The contractual disputes now emerging from the Covid-19 pandemic will require arbitral tribunals to apply civil or common law principles to resolve the parties’ competing claims. These principles will determine the outcome of a wide variety of cases involving complex facts and different kinds of agreements. Consider, for example, the following four scenarios:

1. A U.S. buyer backs out of a contract to purchase a global retail chain after the seller closes multiple stores due to Covid-19.
2. A Chinese company refuses to buy the contractually required amount of natural gas from a French supplier following a sharp decline in demand due to Covid-19.
3. A German supplier fails to provide time-sensitive services to a Brazilian purchaser because the supplier’s key workers fall ill with Covid-19.
4. A conference organizer terminates a scheduled June event in London after the U.K. government issues an order prohibiting gatherings of more than 100 people.

In the first two scenarios, the nonperforming party seeks to avoid liability based on economic conditions created by the pandemic. In particular, in Scenario No. 1, the U.S. buyer no longer wants to purchase the retail chain because the pandemic has greatly reduced the number and value of the stores, while in Scenario No. 2, the French supplier is unable to provide the gas due to a shortage caused by the pandemic. In Scenario No. 3, the Brazilian conference organizer is unable to provide the services because of a lack of workers due to the pandemic. In Scenario No. 4, the conference organizer is unable to provide the services because of a lack of social distancing measures due to the pandemic.

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Commentary

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processes. Drawing upon examples with which I’m familiar, programmatic relief was written into settlement documents, publicly filed, in the Merrill Lynch and Wells Fargo gender and race discrimination cases.

With the assistance of the finest ADR systems design professionals and mediators, these were fashioned and negotiated with plaintiff’s counsel, class representatives, and defense counsel. These actors were closely familiar with the way certain employment practices and policies facilitated discrimination as well as corporate interests, operations, and constraints.

These settlements resulted in corporate, class-wide, and individual redress and reform measures that would not have been achievable otherwise. Without question, these processes shifted the traditional balance of power between the parties in a positive way. Not guilty, ADR!

I can’t resist noting that discussion of ADR power imbalances ignores the larger realm in which aggrieved parties decide whether to raise claims, retain counsel, file suit, and settle without any third-party neutral involvement.

An employee who needs her job may not raise claims that the company is shorting her wages or making her work in unsafe conditions. She may suffer injustice—unlawful injustice to. If she can’t afford legal advice regarding her complaint, and so may suffer injustice—unlawful injustice to. If the employee does take the complaint to the employer, with or without counsel, what realistic chance does he have of negotiating a settlement?

Power imbalances are real. They occur despite the law, outside of the formal legal system, with no realistic path to legal redress.

Strong-arming by financial power, and disregard for legal standards, are much more likely where grievances are stated privately, counsel has not been retained, or even with counsel, suit has not been filed. Greater financial resources or higher social, political, or employment positions translate to more power. It is both obvious and unfortunate, but nevertheless true.

The universe outside of ADR is entirely at the mercy of power imbalances. ADR does not create these, nor can it erase them. We do the best we can.

IN OUR OWN ROOMS

Within ADR’s house, and now in our arbitration and mediation rooms, we mediators, court ADR administrators, process designers, and arbitrators can construct and conduct processes that reflect moral values our law makers seem to have abandoned. I’m recalling mediations and arbitrations with parties mystified or overwhelmed by costs, vagaries, and the aggressive tenor of litigation. Or parties pinning all hopes and resources on victory unlikely to be realized.

Sometimes, parties are trapped within constructed narratives of demons and foul deeds of former colleagues; they seek vindication and restoration of pride. Too often, despite counsel’s best efforts, they are unable to see through the legal thicket.

In employment discrimination cases, the employer feels extorted, the employee suffers financial and psychological loss or disorientation. Plaintiffs want assurance that this won’t happen again, that their claim will protect others. On both sides, litigation’s complaints, answers, counterclaims, document discovery burdens, deposition cross examinations, can bruise and burn.

