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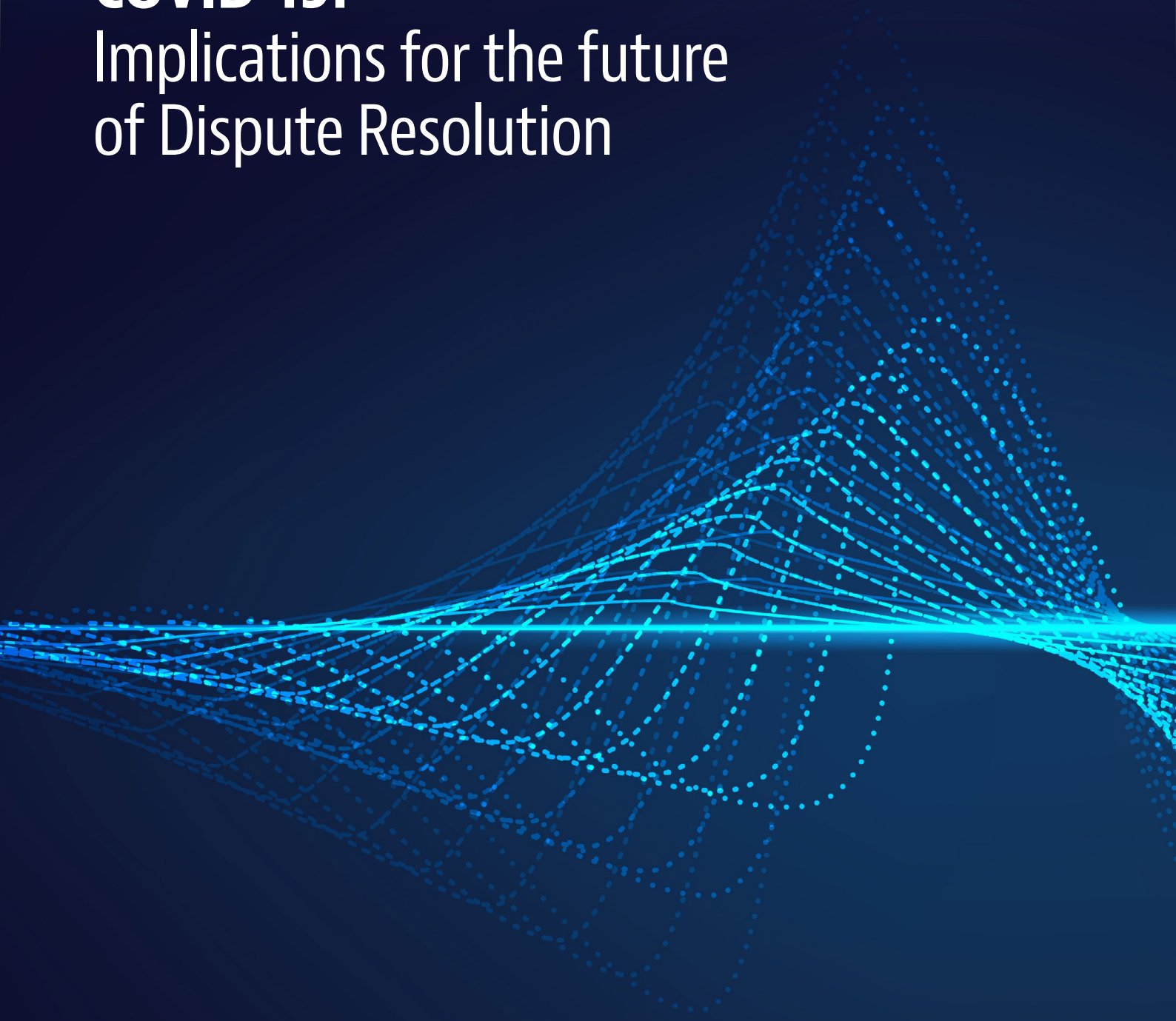
COVID-19:
Implications for the future of Dispute Resolution



Future of Disputes
Thought Leadership

Contents

Introduction

As the 2019 Novel Coronavirus (COVID-19) continues to spread across the world, businesses are facing significant levels of instability and uncertainty caused by weakened financial markets and disruption to workplace operations and business pipelines. It is almost certain that such instability and uncertainty will result in a growth in the number and types of disputes, as businesses become unable (or unwilling) to perform existing contractual obligations and/or have to re-adjust to new pressures on their finances and operations.

