused for its non-performance if cannot properly fulfil its contractual obligations due to an extraneous event, such as a force majeure event. Two key cumulative conditions must be met for an event to qualify as a force majeure even under the statutory regime:</li> </ul>					
			Circu a for	ımstances which only ı	nich renders performance absolutely impossible. of the obligations more onerous do not qualify as the required the need for absolute impossibility to			
			cons	equences must be una	outable to the defaulting woidable. This condition bility of contractual perform.	is often taken to mean	that the event's	
			performa without h renders t any cond definitive payment certain p performa	nce of its own affected aving to pay any dama the defaulting party's parete interest in the perly from its obligations.  obligation by relying of ayments from taking playments from taking playing of the party of the party of the payments from taking playing of the payments from taking playing the payments from taking playing taking taking playing taking taking playing taking taking taking playing taking	erformance definitively in formance of the agreeme Note that a defaulting pa n force majeure, save for ace. If a defaulting party a force majeure event, t	for the duration of the fits contracting party. If appossible or the other cent, the defaulting party can never claim that an event in which the to a bilateral agreement.	orce majeure event, the force majeure event contracting party has lost is released entirely and at it is freed from a authorities would forbid nt is freed from the	
			exercising circumsta the limits which co	g its rights (for example ances in which such ex of a normal exercise ourts have decided that	of those rights by a prude the insistence by a conti	ne performance of cont the other contracting p ent and diligent person. racting party on obtaining	ractual obligations) in party and clearly exceeds There are precedents in	





## Belgium (Cont'd)

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Tom Schoors

**Thales Mertens** 

Camille Leroy

**Evelien Van Espen** 

1			TOTH SCHOOLS	Thates Wellens	<u>Callille Leloy</u>	Lvellell vall Espell	
No.	Question	Answer					
1.	Cont'd	Hardship: Hardship can be defined as circumstances (i) which are extraordinary and unforeseeable, (ii) which are not attributable to either party, and (iii) which render the performance of its obligations by one party more onerous to the point that the balance of the contractual relationship is affected. The theory of hardship has been rejected by the Belgian Supreme Court. As a result, Belgian law does not currently provide for relief and does not allow for a contract to be renegotiated or otherwise modified in circumstances of hardship in the absence of a specific contractual regime. However, some specific legislation deviates from the standard regime and allows hardship to be invoked, for example in relation to government contracts. Another example of such legislation can be found in Article 79 of the United Nations Convention on Contracts for the International Sale of Goods (CISG). In addition, it should be noted that a broader acceptance of hardship in Belgian law is on its way: the current draft reform act of the Civil Code includes a new Article 5.77, which will – in the event it is adopted – make the theory of hardship applicable to agreements concluded after the entry into force of the new Civil Code.					
		response to the pandemic on 24 April 2020, dissolved unil due and payar extended to 1 of Economic I which were no debts that are	ne Covid-19 pandem contracts. The Royal states that agreeme aterally or by the couble under the agreen 7 June 2020. It applicaw, whose continuity of in a state of cessare due and (other) con	ic. One of those decree Decree No. 15, which ents concluded by an er- erits for reasons linked to ment. This protection — es to enterprises, within by is threatened by the O	es regulates the impact was published in the B nterprise before 24 Apro the non-payment of a initially foreseen to end the meaning of Book COVID-19 pandemic ar prior to 18 March 2020 ions (such as the excel	elgian Official Gazette on il 2020 cannot be a monetary debt that is I on 17 April 2020 – was XX of the Belgian Code and its consequences and . The obligation to pay	
2.	Does an epidemic or pandemic constitute such an event?	amounting to pandemic ma  However, for majeure, the	force majeure. The r y also qualify as a fa an epidemic, panden general conditions ou	ourts have accepted he measures imposed by the straight of the prince (factum principal principa	he authorities in respor ncipis), and hence as a imposed by the autho ulfilled (unless such ev	se to an epidemic or type of force majeure. rities to qualify as force	





