

# Contractual Performance and COVID-19

An In-Depth Comparative Law Analysis

Edited by

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## Preface: A Note from the Editors

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For the past two years, the global outbreak of the COVID-19 pandemic has had a devastating impact on human health and life around the globe. It has had an equally far-reaching impact on contractual relations worldwide. The outbreak of COVID-19 has forced governments to take unprecedented measures to slow down the spread of the pandemic and to protect health and safety. Due to new variants of the SARS-CoV-2 virus and still less-than-perfect vaccination rates in many parts of the world, many governments are repeatedly forced to take extreme measures, including lockdowns of cities and countries, import and export bans, travel restrictions and closure of borders, as well as large-scale government intervention in the legal and economic framework. Companies have faced serious economic consequences, including, but not limited to, suspensions and shutdowns of facilities and production; delays in the delivery of goods and services; supply chain shortages; decreases in sales; fluctuations in prices; and changes in exchange rates. All of this may impact the ability of parties to reasonably exercise their contractual rights or perform their contractual obligations.

The impact of the COVID-19 crisis, and the government measures implemented to address it, on the economy in general and on individual businesses in particular is profound and likely to reverberate for a significant period of time. This publication discusses the legal provisions and doctrines that various legal systems have developed to address such an unexpected event or fundamental change in circumstances on the parties' contractual obligations and applies those principles to the situations that many contracting parties face as a result of the COVID-19 outbreak.

This publication strives to provide an in-depth and practically relevant comparative analysis. At the same time, we recognize that it is in many ways navigating uncharted territory: while applicable doctrines, such as impossibility, *force majeure*, frustration, hardship or *imprévision*, *clausula rebus sic stantibus*, *extraordinary termination*, or *caducité* have always held a place in academic textbooks, the global legal order has not had to contend with a crisis of this magnitude for generations.

As such, this publication has always had to contend with a measure of fluidity. To address the crisis as it unfolded, it started as an online compendium in June 2020; evolving into a comprehensive analysis of 12 major jurisdictions from around the world that aims to reflect the global nature of the pandemic. As further legal and

factual developments occur, and with further jurisdictions being added, this publication will continue to be updated both online and in print.

This book examines both civil law (France, Germany, Switzerland, Austria, Russia, China, Brazil, and Costa Rica) and common law (the US, England and Wales, Hong Kong and Singapore) jurisdictions. These have been chosen both because they provide a blueprint for other jurisdictions around the world, and because they are particularly relevant for international arbitration. Further leading jurisdictions from around the globe will follow, including from Europe, the Americas, and Asia.

The research into how these different legal systems seek to resolve the tension between *pacta sunt servanda*, on the one hand, and consideration of the impact of an unforeseen and serious change of circumstances outside the parties' control, on the other hand, has been fascinating. The resulting analysis demonstrates that while dogma, structure, and nomenclature widely differ, the ultimate solutions offered by these diverse legal systems are similar.

It is a testament to the dedication of the lawyers in WilmerHale's international arbitration group that they immediately rallied behind this important project and produced the first analyses of leading jurisdictions just a few months into the pandemic. Today, this publication constitutes the most comprehensive comparative examination of the impact of the COVID-19 pandemic on contractual performance.

We are grateful to all our colleagues at WilmerHale, whose individual contributions are acknowledged in the various country chapters and at the Kluwer International website. And we are particularly grateful to Gwen de Vries and her colleagues at *Wolters Kluwer* for realizing this project, and for providing wise counsel throughout the process.

To our clients, friends, and readers, we welcome your thoughts, suggestions, real life experiences, and questions. Please address them to [franz.schwarz@wilmerhale.com](mailto:franz.schwarz@wilmerhale.com); [john.trenor@wilmerhale.com](mailto:john.trenor@wilmerhale.com); or [helmut.ortner@wilmerhale.com](mailto:helmut.ortner@wilmerhale.com).

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# Introduction

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The COVID-19 outbreak was declared a pandemic by the World Health Organization on 11 March 2020. Since then, most countries have been hit by multiple waves of the pandemic, and new variants of the SARS-CoV-2 virus continue to make precautionary and protective measures necessary, even in countries in which vaccines may now be readily available. As a result, many parties have been facing serious COVID-19-related impediments. Key personnel or large parts of the general workforce may be infected and/or fall ill, or are held up in self-isolation or quarantine, creating significant contract performance issues. Indeed, companies may manage, or may have to manage, the mere risk of infection by abstaining from work necessary for contract performance.