Below we provide our views on the types of disputes that will arise from the COVID-19 crisis, in both the short and the longer term. We then consider whether COVID-19 may have a broader impact on the way we resolve disputes in the future.

Issues triggering disputes in the short term

Force Majeure / Frustration / Impossibility

In the short term, there is already a spike in disputes arising from parties finding themselves unable or unwilling to comply with existing contractual obligations and seeking to cease to be bound by those obligations by relying on legal concepts such as force majeure, frustration and impossibility. In many jurisdictions, these are not legal terms of art with fixed meanings, but principles that must be applied by reference to the facts before determining whether they are engaged. This often allows room for debate between the parties to a contract as to the meaning and consequences of these terms and therein lies fertile ground for disputes We expect that the coming weeks and months will likely bring to the fore questions of force majeure, frustration, impossibility and hardship clauses in response to issues such as: quarantines, business closures, lack of staff able to work, cancelled events and travel restrictions. This is by no means an exhaustive list and, in many jurisdictions, whether such doctrines and / or contractual provisions can be relied upon will depend on the particular contract and business at issue.

Local law advice should be taken whenever concepts such as force majeure, frustration or impossibility are being relied on to avoid or adjust contractual obligations. You can access our comparative analysis of force majeure provisions in more than 20 major jurisdictions in our Coronavirus Resource Center.

Supply of Goods

Suppliers of goods will also face particular challenges over the next few weeks and months as supply chains slow down or freeze up entirely due to business closures, lack of staff and transport delays. Such delays may almost inevitably lead to knock-on claims for damages by other contracting parties in the supply chain. Again, concepts such as force majeure, frustration or impossibility are likely to be relevant to these disputes.

During these times of instability, businesses may also struggle to ensure supply chain compliance where rapid re-adjustments are made to business models. By way of example, businesses will have to consider how new suppliers are vetted remotely without face to face meetings, if that would be the usual practice. Weakening the on-boarding process in any way brings with it inherent contractual, litigation, compliance and financial risks for the business that should be avoided if at all possible. Accordingly, all necessary steps should be taken to ensure that new suppliers are vetted adequately, even in the absence of face-to-face meetings.

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Compliance and Investigations

Compliance and investigations is a key area where the impact of COVID-19 will be felt immediately and keenly. Central to this is the question of how the conduct of employees and other third parties (who may incur criminal liability for the company) can be monitored adequately from a compliance perspective with less in-person contact. Key risks include those arising from anti-trust compliance, anti-bribery and fraud.

Third-party compliance risk: Typically, compliance officers spend a good proportion of their time meeting with employees and other third parties carrying out compliance checks and audits. Without that face-to-face contact, the risk exists that supervision over employees and third parties will be more difficult, particularly in certain parts of the world where compliance risks are traditionally elevated. It is crucial that businesses start adapting their approach to compliance checks and balances to ensure that systems and controls continue to meet the relevant legal or regulatory benchmarks, even in this time of crisis. Not making such adaptations risks storing up significant compliance related issues, particularly in those jurisdictions where closer oversight from regional or head office compliance professionals is most keenly required. In the future, enforcement agencies or regulators are unlikely to have sympathy for companies who let compliance issues fester or slip during the COVID-19 crisis.

Fraud: Companies should also be on the lookout for fraudsters seeking to make money out of the crisis. One very typical fraud of which we expect to see more in the coming weeks and months is so-called "authorised push payment frauds". Authorised push payment fraud happens when fraudsters deceive consumers or individuals at a business to send them a payment under false pretences to a bank account controlled by the fraudster. We expect fraudsters to seek to take advantage of the chaos in supply chains in order to perpetrate these simple, but devastatingly effective, types of frauds against business. Companies and their directors should remain on their guard and ensure that all systems and controls remain robust.

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Local law advice should be sought in all compliance high-risk jurisdictions in which the business operates to ensure that adequate steps are being taken to maintain compliance procedures in these challenging times.

Internal investigations: COVID-19 is also going to affect ongoing internal investigations. In the current climate, no face-to-face internal investigation interviews can effectively take place. Such face-to-face

interviews are often the preference for investigations practitioners as body language is often crucial to an assessment of witness credibility. Without such face-to-face interviews, businesses will need to ensure they have the technology in place to ensure that interviews can at least take place over video conference.