#### Belgium (Cont'd)

			Tom Schoors	Thales Mertens	Camille Leroy	Evelien Van Espen
No.	Question	Answer				
3.	Do parties to contracts governed by your law commonly include an express mechanism in the contract for dealing with an unforeseen event such as an epidemic or pandemic that fundamentally changes the contractual bargain (for example a force majeure clause)?	contract (ind contracts to contains a li force majeu clause also consequence	cluding by a party's ge- include a force majeu st (exhaustive or not) re) or only in the even provides for a procedu es and effects of a for	•	ons). It is common for let the force majeure requestorce majeure in any are fulfilled. Often, suffilleds to be complied v	Belgian law governed uirements and that event (per se events of uch a force majeure
				trict rules on force maje		acinp clause, allering ici
4.	Does an epidemic or pandemic constitute such an event?	falls within t	he scope of the releval matter of contractual the statutory regime	demic or pandemic mee int contractual regime. T interpretation on a case to interpret the relevant	The application of force by-case basis. Courts	e majeure (or hardship) s will often use the
5.	Are claims as a matter of law and claims under express terms of the contract mutually exclusive?	even if the or reduce or ex- circumstance Likewise, a stipulating or rules. Howe	contract does not conti- dend the scope of for- es that constitute a fo- force majeure clause ifferent consequences wer, as mentioned abo	s governed by Belgian la ain an express force ma ce majeure under the st rce majeure event or a may change the effects s of an event of force ma ove, courts will construe are not sufficiently clear	ijeure clause. A force r atutory regime by prov list of events that qualif of the statutory regime ajeure from those prov such force majeure cl	iding a definition of y as force majeure. e for force majeure by ided under the default



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#### The Netherlands



Arnold Croiset van Uchelen Marnix de Planque Joris Steenkamp

1		Arnoid Croiset van Uchelen Marnix de Planque Joris Steenkamp
No.	Question	Answer
1.	Does the law in your jurisdiction provide a mechanism for dealing with the impact of an unforeseen event such as an epidemic or pandemic on contractual obligations (for example, a defence based on force majeure, frustration or change of circumstances) where this is not expressly provided for in a contract?	<ul> <li>There are three potential mechanisms:</li> <li>Force majeure: This is a rule of Dutch law that allows a party to suspend performance of its obligations as long as the circumstances causing force majeure last. If performance thereafter is pointless, the party is effectively discharged from its obligations.</li> <li>Force majeure implies the non-performing party is not in default, so it will not be liable for damages. Its counterparty is however entitled to rescind the contract.</li> <li>There is force majeure only if the event invoked by a party makes it impossible for it to perform its contractual obligations. There is no force majeure if the relevant event is for the risk and account of that party, either based on contract, law or generally accepted views in society.</li> <li>Unforeseen circumstances: There is a Dutch law remedy in cases of "unforeseen circumstances". A party can request the court to terminate or amend a contract if circumstances arise that were not explicitly or implicitly foreseen in the contract and that are of such a nature that unaltered continuation of the contract cannot be expected. The courts apply this remedy very restrictively.</li> <li>Reasonableness and fairness: Dutch contract law provides that the parties must act in accordance with the standards of "reasonableness and fairness". A creditor cannot require performance of the debtor's obligations if that would be "unacceptable" under such standards (the "derogatory effect of reasonableness and fairness"). This remedy does not lead to a permanent termination or amendment of the contract, but rather implies that obligations may be suspended or that the contract must be performed in a different way temporarily or in a specific set of circumstances. The threshold for invoking this remedy is relatively high.</li> </ul>
2.	Does an epidemic or pandemic constitute such an event?	The force majeure doctrine can only be invoked if performance is impossible as a result of the epidemic or pandemic. As a result, an epidemic or pandemic will not, in principle, trigger force majeure in relation to financial obligations, as payments are generally still possible.  Whether an epidemic or pandemic justifies invoking the doctrine of unforeseen circumstances or the doctrine of reasonableness and fairness is a matter of contract interpretation and balancing the interests of the parties and other circumstances.  If a party can refuse performance based on force majeure, it will not typically need to invoke the doctrine of unforeseen circumstances or the doctrine of reasonableness and fairness. However, in some cases they can coincide, for example, where a contract could be performed in an amended or modified form on the basis of unforeseen circumstances, but pending such amendment the debtor invokes force majeure.