Autonomy and control are surrendered to judge, magistrate and/or the specter of a jury. As arbitrators, we can fit the process rules to the circumstances. We can exercise discretion to streamline and reduce cost burdens. We can run pre-hearing conferences in a respectful and even-handed manner, recognizing the challenges faced by the parties and counsel. We can patiently allow a pro se claimant to make a case and waive strict technicalities. We can respectfully hear what parties and counsel wish to say, without cutting them off due to evidentiary rules.

While required to make decisions consistent with operative law (in most instances), arbitrators can make well-reasoned, accessible, fair, and equitable rulings and awards.

As mediators, we can seek to create some good within the mediation process. We listen, we seek to understand and respect the parties, their lawyers, and their experience of the conflict. We can gently explain negotiation and legal realities the parties won’t or can’t hear from their lawyers, while leaving choices in the parties’ hands.

Case law and statutes are what they are. Mediators can offer or facilitate solutions that address people’s business, professional or emotional needs and aspirations. We can lead people to find their way out of a litigated conflict trap that saps resources, energy, and emotional equilibrium.

We can conduct a process that enables people—even executives are people—to reckon with those they believe to have perpetrated or suffered harm. We can aid them in restoring some control over the destiny of their dispute, and own the decision to settle or not, subject to agreement by both sides.

Thankfully, within our tiny mediation and arbitration rooms in ADR’s house, we can choose to be strong advocates for respectful, fair, and humane process.

The polity crumbles and my reality-based despair at craven actors’ exercise of power remains. Fortunately, we need not be neutral about the integrity and humanity with which we conduct dispute resolution in our own spaces.

No regrets.

Practice Skills

(continued from page 134)

Scenario No. 2, the Chinese company does not want to purchase the required amounts of natural gas because the pandemic has reduced the demand for the product.

By contrast, in the third and fourth scenarios, the nonperforming party seeks to avoid liability based on circumstances created by the pandemic that prevent performance. In particular, in Scenario No. 3, the reduced workforce caused by widespread infection prevents the German supplier from timely providing the required services, while in Scenario No. 4, the government order prevents the conference
organizer from going forward with a scheduled conference.

These four examples provide a framework for examining the different ways in which civil and common law principles will shape the outcome of arbitrations seeking to resolve these emerging disputes.

**EXCUSING NONPERFORMANCE**

In both common law and civil law jurisdictions, the occurrence of a material adverse event can excuse contractual nonperformance in certain circumstances.

Most notably, in both jurisdictions, the law recognizes contractual provisions designed to allocate risks between the parties, such as force majeure and “material adverse event” clauses. See, e.g., Akorn Inc. v. Fresenius Kabi AG, 2018 WL 4719347, at *53 (Del. Ch. Oct. 1, 2018); OWBR Lx. Clear Channel Comms. Inc. LLC, 266 F. Supp. 2d 1214 (D. Hawaii 2003). These clauses generally require the “triggering event” to be both unforeseeable and beyond the party’s control before the event can serve as a justification for nonperformance.

In addition, in many civil law jurisdictions, the relevant law includes statutory provisions granting certain types of contractual relief in the case of material adverse events. These provisions not only incorporate the general force majeure principles, but also create an “economic hardship”-type defense that is not found in the common law. See, e.g., Articles 1195 and 1218 of French Civil Code; Articles 317, 393 and 478 of Brazilian Civil Code; Article 6.2.3 of Unidroit Principles of Int’l Commercial Contracts.

Under this defense, an economically onerous condition created by an unexpected event can provide grounds for a mandated renegotiation of the agreement. If the parties are unable to agree, the matter can then be referred to a court or arbitrator to either make appropriate revisions or terminate the contract. See, e.g., Akorn Inc. above.

Finally, in some common law jurisdictions, the courts recognize a breach of contract defense based on “impossibility of performance” or “frustration of purpose.” See, e.g., Kel Kim Corp. v. Central Markets Inc., 70 N.Y. 2d 900, 902 (1987). Under this defense, an unforeseeable event that frustrates the contract’s core purpose can provide grounds for terminating the agreement.