Insurance disputes

Disputes are already emerging between insureds and their insurers over liability for COVID-19 related losses. Most businesses will hold relevant business interruption insurance, but these policies often contain exclusions for viruses, such as COVID-19, or cover named diseases only. The cancellation of events means that insurance claims are spiking, but only some claims will be successful, such that we expect to see a steep increase in litigation where insurers refuse to cover losses. However, a number of important aspects of such claims remain clouded in doubt, including how loss caused by pre-emptive, preventative measures, rather than Government-mandated actions, will be dealt with.

As a practical first step, companies should carefully check insurance policies and begin a conversation with their insurer as soon as possible. Looking forward, when insurance policies are renewed, both the insured and the insurance companies will have to think about how to account for the impacts of COVID-19 and similar outbreaks in the future. Defining and pricing such risks is difficult when so much about COVID-19 is unknown, but it seems that an overall rise in insurance premiums is one potential response of the insurance industry.

The immediate impact on our courts and arbitrations

We are already seeing a number of fundamental procedural changes to the way in which disputes are resolved as a result of the COVID-19 outbreak.

With the physical court closures and postponement of arbitral hearings, we are seeing a sharp rise in "virtual hearings" or entire trials moving to being online. There is little feedback yet on how this is working in practice, but it is in the interests of all court users to make it work effectively and efficiently. There may be some resistance to entirely online civil court hearings in jurisdictions, such as in the US, where jury trials are the norm, and industries have been built around the connecting with, and studying of, juries. However, we also believe that there may be increased interest in mediation as a tool to resolve COVID-19 driven disputes and the possibility of running these online. There has already been a rise in the use of online settlements, through technologies such as SmartSettle, which uses a blind bidding system to facilitate negotiated solutions. There are a number of automated dispute resolution platforms currently under development, the progress of which may well be accelerated by the present circumstances. Perhaps we will see use of such platforms become more common as they develop to be more accessible. Practically speaking of course, there remain a number of major considerations for court users to grapple with in this new world of online courts and tribunals. To give one particular example: how are courts/tribunals going to deal with the personal service of documents? With large swathes of the workforce now working permanently from home, it seems very likely that documents served through normal means (i.e. served by post) may end up at an office which is closed. It is yet to be seen whether litigants (or would-be litigants) will seek to take advantage of these unique situations to their own strategic advantage.

From a practical perspective, businesses that are currently engaged in ongoing litigation or arbitration should keep a close eye on announcements made by the relevant governing body or institution to ensure they are aware of changes to rules and or/procedures.

Disputes arising in the medium term

Turning away from the types of disputes of which we expect to see more in the coming weeks, we now focus instead on those disputes we expect will emerge in the coming 6-12 months as we (hopefully) deal with, and move on from, the immediate COVID-19 crisis.

Insolvency litigation

COVID-19 is leading to the sharpest economic slowdown we have seen in a generation, though we do not know if it will be followed by a quick or slow recovery. Given the slowdown, we would expect to see a concomitant uptick in insolvency and other financial disputes, for example in the energy sector where the drop in the oil price is also creating havoc, and amongst financial institutions and corporates. These will inevitably happen across the globe but, given the high level of debt in Asia and Africa and the slowdown in the Chinese economy, we expect to see a particular increase in insolvency-related disputes as relationships start to unravel in China's 'Belt and Road' projects. The automotive and aviation sectors also look to be particularly vulnerable. As borrowers' access to financing is constrained by any slowdown, this may trigger default situations, leading to disputes throughout the project chain and ending with lenders. There will be a time lag between any slowdown and the resulting disputes, but in the near term financial institutions and corporates should be sensitive to third party insolvency risk, particularly when entering into increasingly complex financing arrangements.

Governments may be minded to shape legislation to take account of this unique situation. For example, in the UK, the Government has announced proposals to relax the rules on wrongful trading to absolve directors of liability for wrongfully trading through a technically insolvent company. Perhaps other Governments will show willingness to follow suit, recognising the need to support business continuity, rather than to protect investors and creditors.

Mergers & Acquisitions

From an M&A perspective, it is increasingly likely that a significant number of deals in progress will be stalled or abandoned due to COVID-19 related uncertainty. While the collapse of such pre-contractual discussions is less likely to result in formal litigation, we consider it more likely that parties will seek to recover by way of litigation or arbitration losses suffered as a result of a "bad" deal e.g. where a target company has not performed or economic conditions have made the investment far less lucrative. In such circumstances, we expect to see litigation and arbitration in relation to the representations and warranties given under SPAs arising in greater numbers than one might expect in a better economic situation.