Further, to protect their citizens and contain the global spread of the disease, many countries have been implementing significant and, in many cases, unprecedented measures affecting businesses and a wide variety of contractual and legal relationships. In many parts of the world, the impact of the COVID-19 pandemic and government measures on global activity has been significant, and many parties have been finding it difficult, if not impossible, to exercise contractual rights or perform contractual obligations.

In all of these cases, parties to contracts will ask the question of whether and under what circumstances these COVID-19-related issues and impediments to performance may excuse contractual performance or lead to modification or termination either under various contractual provisions, such as those regarding *force majeure*, hardship, delay or termination, modification or adjustment, etc., or else under various legal concepts, such as impossibility, *force majeure*, hardship or *imprévision*, *clausula rebus sic stantibus*, extraordinary termination, *cauducité*, etc. Can an obligor excuse performance, discharge obligations, and avoid incurring liabilities for not performing contractual obligations as originally promised? If so, what is the legal position of the obligee? This publication examines how different jurisdictions address certain COVID-19-related impediments to contractual performance.

## A. THE BASIC PRINCIPLES RELEVANT FOR ASSESSING THE IMPACT OF COVID-19 ON CONTRACTUAL RELATIONSHIPS

There are several fundamental principles that most of the legal systems discussed in this publication share and that may come into play (albeit with nuances) in how legal systems address COVID-19-related impediments. The country reports that follow this Introduction highlight some of the different approaches that each jurisdiction takes as to these basic contract principles (Section B in each country report).

### 1. *Pacta Sunt Servanda* and the Sanctity of Contracts

Most prominently, all of the analyzed legal systems place a strong emphasis on *pacta sunt servanda* or the sanctity of contracts as the bedrock principle of contract law: once the parties have negotiated a contract and agreed to be legally bound by it, subsequent developments will in principle *not* allow a party to avoid or modify its contractual obligations.

It is only in exceptional situations or circumstances that legal systems will intervene and permit a party to annul, modify, or excuse the party's contractual obligations. This publication refers to such exceptional excuses of a party's contractual obligations as "emergency valves" designed to account for extraordinary circumstances in which the performance as originally promised can no longer be maintained. Conversely, unless these exceptional circumstances are present, parties are considered to have assumed the general risk, inherent in life, that circumstances can change subsequent to concluding the agreement – irrespective of whether performance will become more onerous and/or expensive for them.

There are two main reasons for this basic approach. First, legal certainty and economic efficiency are considered so valuable that they take priority over ensuring that the commercial bargain underlying the contract is maintained over time, through all subsequent developments, exactly as it was originally intended.

Second, parties are free to include specific clauses in their contracts that allocate the distribution of risks between them, such as *force majeure* and hardship provisions. There are model clauses, *e.g.*, as suggested by the ICC, that may provide a reasonable starting point and guidance for drafting such clauses more tailored to the circumstances of the parties and their contractual relationship. In 2020, the ICC updated its suggested model clauses for contractual *force majeure* and hardship provisions. The new ICC Force Majeure Clause<sup>1</sup> defines *force majeure* as:

“the occurrence of an event or circumstance that prevents or impedes a party from performing one or more of its contractual obligations under the contract, if and to the extent that that party proves: (a) that such impediment is beyond its reasonable control; and (b) that it could not reasonably have been foreseen at the

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1. See ICC Force Majeure and Hardship Clauses, March 2020, <https://iccwbo.org/content/uploads/sites/3/2020/03/icc-forcemajeure-hardship-clauses-march2020.pdf> proposing a long and a short version of the ICC Force Majeure Clause; the definition of Force Majeure is identical in both versions.

time of the conclusion of the contract; and (c) that the effects of the impediment could not reasonably have been avoided or overcome by the affected party.”

The new ICC model *force majeure* clause then includes a list of events that are presumed to satisfy conditions (a) and (b) “[i]n the absence of proof to the contrary.” The list of presumed *force majeure* events includes “plague,” “epidemic,” “act of authority whether lawful or unlawful, [and] compliance with any law or governmental order.” A party that has successfully invoked the clause “is relieved from its duty to perform its obligations under the contract and from any liability in damages or from any other contractual remedy for breach of contract.”