#### The Netherlands (cont'd)



Arnold Croiset van Uchelen Marnix de Planque Joris Steenkamp

No.	Question	Answer
3.	Do parties to contracts governed by your law commonly include an express mechanism in the contract for dealing with an unforeseen event such as an epidemic or pandemic that fundamentally changes the contractual bargain (for example, a force majeure clause)?	This depends on the sector, but it is generally not very common to include such clauses. The reason for this is probably because there are a number of statutory remedies available, although the courts apply these with a high threshold.
4.	Does an epidemic or pandemic constitute such an event?	This will entirely depend on the wording of the relevant clause.
5.	Are claims as a matter of law and claims under express terms of the contract mutually exclusive?	Force majeure is not mandatory law and can be set aside entirely by contract. But it is a matter of contract interpretation whether the clause intends to supplement or replace statutory force majeure. The statutory unforeseen circumstances remedy can largely be contracted away by explicitly allocating the risk of unforeseen circumstances to the debtor, but a court may still find that the actual circumstances are of such an exceptional nature that they cannot be deemed to have been factored into the contract. Reasonableness and fairness are a mandatory part of contract law and cannot be contracted away, but their application will be coloured and limited by what the parties have agreed in terms of risk allocation.



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#### Luxembourg



Thomas Berger

1		<u>Inomas Berger</u>
No.	Question	Answer
1.	Does the law in your jurisdiction provide a	Yes, force majeure is a statutory exemption provided for in article 1148 of the Luxembourg Civil Code.
	mechanism for dealing with the impact of an unforeseen event such as an epidemic or pandemic on contractual obligations (for example, a defence based on force majeure, frustration or change of circumstances) where this is not expressly provided for in a contract?	A force majeure event is generally defined by Luxembourg courts in a contractual context as an event (i) which is unpredictable at the time of the conclusion of the contract, (ii) which is beyond the reasonable control of the debtor, and (iii) the consequences of which would have been unavoidable despite all reasonable efforts to the contrary. The performance of the contractual obligation must be rendered physically or legally impossible by such event, and not just more difficult or unprofitable.
	ioi iii a contract:	In order to be excused from performing its obligation, the debtor will therefore have to prove that the event meets the three conditions of force majeure, which must be considered in the factual context.
		Where the debtor is temporarily prevented from performing its obligations because of a force majeure event, it is exonerated from such performance and from damages for non-performance for as long as the force majeure event prevents the debtor's performance. Where the force majeure event definitively prevents the debtor from performing or where the contract is deprived of its essence (even if the inability to perform is only temporary), the debtor is definitively exonerated from performance and the contract is terminated automatically.
		In addition to force majeure, the <i>théorie de l'imprévision</i> (hardship) provides that where the balance of a contract is jeopardised by an unexpected change of (economic) circumstances, and in consequence it is commercially impracticable to continue the performance of the contract, the parties have an obligation to renegotiate the contract. This theory has received some recognition in Luxembourg, including by the Luxembourg Supreme Court, but to our best knowledge it has to this day never been applied by Luxembourg courts to discharge a party from its obligations or to terminate or amend a frustrated contract.
2.	Does an epidemic or pandemic constitute such an event?	Whether an epidemic or pandemic could be relied on to trigger the mechanisms mentioned above will depend on whether, in light of the specific facts of each individual case (including the type of contract at stake), the necessary conditions are met. Particular attention should be paid to the need to show that performance of the contractual obligation is impossible, as an epidemic or pandemic does not automatically prevent the debtor from performing its obligations. As a result, an epidemic or pandemic will not automatically qualify as an event that allows for the application of such mechanisms.





### Luxembourg (cont'd)



Thomas Berger

1		Inomas Berger
No.	Question	Answer
3.	Do parties to contracts governed by your law commonly include an express mechanism in the contract for dealing with an unforeseen event such as an epidemic or pandemic that fundamentally changes the contractual bargain (for example a force majeure clause)?	Force majeure provisions are very often found in Luxembourg law governed contracts, the purpose of which is often to extend the scope of circumstances that fall within force majeure (usually by providing an illustrative list of events that should be considered as a force majeure event pursuant to the contract) and modifying the effects of force majeure. More rarely such provisions reduce the scope of force majeure. The parties may also include a hardship clause in their contract, stipulating that the contract will be revised if there is a change of economic circumstances and setting out the nature of such changes as well as the procedure to follow for the revision of the contract.
4.	Does an epidemic or pandemic constitute such an event?	<ul> <li>Where the parties have stipulated a force majeure clause in their contract, it will be necessary to look at the wording of the clause and determine whether the parties have defined epidemic or pandemic and whether the parties' intent was to include such epidemic or pandemic as falling within the scope of force majeure.</li> <li>If the clause specifies that "epidemics" or "pandemics" constitute force majeure events and explains in concrete terms what should be meant by such definition (for example, the closure of borders), it would a priori apply to the Covid-19 pandemic.</li> <li>If the clause contains a non-exhaustive list of events and/or a generic definition of force majeure, and if the Covid-19 pandemic can be considered as being similar to those events and/or within this definition, the clause might be applicable to the Covid-19 pandemic.</li> <li>If, on the other hand, the clause contains an exhaustive list, which does not cover the Covid-19 pandemic or the governmental measures taken to respond to it, or if the definition cannot be applied to this situation, the clause will a priori not apply and the debtor will not be excused from performing its obligations.</li> </ul>