The result of COVID-19 and how investment managers are currently advising clients to respond to the issue will also potentially see future claims by investors against those investment managers for negligent advice and the ensuing financial losses suffered.

Consumer claims and enforcement of consumer protection laws

Consumer facing companies, particularly those in the events and travel industries, are facing enormous challenges over the coming months as they are deluged with refund claims for cancelled events, flights and holidays. Consumer businesses as a whole will also be under pressure from increased consumer claims for non-delivery or late delivery of goods and services. Many consumer businesses are trying to incentivise customers to re-book flights or accept vouchers for future use as a means of staggering refund demands and easing cashflow constraints.

Businesses can offer incentives to consumers to encourage re-booking or the supply of alternative goods or services, but must ensure that their messaging of such offers to consumers does not mislead and does not prevent a consumer from receiving a full refund if that is their preferred option and right. Where messaging does not comply with consumer protection legislation, businesses can expect regulators in this space to take direct action to enforce the law. We do not expect to see any softening of enforcement of consumer law due to the COVID-19 crisis. For example, the Competition and Markets Authority (CMA), the UK regulator of competition and consumer

law, has set up a COVID-19 taskforce specifically to monitor market developments and identify harmful sales and pricing practices as they emerge. It has already indicated that it will advise the UK Government on emergency legislation if there are negative impacts for consumers which cannot be addressed through existing powers.

State support for companies, industries and economies

In the EU, a number of Member States are considering, or have already announced, substantial supporting packages to limit the impact of the outbreak on the economy. State aid usually requires European Commission approval and some support measures have already received such approval; we might see Member States protesting against unfavourable EC decisions, or companies whose competitors receive State aid might consider complaining to the EC or commencing litigation.

More broadly, the crisis has given rise to State interference in economic life in ways previously unimagined. This may give rise to judicial review claims in some jurisdictions and investment treaty claims by companies seeking compensation, although there may be reputational factors for such claimants to consider around being seen to sue governments at a time of national (and international) crisis.

Claims arising from our reliance on technology

Our new educational and working environment is now, more so than ever, reliant on there being in place a fast and efficient IT infrastructure with sufficient capacity. Of course, IT infrastructure can become unstable (e.g. due to viruses, low capacity, low resources, connectivity, etc.) or fail entirely and the compromising of data means clients, employees and companies may suffer. The increasing use and reliance on technology may well result in an increasing number of disputes around the use of that technology.

Employment and pensions

A careful approach is required before mandating unpaid leave or use of accrued leave for employees who are not sick or known to be infectious in order to avoid the inevitable increase of employment-related litigation in the wake of COVID-19. Employers must also ensure they consider already complex paid sick leave laws. Remote working also creates complex wage and hours issues, and, paired with the economic uncertainty of COVID-19, provides a breeding ground for potential wage and hour violations. Further, COVID-19 could result in a surge in claims arising pursuant to violations of collective bargaining agreements or under equal employment opportunity laws, although it remains an open question whether COVID-19 could give rise to claims for disability discrimination.

In addition, as the stock markets plummet and people lose out on pension returns, those investors are likely to seek compensation, which is likely to result in additional litigation. Related to this, there is likely to be an increase in claims against directors for breach of duty.

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Export bans, e.g. of medical equipment

Some governments, such the French, Czech Republic, Polish and Russian governments, have implemented measures such as restrictions on certain kinds of protective personal equipment leaving their countries. The EU Commission has enacted Implementing Regulation 2020/402 on 14 March 2020 restricting the export of protective personal equipment to outside the EU. Germany has repealed its national restrictions in response to the EU Implementing Regulation. In total, as of 21 March, it was reported that 54 countries had implemented export restrictions for medicinal products. While the details differ, the export restrictions have prohibited and continue to prohibit suppliers from fulfilling their contractual delivery obligations with international customers. The potential claims that could be brought to courts and arbitration based on a non-delivery or a delayed delivery of goods are numerous. Depending on the applicable law, it is to be expected that actions for damages, payments and other types of claims will rise as a consequence of the export restrictions imposed.

The potential longer term impact on the way we resolve our disputes

Looking further ahead, one question we have already been considering is whether the impact of COVID-19 may have a longer term impact on the way we resolve disputes.