Furthermore, the model clause provides:

“Where the duration of the impediment invoked has the effect of substantially depriving the contracting parties of what they were reasonably entitled to expect under the contract, either party has the right to terminate the contract by notification within a reasonable period to the other party. Unless otherwise agreed, the parties expressly agree that the contract may be terminated by either party if the duration of the impediment exceeds 120 days.”<sup>2</sup>

The ICC Hardship Clause<sup>3</sup> emphasizes the principle of *pacta sunt servanda* / sanctity of contracts in its first paragraph:

“A party to a contract is bound to perform its contractual duties even if events have rendered performance more onerous than could reasonably have been anticipated at the time of the conclusion of the contract.”

In its second paragraph, the model clause goes on to define hardship for a party as a situation in which:

“(a) the continued performance of its contractual duties has become excessively onerous due to an event beyond its reasonable control which it could not reasonably have been expected to have taken into account at the time of the conclusion of the contract; and that (b) it could not reasonably have avoided or overcome the event or its consequences.”

In such a situation, the ICC model hardship clause provides that:

“the parties are bound, within a reasonable time of the invocation of this Clause, to negotiate alternative contractual terms which reasonably allow to overcome the consequences of the event.”

Finally, the ICC model clause suggests three alternatives for a third paragraph of a hardship clause, in case the parties have been unable to agree on alternative contractual terms.

- a. The first option gives the party invoking the hardship clause a right “to terminate the contract” (Option “Party to terminate”);

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2. This wording, too, is identical in both the long and the short version.

3. ICC Force Majeure and Hardship Clauses, March 2020, <https://iccwbo.org/content/uploads/sites/3/2020/03/icc-forcemajeure-hardship-clauses-march2020.pdf>.

- b. the second option gives the party invoking the clause a choice either to “request the judge or arbitrator to adapt the contract with a view to restoring its equilibrium, or to terminate the contract, as appropriate” (Option “Judge adapt or terminate”); and
- c. the third option entitles the party invoking the clause “to request the judge or arbitrator to declare the termination of the contract” (Option “Judge to terminate”).

Where the parties have failed to make contractual arrangements for the allocation of risk in case of unforeseen or exceptional circumstances or hardships, however, their rights and obligations depend on whether the law applicable to their contractual relationship provides for an “emergency valve” in the sense discussed above. The discussion of these emergency valves and how they may shape contractual rights, obligations, and remedies in the context of the COVID-19 pandemic forms the core of this publication.

## **2. Good Faith**

Good faith is another fundamental principle recognized by many jurisdictions. In some civil law countries, it plays a particularly prominent role. Some common law systems may imply a duty of good faith and fair dealing; yet other common law systems allocate more value to the four corners of the agreement that the parties struck without importing additional duties of good faith in most circumstances.

In civil law jurisdictions, the balancing act between protecting the bedrock principle of *pacta sunt servanda* and the application of emergency provisions can be framed as an issue of the application of a contract and its good faith interpretation. In this context, some legal systems derive a range of obligations from this principle, including a duty to inform the obligee in a timely fashion of an (impending) impediment, a duty to grant a grace period before termination, or a duty to engage in good faith negotiations before modifying or terminating the agreement, or before requesting a judge or tribunal to do so. Some jurisdictions even refer to good faith as a basis for how to modify contractual agreements, assuming an emergency valve exists that permits such modifications.

## **3. Party Intent**

The intent of the parties is also a pervasive principle that plays a significant role in the interpretation of contracts.

When interpreting contracts, most civil law jurisdictions aim at giving legal force to what the parties actually intended to agree on – even if this may have been expressed imperfectly in the language of the contract. In some exceptional cases, civil law jurisdictions also empower a judge or arbitrator to amend contractual provisions if the parties are faced with a situation that they had not contemplated at the time of entering into the contract. Any such amendment must be made in line with what the parties would likely have agreed on if they had known about the changed circumstances at the time of concluding the contract (so-called hypothetical intent).

The intent of the parties also plays a significant role in contract interpretation in common law jurisdictions. In many common law jurisdictions, it is the objective intent of the contract that is given primacy, based on the language of the contract. In some common law jurisdictions (and indeed some civil law jurisdictions), courts only look to evidence outside the contract if the language is ambiguous.

In applying the emergency valves discussed in this publication, the intent of the parties may come into play when interpreting the scope of contractual *force majeure* and hardship clauses – for example, if a clause does not explicitly make a reference to pandemics or other COVID-19-related impediments. In some jurisdictions, it may also serve as a reference point for the court or arbitrator if called on to modify an agreement based on an emergency provision (in the contract or in the applicable law): are there specific circumstances evidencing the parties’ intent, or making it possible to adduce the parties’ hypothetical intent, that provide guidance as to how the contract could be modified? Frequently, issues arise as to whether the parties have explicitly or implicitly allocated the risk of the unexpected event that impedes the performance of one of the parties, in which case issues regarding the intent of the parties may come into play. Different legal systems approach how to ascertain the parties’ intent in varying ways.