#### Luxembourg (cont'd)



**Thomas Berger** 

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	No.	Question	Answer
	4.	Cont'd	Ultimately, this will be a matter of interpretation. It should be noted that courts generally interpret the clause in light of the statutory conditions of force majeure.
			Where it can be demonstrated that the parties intended the clause to cover an epidemic or pandemic, the terms of the clause will apply.
	5.	Are claims as a matter of law and claims under express terms of the contract mutually exclusive?	As indicated above, a force majeure clause may have the effect of reducing or extending the scope of circumstances that fall within force majeure or otherwise modifying the effects of the statutory regime on force majeure. However, absent such a clause (or to the extent not covered by it where such clause only partially deviates from the statutory regime), the statutory force majeure regime will apply.

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### United Arab Emirates



**Yacine Francis** Kirsten O'Connell

		Tachie Francis Kirsten o Connen
No	Question	Answer
1.	Does the law in your jurisdiction provide a mechanism dealing with the impact of an unforeseen event such as an epidemic or pandemic on contractual obligations (for example, a defence based on force majeure, frustration or change of circumstances) where this is not expressly provided for in a contract?	Yes.  The UAE Federal Law No. 8 of 1985 (the UAE Civil Code) has provisions that refer to force majeure and other provisions that excuse non-performance of contractual obligations as a result of unforeseen exceptional events.  Force Majeure: Article 273 of the UAE Civil Code provides that the key element for a force majeure claim is that the event makes "performance of the contract impossible" in part or in whole. Although there is no system of binding precedent in the UAE, the UAE Courts generally interpret "impossible" literally, and have dismissed force majeure claims that are based on mere hardship or an economic imbalance between the parties. Additionally, the UAE Courts practice require "force majeure" events to have been unavoidable (i.e. beyond the control of the non-performing party) and unforeseeable at the time the contract was entered into. Where performance of the contract is found to be impossible, the contract is automatically cancelled. As a result the parties will be returned to their pre-contractual positions with the potential for damages to be awarded to achieve this. In respect of continuous contracts, the part of the contract that was already performed prior to the occurrence of the force majeure event renders only part of an obligation impossible to perform, Article 273(2) provides that only that part of the contract is to be extinguished and that the remainder of the contract is to remain enforceable.  Under Article 287 of the UAE Civil Code, an event of force majeure can also be used as a defence to tortious liability. A defendant will not be held liable for loss or harm suffered, if it can prove under Article 287 that the loss or harm arose out of an extraneous event in which the defendant played no part, such as a "natural disaster, sudden incident, force majeure, act of a third party."  Onerous obligations: Article 249 of the UAE Civil Code can be invoked by parties dealing with the impact of an unforeseen event, where contractual performance is rendered "onerous" as opposed to impos





## United Arab Emirates (Cont'd)



**Yacine Francis** Kirsten O'Connell

		Tacille Francis Kirsten O Connen
No.	Question	Answer
2.	Does an epidemic or pandemic constitute such an event?	UAE Law Possibly.  Whether an epidemic or pandemic can be relied on to trigger the mechanisms mentioned above will depend on whether the necessary requirements are met in light of the specific facts of each individual case.  DIFC Law Possibly.  Same position as above.  ADGM Law Possibly.  Same position, but by reference to the laws of England and Wales.
3.	Do parties to contracts governed by your law commonly include an express mechanism in the contract for dealing with an unforeseen event such as an epidemic or pandemic that fundamentally changes the contractual bargain (for example a force majeure clause)?	Yes. Force majeure clauses are common.  DIFC Law Yes. Same position as above.  ADGM Law Yes. Same position as above.