Thus, as depicted in the chart below, the potential civil and common law defenses in a Covid-19 contract dispute share several key elements, including the requirement that the “triggering event” be both unforeseeable and beyond the non-performing party’s control. Yet, at the same time, the defenses also have important differences, such as whether “economic hardship” is alone sufficient to justify nonperformance. See the table at bottom.

As shown below, the adjudication of the defenses listed in the table in Covid-19 arbitrations will depend in part on whether the arbitral tribunal relies on common law principles or civil and statutory law.

**DEFINING THE TRIGGERING EVENT**

Under both civil law and common law principles, a key issue likely to arise in any Covid-19 contract arbitration is whether the claimed “triggering event” qualifies as a material adverse event excusing nonperformance, assuming all other requirements are met.

In such cases, the nonperforming party will invoke either the pandemic itself or a specific government restriction—or a combination of both—as the event excusing nonperformance.

If the parties formed the relevant contract after the first reports of Covid-19, they are likely to dispute whether the pandemic (or any subsequent government action) was sufficiently “unforeseeable” to qualify as a triggering event.

On this issue, the date of contract formation will be critical in assessing whether the information available to both parties made the effects of the emerging pandemic (1) reasonably foreseeable; and (2) beyond the control of the nonperforming party.

On the other hand, if the parties formed the contract before the first reports of Covid-19, the nonperforming party will likely be able to show that the pandemic (or its effects) constituted an unforeseeable occurrence that was beyond its control. Indeed, in many cases, the contract will contain a force majeure provision that expressly applies to “epidemics,” “acts of government” or, more generally, “other events beyond the party’s control.”

The definition of the triggering event is important not only for assessing its foreseeability, but also for determining the scope and duration of its effects. Although government orders or even the pandemic itself may

| Defense                                      | Requirements                                                                 | Economic Hardship Qualify? | Consequences                                                                 |
|----------------------------------------------|-----------------------------------------------------------------------------|-----------------------------|-----------------------------------------------------------------------------|
| Force Majeure (contract)                     | Unforeseen event beyond a party’s control that prevents or impedes performance with no reasonable alternatives. | No.                         | Nonperformance excused for duration of force majeure event.                 |
| Material Adverse Event (contract)            | Unforeseen event beyond a party’s control that has material adverse consequences. | Generally no (but depends on contract language). | Termination of contract.                                                   |
| Economic Hardship (statute or contract)      | Unforeseen event beyond a party’s control that makes performance economically onerous. | Yes.                        | Renegotiation of contract or termination.                                   |
| Impossibility of Performance or Frustration of Purpose (common law) | Unforeseen event beyond a party’s control that prevents performance or frustrates core purpose of contract. | No.                         | Termination of contract.                                                   |

(continued on next page)
be found to terminate on a specific date, they can also have continuing effects that either prevent performance or make such performance economically difficult. See, e.g., Carboex SA v. Louis Dreyfus Commodities Suisse SA [2012] EWCA Civ 838 (Eng. Court of Appeal) (available at https://bit.ly/320NXbR) (supplier excused from liability not only because of strikes that interfered with cargo handling operations, but also because of the continuing congestion that delayed delivery).

These are factual questions that carry important implications for other issues likely to be arbitrated in the dispute.

**CAUSATION ANALYSIS**

Under both civil law and common law principles, a nonperforming party also must show that the triggering event either (1) prevented the party from performing its obligations (common law); or (2) created economic conditions that made performance “excessively onerous” (civil law). *Hong Kong Islands Line Am. S.A. v. Distribution Servs. Ltd.*, 795 F. Supp. 983, 989 (C.D. Ca. 1991); ICC Hardship Clause (2020) (available at https://bit.ly/347eY00). (The “economic hardship” inquiry could also be relevant under common law principles if the relevant contract included an economic-hardship provision.)

To this end, the nonperforming party must satisfy two separate, but closely related “causation” elements: (1) a direct causal link between the triggering event and nonperformance; and (2) due diligence in avoiding the effects of the triggering event.

The Causal Link Requirement: The first requirement focuses on whether a causal link exists between the triggering event and the alleged effect on performance.