## **B. STRUCTURAL DIFFERENCES IN HOW LEGAL SYSTEMS ADDRESS COVID-19-RELATED IMPEDIMENTS**

The country reports that follow this Introduction deal also with the more detailed norms that operate in the context of these fundamental contract principles. However, this publication does not simply focus on the general contract law regime of the jurisdictions under consideration. It does not dwell on the evident fact that late performance or non-performance of a contractual obligation will likely result in a breach of contract triggering a range of remedies at the disposal of the obligee to address this issue.

Rather, it specifically looks at how the contract law of the selected jurisdictions addresses circumstances in which late, partial, or non-performance is triggered by exceptional impediments that may arise out of the COVID-19 pandemic. In this context, it examines for each jurisdiction which emergency valves are available to address COVID-19-related changes of circumstances and impediments to performance and under what conditions they apply (Section C in each country report). Thereafter, it examines for each jurisdiction whether and to what extent the emergency valves allow an obligor to excuse, modify, or terminate its contractual obligations in response to COVID-19-related impediments; and what remedies are available to the obligee in this case (Section D in each country report). Each country report also briefly outlines specific government measures taken to address COVID-19-related impediments as they pertain to particular types of contracts, e.g., construction contracts, employments contracts, or lease agreements (Section E).

By way of introduction, there are several major legal principles and doctrines available under various *civil law systems*. Not all jurisdictions apply all doctrines and not all



use the same terms to describe the doctrines; the scope varies significantly based on the governing law. These doctrines in civil law systems are as follows:

- a. *Impossibility*: Excluding a claim for performance of an obligation or termination of an agreement due to a permanent and total impediment occurring subsequent to the conclusion of the contract that makes the performance in kind owed under the agreement factually, legally, or – in some jurisdictions – economically impossible. If the impediment rendering performance impossible is not permanent, performance may be *temporarily* excused under provisions regarding delay. (In some jurisdictions, this emergency valve leads to termination of the affected obligations, but these may be revived if the impediment ceases to exist.)
- b. *Force majeure* (fortuitous event): Suspension or termination of a contractual obligation due to an event or measure that creates an impediment to performance or (in some jurisdictions) frustrates the purpose of the contract and that cannot reasonably be overcome, was unforeseeable, and is beyond the control of the parties and/or not attributable to the party invoking it. (In some jurisdictions, only a suspension of the affected obligation for the duration of the impediment is possible under this emergency valve.)
- c. *Clausula Rebus Sic Stantibus* and (material) change of circumstances: Modification or termination of the contract due to an unforeseeable, external, and significant change in circumstances that affects the commonly assumed basis of the agreement, (in some jurisdictions) does not merely reflect the realization of commercial risks, and leads to a disruption of the parties' bargain that is so serious that they cannot reasonably be expected to be bound to their agreement.
- d. *Hardship* (*imprévision*): Modification or termination of the contract due to an unforeseeable change of circumstances that makes performance excessively onerous and the risk of which was not accepted by the party invoking it.
- e. *Extraordinary termination*: *Ex nunc*<sup>4</sup> termination of a long-term contract for a compelling reason that makes continued performance intolerable for the party invoking it and that was neither foreseeable nor originated within the sphere of responsibility of the party invoking it.
- f. *Caducité* (contract frustration): Termination of a validly formed agreement due to a change of circumstances that makes one or more essential elements of the contract disappear and that is beyond the party's control. (In some jurisdictions, the affected cause or purpose must have been expressly included in the contractual language.)

In many *common law jurisdictions*, there are several potentially applicable doctrines that may excuse performance under a contract in light of a supervening event. Not all jurisdictions apply all doctrines and not all use the same terms to describe the doctrines; the scope varies significantly based on the governing law. These doctrines in common law jurisdictions are:

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4. I.e., from now on, as of the time a subsequent change on circumstances took place.

- a. the *doctrine of impossibility* – which generally excuses performance when a supervening event that the parties assumed would not occur destroys the subject matter of the contract or the means of performance, effectively making performance objectively impossible;
- b. the *doctrine of impracticability* – which generally excuses performance when a supervening event that the parties assumed would not occur renders performance impracticable, i.e., unreasonably or extremely difficult or expensive; and
- c. the *doctrine of frustration of purpose* – which generally excuses performance when a supervening event that the parties assumed would not occur substantially frustrates a party's principal purpose under the contract.