### United Arab Emirates (Cont'd)



**△** Yacine Francis Kirsten O'Connell

1		Yacine Francis Kirsten O'Conneil
No.	Question	Answer
4.	Does an epidemic or pandemic constitute such an event?	Very common.  It is common for contractual force majeure provisions to include as force majeure events: epidemic, plague, act of God and government action or government inaction.  DIFC Law  Very common.  Same position as above.  ADGM Law  Very common.  Same position as above.
5.	Are claims as a matter of law and claims under express terms of the contract mutually exclusive?	UAE Law The position is not clear. In the absence of an express provision that confines the parties to the remedies available under the contractual terms, it is arguable that the force majeure provisions under UAE Law may apply in addition to the contract terms. It is also arguable that the force majeure provisions under UAE Law may apply as mandatory law that is of a public policy nature.  DIFC Law The position is not clear.  Same position as above.  ADGM Law The position is not clear.  Same position as under the laws of England and Wales.



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### Slovakia



Martin Magal

Mataj Košalko

		<u>Martin Magar</u> <u>Mataj Kosarko</u>
No.	Question	Answer
dealing with the impact of an unforeseen er an epidemic or pandemic on contractual of (for example, a defence based on force may	Does the law in your jurisdiction provide a mechanism	Yes. The following regimes may apply:
	an epidemic or pandemic on contractual obligations (for example, a defence based on force majeure, frustration or change of circumstances) where this is	Force Majeure: Under Section 373 et seq. of the Slovak Commercial Code, a party is not liable to pay damages if the breach of the obligation was due to circumstances excluding liability. A circumstance excluding liability is an obstacle that occurs independently of the intent of the obliged party and that prevents the party from fulfilling its obligations, provided the obliged party could not have averted or overcome this obstacle or its consequences or have foreseen this obstacle at the time when the obligation was established. Although the defaulting party is not liable to pay damages, it will remain liable to pay a contractual penalty, unless the agreement provides otherwise.
		Fundamental Change of Circumstances: Under Section 356 et seq. of the Slovak Commercial Code, if the basic purpose of a contract is frustrated after its conclusion in consequence of a fundamental change in the circumstances under which the contract was concluded, the party affected by the frustration of the purpose of the contract may withdraw from it. The basic purpose must have been explicitly expressed in the contract. Change in the property relations of either of the parties or a change in the economic or market situation is not deemed a fundamental change in circumstances. The party that withdraws from the contract is, however, obliged to compensate the other party for the damage it has incurred by the withdrawal from the contract.
		Impossibility to perform the contract: Under Section 575 et seq. of the Slovak Civil Code and Section 352 et seq. of the Slovak Commercial Code, if performance becomes impossible the debtor's obligation ceases to exist. The Slovak Civil and Commercial Codes do not stipulate an impossibility test. Instead, they state examples of what is deemed impossible and what is deemed possible. So, for instance, the effects of the impossibility of fulfilment arise in the case of a rejection of an import/export licence but they do not arise if the performance may be carried out under aggravated conditions, at greater expense or after the agreed time.
2.	Does an epidemic or pandemic constitute such an event?	Whether an epidemic or pandemic could be relied on to trigger the mechanisms mentioned above will depend on whether, in light of the specific facts of each individual case, the necessary conditions are met. An epidemic or pandemic will not automatically qualify as an event which allows for the application of such mechanisms. For instance, once an epidemic or pandemic has already started spreading, it would not satisfy the force majeure test because it might have been foreseeable that it could affect business relations.





### Slovakia (Cont'd)



**Martin Magal** 

Mataj Košalko

No.	Question	Answer
3.	Do parties to contracts governed by your law commonly include an express mechanism in the contract for dealing with an unforeseen event such as an epidemic or pandemic that fundamentally changes the contractual bargain (for example a force majeure clause)?	It depends on the type of contract and parties. Sophisticated parties commonly include force majeure clauses in their contracts.
4.	Does an epidemic or pandemic constitute such an event?	Where the parties have stipulated a force majeure clause in their contract, it will be necessary to look at the wording of the clause and to determine whether the parties have defined epidemic or pandemic and whether the parties' intent was to include such an epidemic or pandemic as falling within the scope of force majeure. Where it can be demonstrated that the parties intended the clause to cover an epidemic or pandemic, the terms of the clause will apply.
5.	Are claims as a matter of law and claims under express terms of the contract mutually exclusive?	The provisions of the Slovak Commercial Code on force majeure, fundamental change of circumstances and impossibility to perform the contract are not mandatory. Parties can reduce or extend in their contracts the scope of circumstances which fall within these mechanisms or otherwise modify the effects of the statutory regime.