In the case of force majeure claims, courts and tribunals generally hold that the nonperforming party must show that the triggering event directly prevented or impeded performance.

In some cases, the non-performing party may be better able to make this showing if it can cite a governmental act as the triggering event, rather than the pandemic itself. A governmental act not only carries the force of law, but also has a well-defined scope that facilitates a showing of causation.

The causation analysis can lead to different outcomes under civil law and common law principles. In both systems, the requisite causation showing can likely be made in Scenario No. 3 above (where the pandemic reduced the German supplier’s work force and thereby prevented it from providing the required services) and Scenario No. 4 (where the government order prevented the London organizer from holding events attended by more than 100 people).

By contrast, in common law jurisdictions, the courts generally hold that an economic hardship does not qualify as a force majeure event—even when the hardship is the direct result of such an event. *In re Millers Cove Energy Co. Inc.*, 62 F.3d 155, 158 (6th Cir. 1995); OWBR v. Clear Channel Communications, Inc. LLC, 266 F. Supp. 2d 1214 (D. Hawaii 2003).

For example, in one well-known U.S. case, a conference organizer reserved more than 500 hotel rooms for an October 2001 event, but then invoked force majeure when attendance plummeted following the 9/11 terrorist attacks. The court rejected the claim, holding that mere economic hardship does not establish a force majeure event, even when it results from an indisputably unforeseen event. OWBR, above.

Thus, under common law principles, the U.S. buyer in Scenario No. 1 and the Chinese buyer in Scenario No. 2 may not be able to establish an adequate factual basis for force majeure relief. In both scenarios, the non-performing party seeks to suspend its obligations not because the pandemic has prevented performance, but because it has made performance economically onerous.

On the other hand, under civil law principles, the same U.S. and Chinese buyers may be able make a sufficient showing of “economic hardship” to establish a basis for either renegotiating the contract or terminating the agreement.

Putting aside these differences, in many Covid-19 arbitrations, the nonperforming party will be able to make at least a prima facie showing, based on both fact and expert testimony, that either a government lockdown or the pandemic itself was the proximate cause for its nonperformance. C. Brunner, “Rules on Force Majeure as Illustrated in Recent Case Law,” Sec. III. G., Hardship and Force Majeure in Commercial Contracts, F. Bartolotti and D. Ufot (eds.), International Chamber of Commerce (2018).

The factual predicate for this showing could take many forms, including a labor force reduced by illness, an inability to obtain a needed government permit, supply chain disruptions or other factors.

In these cases, the litigation will focus not only on the adequacy of the “causal link,” but also on whether other causes contributed to the non-performance.

**Could the Effects Have Been Avoided?** Both civil and common law jurisdictions also focus on whether the nonperforming party could have avoided the effects of the triggering event through the exercise of due diligence.

This requirement rests on the recognition that the triggering-event effects can sometimes be avoided, even though the event itself is “unforeseeable.” If the nonperforming party’s lack of diligence prevented it from avoiding the effects of the triggering event, a tribunal will likely decline to excuse nonperformance.
In one reported example, a tribunal found that a flood did not excuse a supplier’s failure to deliver goods that had been destroyed, even though the flood itself qualified as a force majeure event. Id. The tribunal reasoned that the supplier could have avoided the damage caused by the flood if it had packaged the goods in ways consistent with standard industry practice.

Similarly, if a companyitized by a cyberattack failed to mitigate the effects of the attack by following its own policies, the company may be foreclosed from using the attack to excuse nonperformance.

Similar issues are likely to arise under both civil and common law principles as parties dispute whether the nonperforming party failed to take reasonable steps that would have allowed it to avoid the pandemic’s effects. In these disputes, the parties will present both fact evidence and expert testimony comparing the nonperforming party’s internal policies and procedures with standard industry practices and/or the practices of similarly situated third parties.

**Could the Effects Have Been Overcome or Mitigated?** Both common law and civil law principles also focus on whether the nonperforming party could have overcome or at least mitigated the effects of the triggering event by employing a commercially reasonable alternative.