The courts and tribunals

As noted above, a number of courts and tribunals have already moved online. We consider this crisis will be a turning point for the use of online courts and tribunals. The current crisis will require investment from all sides in the technology to make such hearings work effectively. We do not expect that investment will go to waste once the immediate crisis is over. Once it is clear (as it soon should be) that smaller hearings and applications can be heard very effectively and fairly over video conferencing, both the courts/tribunals and their users will expect such online contact to become the norm (or at least accepted more readily).

Online mediation, which is currently in operation across much of the world, may also see significant growth. Mediation efforts have been growing rapidly around the world, with increasing amounts of legislation to support this efficient and cost effective method of dispute resolution. Mandatory mediation has been in place for some time in jurisdictions such as Australia, Italy and the Philippines, and other countries now seem to be following suit (for example Turkey, Greece and India). We may see that COVID-19 poses an opportunity for online mediation to be adopted more commonly in disputes that would ultimately be referred to international arbitration, as mediation has until now tended to be more common in the litigation context than in arbitration.

For certain jurisdictions (notably China, the Netherlands, Singapore and the UK), the idea of online courts and hearings is not particularly novel, though the practice of using them until now has been limited to lower value disputes. However, we may see the use of online hearings becoming a new normal in disputes where previously that would not be expected. In other jurisdictions, we expect that if the courts and tribunals can put in place the resources now to make such online hearings happen in the coming weeks and months, it will mark a permanent sea-change in the way that justice is delivered in those jurisdictions.

Rethinking force majeure

Businesses will undoubtedly use this experience to shape their use of, and approach to, force majeure and other similar concepts in their contracts. We expect that such clauses will no longer be considered entirely boiler plate as may have previously been the case. Likewise, companies may look to renegotiate existing key contracts that do not currently contain suitable force majeure-type wording.

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Governing law and jurisdiction

Contractual parties may also reflect on their governing law and choice of jurisdiction for agreements in light of COVID-19. There is a risk that commercial litigants take a move away from those jurisdictions that have been badly affected by the virus and, instead, decide to resolve their disputes in jurisdictions that were either less affected by the pandemic or were better able to keep their judicial functions open and operational during the crisis. A key consideration may be the extent to which justice in the country is able to operate in the event of a similar pandemic in the future.

As regards the choice of dispute resolution mechanism, we consider it possible that, in the wake of uncertainty, court closures and delays, contractual parties may seek some comfort in the arbitration process; it being outside the bureaucracy of the state.

How can you pre-empt litigation risk?

In light of the issues raised above, we set out below some of the steps that businesses can and should be taking now to avoid or minimise the risk of becoming embroiled in any of the disputes identified above.

1. Spend time **checking your key contracts**, focussing particularly on force majeure provisions, dispute resolution clauses and termination procedures. Consider whether there is a need for a pre-emptive re-negotiation or a restructuring of some kind. **Think about your obligations** to mitigate the effect of contractual non-performance, any applicable time bars in your contracts, any notification requirements and other procedural issues.

2. With a greater reliance on technology to help employees perform their jobs, and a move to replace face-to-face meetings with video calls, **ensure that regular online video conference training is implemented** to ensure that employees and other relevant third parties are not missing out on training (especially compliance training) due to a lack of face-to-face meetings.

3. Discuss issues as soon as possible. In our experience, starting conversations with counterparties as early as possible when there is a sign of trouble reduces the risk of disputes further down the line and helps protect long-term relationships during times of distress. In addition, reaching out to lender banks to discuss potential issues with servicing of loans may avoid situations escalating prematurely.

4. Think carefully about your compliance requirements. As your supply chains are being adjusted due to COVID-19, you should consider restructuring your compliance procedures and processes. Perhaps you could consider moving to an e-based compliance and risk assessment system instead?

5. Seek help if you need it! If you need to **talk to someone** about any of the issues detailed in this update, or would like more detailed advice, please get in touch with **your usual Baker McKenzie contact**, or our dedicated COVID-19 team. Our response will draw on Baker McKenzie's more than 1100 disputes lawyers around its 77 offices in 46 countries, leveraging the full breadth and depth of our legal and industry expertise to help our clients navigate risk around the world.

Visit our **Beyond COVID-19: Resilience, Recovery & Renewal Centre** for the latest insights and further Future of Disputes thought leadership