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## South Africa



**Gerhard Rudolph** 

Nikita Shaw

		Some a reading in
No.	Question	Answer
(	Does the law in your jurisdiction provide a mechanism dealing with the impact of an unforeseen event such as an epidemic or pandemic on contractual obligations (for example, a defence based on force majeure, frustration or change of circumstances) where this is not expressly provided for in a contract?	Yes, a common law mechanism exists in the event that performance by a party of its obligation(s) becomes objectively impossible due to unforeseeable and unavoidable events, through no fault of the parties. This is called the doctrine of supervening impossibility and may be raised as a defence for non-performance under a contract.  Supervening impossibility events include any happening, whether due to natural causes or human agency, that is unforeseeable with reasonable foresight and unavoidable with reasonable care.
		The effect of supervening impossibility is to discharge or terminate the contract, releasing the parties from their respective obligations and right to performance.
2.	Does an epidemic or pandemic constitute such an event?	This will depend on the particular circumstances of the epidemic or pandemic, the nature of the contractual obligations and the effect of the epidemic or pandemic on the contractual obligations. Broadly speaking, the requirements to invoke the doctrine of supervening impossibility are as follows:
		<ul> <li>The impossibility of performance must be absolute or objective. Absolute "factual" impossibility is not required and performance may still be objectively impossible if such performance is factually possible but has become illegal or so difficult that the party cannot reasonably be expected to perform.</li> </ul>
		<ul> <li>The impossibility of performance must not have been avoidable by a reasonable man or reasonably foreseeable by the party attempting to invoke supervening impossibility.</li> </ul>
		Impossibility is not implicit in a change of financial strength or commercial circumstances that would mean compliance with the contractual obligations are more difficult, onerous or costly.
		In most instances, it is unlikely that the Covid-19 pandemic in itself will be sufficient to invoke the doctrine of supervening impossibility. However, measures taken in response to the pandemic, such as the lockdown regulations passed pursuant to the declaration of a National State of Disaster, may result in situations where the doctrine may be raised as a defence to performance.
3.	Do parties to contracts governed by your law commonly include an express mechanism in the contract for dealing with an unforeseen event such as an epidemic or pandemic that fundamentally changes the contractual bargain (for example a force majeure clause)?	Yes, force majeure and material adverse change/effect clauses are common.  A force majeure clause generally allows for the suspension of performance of some or all of a party's obligations upon the occurrence of a specifically defined force majeure event. Parties often include a right to terminate the contract if the force majeure event persists for longer than a specified period.  Material adverse change/effect clauses are often used in loan agreements and commercial sale agreements. Such provisions include a right to renegotiate and/or terminate the contract upon the occurrence of a specifically defined material adverse change.





### South Africa (Cont'd)



Gerhard Rudolph

**Nikita Shaw** 

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No.	Question	Answer
4.	Does an epidemic or pandemic constitute such an event?	This will depend upon the wording of the particular clause.  Force majeure clauses generally contain a list of events, or types of events, which will constitute force majeure under the contract. It is necessary to consider the language of the clause to determine whether an epidemic or pandemic, or any measures taken in response, fall within the ambit of the listed or similar events. A similar approach is required with material adverse change/effect clauses.  Prior to the Covid-19 pandemic, force majeure and material adverse change/effect clauses seldom specifically listed epidemics or pandemics as trigger events. However, it is possible that the measures taken to address the Covid-19 pandemic could fall within the ambit of more general categories of events relating to business interruption or closure.
5.	Are claims as a matter of law and claims under express terms of the contract mutually exclusive?	Claims are mutually exclusive but often overlap. If the terms of the contract address the consequences of the Covid-19 pandemic (and/or any measures to address it), the parties must rely on the provisions of the contract.  Generally, the doctrine of supervening impossibility is raised in the alternative, should the contractual mechanism be found to be inapplicable.