In some cases, resolving this issue will determine the dispute’s outcome. For instance, in Nat’l Oil Co. of Libya v. Libyan Sun Oil Co., ICC Award No. 4462 (1985) (available at https://bit.ly/2PXINc7), a company that failed to complete a Libyan construction project blamed a U.S. government order banning travel to Libya because the company could not use the U.S. personnel it had allocated for the project. In rejecting the defense, the tribunal stressed that the company could have relied on non-U.S. personnel to complete the project.

Thus, in many coronavirus-related arbitrations, the parties will present both fact evidence and expert testimony on two issues: (1) whether any alternative means of performance were available to the nonperforming party; and if so, (2) whether such alternatives were “commercial reasonable.”

On these issues, evidence showing the ways in which similarly situated third parties dealt with the same impediment could be especially relevant in supporting—or undermining—the claims made by the non-performing party. See, e.g., Macromex SRL v. Globex Int’l Inc., ICDR Case No. 50181T0036406 (Oct. 23, 2007) (available at https://bit.ly/2Ec3Gg4); 330 Fed. Appx. 242 (2d Cir. 2009).

**ASSESSING THE NOTICE**

The adequacy of any contractually required notice is also likely to be an important issue, particularly in disputes governed by common law principles.

The force majeure-type provisions in many contracts often contain requirements that the nonperforming party give notice within either a “reasonable” period or a specified number of days.

These requirements raise two major issues. First, under the contract, when does the period begin within which the nonperforming party must give notice? Is it the date the triggering event occurs, the date its effects on performance occur, or the date such effects become reasonably foreseeable?

Second, is the notice requirement a “condition precedent” to excusing performance under the contract, or is it simply a separate contractual duty? If the requirement is a condition precedent, its breach may bar the contractual defense.

On the other hand, if the requirement is simply a separate duty, its breach will have no consequence absent a showing of harm.

In resolving this issue, courts and tribunals generally decline to view notice as a “condition precedent” unless the contract expressly designates it as such, particularly if the opposing party suffered no prejudice as a result of any alleged delay. Global Tungsten & Powders Corp. v. Largo Resources Ltd., ICC Case No. 19566 (2014) (available at https://bit.ly/312JRR8); General Dynamics UK Ltd. v. State of Libya, ICC Case No. 19222 (2016) (available at https://bit.ly/2DXuIrC).

In some cases, therefore, the arbitration will address what the opposing party knew about the triggering event and its effects on the nonperforming party’s ability to discharge its obligations.

**REMEDIES AND DAMAGES**

In Covid-19 disputes, the damages phase of the arbitration will have to address two scenarios.

The first scenario assumes that the non-breaching party proves its case and the nonperforming party does not establish a valid defense based on a pandemic-related effect. In this scenario, the non-breaching party will generally be entitled to recover the actual damages suffered as a result of the identified breach, with the amount of recovery not to exceed the amount of foreseeable damages at the time of contract formation. See, e.g., Convention on the International Sale of Goods, Article 74.

The damage recovery would also be subject to any successful mitigation efforts undertaken by the non-performing party.

The second scenario assumes that the nonperforming party establishes a valid defense based on a pandemic-related effect. In the case of force majeure-type provisions, such a showing will generally release the nonperforming party from liability, but only for as long as the triggering event prevents performance. ICC Case No. 18982 (2014). Some tribunals have applied this principle to excuse liability during the duration of the triggering event even though the nonperforming party was already in default before the triggering event allegedly occurred. See General Dynamics U.K. Ltd., above.

As a result, in some cases, the nonperforming party will still be liable for at least some damages for at least part of the term of the contract.

In these cases, the duration of the triggering event—both its starting point and its end point—will become a disputed issue during the damages phase of the litigation or the arbitration. This is particularly true if the nonperforming party relies not only on the triggering event, but also on its continuing effects to excuse non-performance. See, e.g., Carboex SA above.

**...**

The Covid-19 pandemic is sure to generate a wide range of contract disputes that will be resolved in U.S. and international arbitrations. In these cases, the outcome of the arbitration will often depend on whether common law or civil law principles govern the resolution of the underlying claims.