These common law doctrines are closely related to each other and the concepts underlying contractual *force majeure* clauses. In their purest forms, the first two doctrines focus on the effect that the supervening event has on the *performance* of a contractual obligation, and the third focuses on the effect that the supervening event has on the *purpose* of the contract. In some common law jurisdictions, the doctrine of impossibility has been expanded to include impracticability, and in some other common law jurisdictions the doctrine of frustration has been broadened to encompass the notions of impossibility, impracticability, and frustration.

Not all of these legal civil and common law principles and doctrines are available under all of the legal systems discussed in this publication, and indeed, at first glance, the doctrinal and normative structure of the various legal systems may appear to *differ considerably* in the provisions and doctrines that may be available to an obligor facing a COVID-19-related impediment. For example, the table below provides a high-level comparison of the legal principles and doctrines available in the western-European key civil law jurisdictions of France, Switzerland, Germany, and Austria.

Jurisdiction	Impossibility	Force Majeure	Clausula	Hardship/Imprévision	Extraordinary Termination	Caducité
France	✗	✓	✗	✓	✗	✓
Switzerland	✓	✗	✓	✗	✓	✗
Germany	✓	✗	✓	✗	✓	✗
Austria	✓	✗	✓	✗	✓	✗

Of course, this table provides only an initial, high-level overview, without doing justice to the complexities underlying the nuances of each of these civil law jurisdictions. For example:

- a. The civil codes of some jurisdictions, such as Switzerland and Austria, do not provide for any typical emergency valves such as a *force majeure* or hardship provision (at least not as a *general* doctrine applicable to *all types*

of contracts). The only legal principles and doctrines available to the obligor under the civil codes in these two countries are the general provisions on (temporary) impossibility or extraordinary termination. In Austria, jurisprudence has developed the statutory provision on impossibility into a broader notion that resembles a hardship provision (by extending its application to cases of “economic impossibility”). However, in both legal systems, the courts have developed a *clausula rebus sic stantibus* doctrine that functions as an emergency valve in case of a subsequent change in (external) circumstances that leads to a serious disruption of the parties’ bargain.

- b. Other legal systems have originally developed their emergency-valve provisions by way of case law but have since decided to codify them. Germany did so in 2002, adding an explicit *clausula rebus sic stantibus* provision to its civil code. France took that step in 2016, codifying *force majeure*, *imprévision*/hardship and *caducité*. However, these provisions do not operate in the same way across jurisdictions. For example, the statutory provision on impossibility in Germany may provide an alternative ground to avoid both performance and liability with immediate effect, whereas French law does not approach the situation in the same way. In addition, France also recognizes the concept of *caducité*, whose scope of application partly overlaps with the German *clausula* provision but is not identical with it: the concept of *caducité* may lead to the termination of a contract by operation of law if one of the essential elements of the contract disappears after its formation.
- c. The CISG (applicable to contracts for the sale of goods, where both parties are from contracting states) has taken a different route altogether. Outside of a contractual provision agreed by the parties, the CISG does not recognize the concepts of *clausula rebus sic stantibus*, extraordinary termination, or impossibility as emergency valves that would allow the obligor/seller to require the renegotiation, modification, or termination of the agreement in case of an unforeseen and external change in circumstances. Rather, if such a change in circumstances creates an impediment that renders the obligor’s/seller’s performance impossible (or, in the minority view, excessively onerous), the provision in Article 79 of the CISG only relieves it from liability for failure to perform for as long as the impediment exists.

As the preceding discussion shows, the structural and doctrinal approaches to COVID-19-related impediments in these western European jurisdictions differ considerably. The same change in circumstances may trigger very different approaches under these legal orders, even setting aside the different system of the CISG for international contracts for the sale of goods.

For example, under Austrian law, an unforeseeable and external change in circumstances that renders performance excessively onerous for a party will generally (in itself) not trigger the doctrine of *clausula rebus sic stantibus*, but it will be categorized as “economic” impossibility. In contrast, the German law concept of “economic” impossibility requires that performance is not merely excessively onerous but also distorts the contractual equilibrium. In such cases, it is generally considered to trigger the application of the codified *clausula rebus sic stantibus* provision. This

is an important difference, as the *clausula rebus sic stantibus* doctrine, but not impossibility, provides a basis for amending the contract.