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#### Australia

		Mark van Brakel David Jenaway Alastair Forward
No.	Question	Answer
1.	Does the law in your jurisdiction provide a mechanism dealing with the impact of an unforeseen event such as an epidemic or pandemic on contractual obligations (for example, a defence based on force majeure, frustration or change of circumstances) where this is not expressly provided for in a contract?	Yes, under the doctrine of frustration, a contract may be discharged where, without fault of either party, an unforeseen event renders performance of the contract radically different from that intended by the parties.
2.	Does an epidemic or pandemic constitute such an event?	Possibly; it depends on whether the threshold for frustration has been met. This will involve an evaluation of the terms of the contract and the factual circumstances of the particular case. The threshold is high; the event must have severe consequences and impact the ability to perform the contract as noted above (rather than simply altering the circumstances of contractual performance).
3.	Do parties to contracts governed by your law commonly include an express mechanism in the contract for dealing with an unforeseen event such as an epidemic or pandemic that fundamentally changes the contractual bargain (for example a force majeure clause)?	Yes, force majeure clauses are common in commercial contracts drafted in Australia.  The concept of force majeure is used as a way of providing a permissible basis for a party not performing its obligations where the circumstances may not amount to frustration. It is customary for such a clause to require that, to be applicable, performance in the manner specified by the contract is impossible due to circumstances "beyond the reasonable control" of a party. That requirement will not be met where the obligations can in fact be performed, but it is more difficult or expensive to do so. A prolonged or permanent force majeure event may give rise to an ability to terminate the contract (subject to the wording of the clause).
4.	Does an epidemic or pandemic constitute such an event?	This will depend on whether, as a matter of contractual construction, an epidemic or pandemic falls within the scope of the force majeure clause in the relevant contract and whether the events had the relevant impacts that were "beyond the reasonable control" of the party. The force majeure clause will be construed as a whole and on the basis of the actual words used in the entire contract.  The party seeking to rely on a force majeure clause will normally bear the burden of proving the occurrence of an event within the scope of the clause. The party seeking to rely on the clause may also be required to produce evidence of the impact of the event and that it has taken reasonable steps to prevent the occurrence of the event, or to mitigate its impacts. This may raise important factual and legal issues as noted above, namely that to claim force majeure, performance is impossible due to the event, not that the event has made it more difficult or expensive to perform the contract.





#### Australia (Cont'd)



Mark van Brakel

**David Jenaway** 

**Alastair Forward** 

No.	Question	Answer
5.	Are claims as a matter of law and claims under express terms of the contract mutually exclusive?	The general answer to this is no, but if a contract contains express provisions that sufficiently specify the consequences which are to result from the occurrence of a specific event, then the parties' rights and obligations are generally regulated by those express provisions in the contract rather than the doctrine of frustration. However, the doctrine of frustration may be relied upon if the contractual provision is incomplete or insufficient to cover the relevant circumstances.



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#### Russia



**Andrey Panov** 

**Alexander Nabokov** 

Igor Gorchakov

No. Question  Answer  Does the law in your jurisdiction provide a mechanism  Yes. There are three potentially approximately appr					
1 Does the law in your jurisdiction provide a mechanism. Ves There are three notentially a	Answer				
dealing with the impact of an unforeseen event such as an epidemic or pandemic on contractual obligations (for example, a defence based on force majeure, frustration or change of circumstances) where this is not expressly provided for in a contract?  Force majeure: This is a statut law provides for strict liability for party is liable irrespective of its though). However, a non-perform due to a force majeure event. The following conditions:  i. it must be outside of the ii. it must be extraordinary circumstances;  iv. it or its effects cannot be nature that it is unreasor v. it must prevent the debtor However, it should be noted the developed by jurisprudence, a The Russian Civil Code explicit (i) violation of obligations by or assets or cash.  If the force majeure event prevexonerated from liability for no long as the force majeure event may make use of other remedit	applicable regimes:  applicabl				