Common law jurisdictions take different approaches to applicable doctrines excusing performance as well. For example, New York law generally does not recognize the doctrine of impracticability (excusing performance if it has become unreasonably or extremely difficult or expensive) outside contracts for the sale of goods, while other common law jurisdictions have expanded the doctrine of impossibility to encompass situations in which performance is technically possible but impracticable. And the scope of the available doctrines may differ considerably across jurisdictions. For example, under English law, the frustration doctrine encompasses notions of impossibility, impracticability, and frustration of purpose, while in other jurisdictions these concepts are governed by different doctrines with different required elements.

And the common law approach to doctrines excusing performance differs considerably from the approaches taken in most civil law systems. For example, the doctrine of *force majeure* recognized in many civil law jurisdictions that are based on French law does not exist in most common law jurisdictions, absent a specific contractual provision. Similarly, absent a contractual hardship provision, common law systems generally do not recognize a right of an obligor to require negotiations to modify or terminate a contract, even if they face an unexpected event.

The solutions for addressing impediments and changes in circumstances seriously affecting contract performance that civil law and common law jurisdictions have developed are diverse and nuanced. A given COVID-19-related event may be categorized differently by the respective jurisdictions. And these differences in what statutory provision or court-developed doctrine will apply will determine the options that an obligor has at its disposal to deal with COVID-19-related impediments to the performance of its contractual obligations (e.g., whether it has a right to re-negotiate, modify, or terminate the agreement).

### **C. SIMILAR END RESULTS IN HOW LEGAL REGIMES ADDRESS COVID-19-RELATED IMPEDIMENTS**

Despite these considerable differences in the doctrinal mechanics of how various civil and common law jurisdictions address COVID-19-related impediments to contract performance, our analysis also reveals a tendency to converge to broadly similar results in several practically relevant scenarios.

This is emphasized by the analysis of a series of hypothetical scenarios that reflect a range of COVID-19-related fact patterns in Section F of each country report. Each of these hypothetical scenarios highlights a typical kind of impediment reflecting a different degree of impact on the obligor's ability to perform its contractual obligations. These hypotheticals consider how each legal system under consideration approaches cases in which an obligor cannot meet its contractual obligations as promised because:

- a. an obligor's business cannot operate due to a government-imposed restriction to contain the spread of COVID-19. As a result, the obligor cannot perform a specified contractual obligation (Hypothetical 1: "*Government Restrictions*");

- b. an obligor cannot perform its contractual obligation because one of the obligor's suppliers faces a COVID-19-related impediment, and, as a result, the obligor cannot obtain from its supplier the goods needed to perform its obligation under its contract with the obligee (Hypothetical 2: *"Supply Shortage"*);
- c. an obligor and/or its employees are infected with the COVID-19 virus and have fallen ill. This has prevented the obligor from complying with its contractual obligation (Hypothetical 3: *"Too Sick to Perform"*);
- d. an obligor decides to protect itself and its employees, as well as society at large, from the spread of COVID-19. As such, the obligor chooses to temporarily close its business and does not perform its contractual obligation, despite the absence of government orders in that sense (Hypothetical 4: *"Self-Imposed Lock-down"*);
- e. an obligor argues that it cannot perform its contractual obligation due to a state of breakdown and chaos in the economy that has arisen due to the COVID-19 pandemic. (Hypothetical 5: *"Collapse or Partial Collapse of the Economy"*).

Each country chapter concludes with a discussion on how the legal system addresses these hypothetical scenarios. This discussion is helpful in illustrating how and under what conditions the emergency valves specific to each jurisdiction may spring into action in case of COVID-19-related impediments to contract performance. They illustrate the nuanced ways in which the relevant statutory provisions and court-developed doctrines interact in light of such impediments or changes in circumstances.

These hypothetical scenarios emphasize that legal systems typically find reasonable ways to address such impediments and assist parties in dealing with some of the challenges that the COVID-19 pandemic poses for meeting their contractual obligations. At the same time, these emergency valves apply to excuse contractual performance or to allow for the modification or termination of a contract only in exceptional circumstances. They are exceptions to the general rule that parties must comply with their contractual obligations, and the legal systems included in this publication generally require an obligor to satisfy strict requirements before activating any emergency valve. Parties facing COVID-19-related impediments will thus need legal counsel to analyze the precise terms of the contracts in light of the governing law and the available legal principles and doctrines on a case-by-case basis.

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