#### Russia (Cont'd)



**Andrey Panov** 

**Alexander Nabokov** 

Igor Gorchakov

I				Andrey Panov	<u>Alexander Nabokov</u>	Igor Gorchakov
No.	Question	Answei	r			
1.	Cont'd	Change of circumstances: Under Article 451 of the Russian Civil Code, when a subscircumstances occurs, which was unforeseeable at the time the contract was conclude be altered or terminated unless otherwise provided in the contract or derives from its endorcement of circumstances is considered substantial when circumstances have changed so drasparties could have reasonably foreseen this, the contract would not have been concluded on significantly different terms and conditions.				ded, the contract can s essence. The change rastically that, if the
		Gener	rally, the bar to invoking	g this principle is very hi	gh. The affected party must pro	ve the following:
			at the time of the conc circumstances would r		e parties assumed that such a c	change of
				with the necessary care	sons which the affected party co and diligence that was demand	
			interests and would ca	use such damage to the	d be so detrimental to the balance affected party that it would have ct when concluding the contract	e considerably
			it does not follow from is borne by the affecte	· ·	of the contract that the risk of char	ange of circumstances
		termin unsuc depre	nated by the court. In processful. There is the ju	ractice, however, claims risprudence of the Supr	the contract, this will need to be under Article 451 of the Russia eme Court holding that economic substantial change of circumsia	n Civil Code are usually ic crisis, currency
		Russia obliga wrong the ob author	an Civil Code if, as a re tion, it shall be termina ful acts (e.g. the requir bligation is not consider rity is lifted or quashed,	esult of an act of a public ted automatically. Howe ed license was withdraw ed to be terminated. Fu the contract becomes	lic authority: In accordance with authority, it becomes impossible er, if frustration has arisen due on by the authorities due to breathermore, if the restriction imposinding on the parties again to the transcription on how this provision	le to perform the e to the debtor's aches by the debtor), sed by the public he extent it can still be
		terminate	the contract, but gives sures taken have resu	the right to withdraw from	mporary impossibility of perform om it if there is an objective loss by in performance of the obligation	of interest, for example,





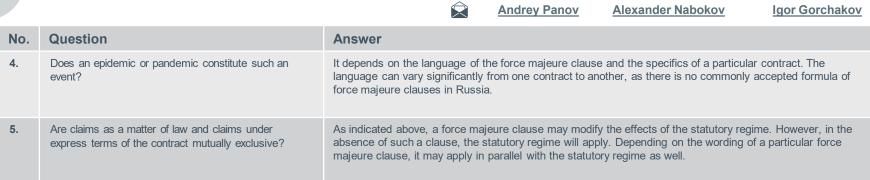
#### Russia (Cont'd)

, T ( )	Russia (Conta)					
		Andrey Panov Alexander Nabokov Igor Gorchakov				
No.	Question	Answer				
2.	Does an epidemic or pandemic constitute such an event?	Force-majeure: In general, according to Russian case law epidemics and pandemics can be considered unforeseeable and unavoidable events and thus force majeure events. However, it is rather unlikely that a pandemic as such would make performance of an obligation impossible; rather this would be due to the measures taken by the public authorities in response to the pandemic. The Supreme Court ruled in April that recognition of the coronavirus as force majeure depends on the debtor's category, conditions and region of its operation and cannot be universal. The circumstances of force majeure cannot be established abstractly, without reference to a specific situation and a specific obligation of a specific debtor. The occurrence of force majeure is decided on a case-by-case basis by the court based on evidence from the parties.				
		<ul> <li>Change of circumstances: Some reputable Russian scholars believe that this doctrine is 'well-tailored' for use by courts in resolving COVID-related disputes, but Russian courts have historically been very sceptical about this doctrine and very reluctant to apply it in cases involving commercial parties.</li> </ul>				
		In its recent clarifications, the Supreme Court did not rule out the possibility of amending or terminating agreements due to epidemiological situations and corresponding restrictive measures, if the court considers this a substantial change of circumstances. At the same time, it was mentioned by the Supreme Court that the amendment of the contract, in this case, is possible only in exceptional cases when its termination is contrary to the public interest or will cause such damage to the parties that significantly exceeds the costs necessary for the performance of that contract on the amended terms.				
		<ul> <li>Frustration of the contract due to an act of a public authority: As in the above, Russian courts very rarely apply this concept. In recent clarifications, the Supreme Court did not rule out the possibility to apply this doctrine; however, as mentioned before, there is very little jurisprudence applying this doctrine.</li> </ul>				
3.	Do parties to contracts governed by your law commonly include an express mechanism in the contract for dealing with an unforeseen event such as an epidemic or pandemic that fundamentally changes the contractual bargain (for example a force majeure clause)?	It is not a universal practice. While some parties include force majeure clauses in their agreements, particularly in contracts with foreign parties or with respect to larger transactions, others simply rely on the existence of the statutory provisions relating to force majeure. If a force majeure clause is included, it could list specific events presumed to constitute a force majeure event, provide for the duty to notify the other party of the existence of a force majeure event, and provide for special rules on termination of obligations in the event of a force majeure event, for example, automatic termination or termination upon expiry of a certain period.				
		There may also be other clauses in the contract that could operate to allocate risk on the occurrence of a pandemic; for example, parties may rule out the application of the doctrine of 'frustration of the contract due to an act of a public authority'.				





#### Russia (Cont'd)





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